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THE
New York Supplement.
VOLUME X.

SEITZ v. DRY-DOCK, E. B. & B. R. Co.

(Common Pleas of New York City and County, General Term. June 3, 1890.)

1. HORSE AND STREET RAILROADS—INJURIES WHILE ENTERING CAR.

In an action for injuries sustained while attempting to enter a street-car, after having signaled the driver to stop, plaintiff and some of his witnesses testified that the car had stopped, but started suddenly, as he was mounting the platform, and threw him down. Other witnesses for plaintiff testified that the car had not stopped, but had slackened its speed so that a person could enter it without risk. Defendant's witnesses testified that the car was moving at its usual speed when plaintiff attempted to enter it. The court charged that, if the car had not stopped when the plaintiff attempted to enter it, the verdict must be for defendant. *Held*, that a verdict for plaintiff would not be disturbed on appeal.

2. DAMAGES—PERSONAL INJURIES—LOSS OF EARNINGS.

While, in an action for personal injuries, the absence of evidence of the value of plaintiff's earnings precludes a recovery of substantial damages for loss thereof, he is nevertheless entitled to nominal damages on that account, and, to make an objection to a recovery of more than nominal damages for such loss available to defendant, a specific request that nominal damages could only be recovered for loss of wages is necessary.

Appeal from city court, general term.

Action for personal injuries brought by Frank Seitz against the Dry-Dock, 1st Broadway & Battery Railroad Company. There was a verdict for plaintiff for \$500. The judgment entered thereon was affirmed by the general term of the city court, and defendant again appeals.

Argued before LARREMORE, C. J., and DALY and BISCHOFF, JJ.

Robinson, Scribner & Bright, (John M. Scribner, of counsel,) for appellant. Orlando L. Stewart, for respondent.

BISCHOFF, J. On the 19th day of April, 1888, on Clinton street, between Division and Grand, in the city of New York, plaintiff, intending to become a passenger in one of defendant's cars, while attempting to board the same sustained severe injuries, some of them being of a permanent nature. Plaintiff testified that before attempting to board the car he signaled to the driver, and, the car thereupon coming to a full stop, he attempted to enter it; and, having hold of the guard-rails, and one foot on the step of the rear platform, the car suddenly started forward, whereby he was prevented from entering, thrown violently to the ground, dragged for a space of 100 feet or more, and thereby received the injuries of which he complains. In his narrative of the facts relating to the accident, he was fully corroborated by his wife, who was a witness on his behalf. Other witnesses for the plain-

tiff, however, testified that the car at the time when the plaintiff attempted to board the same had not come to a full stop, but had sufficiently slackened its speed to enable any person to enter it without incurring risk of injury. Defendant's witnesses, on the other hand, testified that the car had neither slackened its speed nor come to a full stop, but was moving along at the ordinary rate of speed. Upon this conflict of testimony the trial justice declined to direct a dismissal of the complaint or a verdict for the defendant, but submitted the question of defendant's negligence and the plaintiff's contributory negligence to the jury for their determination. While it is true, as appears from the testimony, that some of plaintiff's witnesses contradicted the testimony of others to the effect that the car had come to a full stop, and asserted that the rate of speed had sufficiently slackened to enable any person to board the car, yet it is equally true that these witnesses contradicted the testimony of the defendant's witnesses to the effect that the car had neither stopped nor slackened its speed, but was proceeding at the rate common to street-cars.

Outside of defendant's objection to so much of the trial justice's charge as relates to recovery by the plaintiff of loss of earnings derived from his ordinary avocation of life, defendant's exceptions, grouped together, present the question as to whether or not it was contributory negligence, as matter of law, for the plaintiff to attempt to board the defendant's car while the same was in motion. At the request of the defendant, the trial justice charged the jury that, if they believed that the car had not come to a full stop when the plaintiff attempted to board it, they must find a verdict for the defendant. And, inasmuch as the jury found for the plaintiff, they must, in the light of the trial justice's instructions, be deemed to have accepted as true the statement of the plaintiff and his wife that the car had come to a full stop. The jury were the sole judges of the facts, and with their determination upon the conflicting testimony of witnesses this court will not interfere, unless to prevent an abuse of the jury's province. There is nothing in the evidence to indicate that the jury were moved in their finding either by prejudice against the defendant, or by undue sympathy for the plaintiff. The defendant's contention that the plaintiff was guilty in law of contributory negligence in attempting to board the car while in motion, though at a rate of speed which made it reasonably safe for any person to attempt to board it, is not well founded. This precise question was recently passed upon by the supreme court at a general term in the first department, and many previously reported cases duly considered. *Morison v. Railroad Co.*, 8 N. Y. Supp. 436. The decision in that case is to the effect that it is not always contributory negligence for a party to attempt to get on the rear platform of a car after signaling the driver to stop, and the car has slowed up, if it appears from the evidence that the accident was caused by the sudden starting and change of motion of the car after the plaintiff has attempted to board it. Citing *Eppendorf v. Railroad Co.*, 69 N. Y. 195, and *Morrison v. Railroad Co.*, 63 N. Y. 643. In delivering the opinion of the court, Judge DANIELS says: "By the signal given to the driver, he [the driver] was apprised of the fact that the plaintiff desired to take passage on the car; and, having slackened its speed to enable that to be done, it was his duty not to endanger the plaintiff's safety by suddenly putting the car in motion, before he had been able to reach the platform. * * * Where a passenger is endeavoring to go upon a car in this manner, to start it up with a jerk, while he is in the act of doing so, necessarily tends to endanger his safety; and the act of so starting it is, in and of itself, careless or negligent. * * * In this case, as the driver understood that the plaintiff was about to go on board of the car, * * * it was negligent for him to start up the car with a jerk before the plaintiff was safely on board." In these views I con-

The defendant's exception to the charge of the trial justice, that the plaintiff may recover for loss of earnings resulting from his inability to pursue his ordinary avocations, is equally unavailing. It appears from the evidence that plaintiff, for a period of three weeks or more, was prevented, by reason of the injuries sustained, from pursuing his ordinary occupation, which was that of a shoemaker; but no evidence of the value of his earnings was given. While the absence of such evidence prevented plaintiff's recovery of substantial damages on that account, he was nevertheless entitled to nominal damages for the loss of such earnings, as the law will not assume the plaintiff's services to have been wholly valueless. The trial justice cannot, therefore, be said to have committed error in his instructions to the jury that, in assessing the amount of damages to be awarded to the plaintiff, they might take into consideration his loss of earnings by reason of the injury. To have made the objection to the plaintiff's right of recovery of more than nominal damages for loss of earnings available to the defendant, a specific request that the jury be directed to limit the plaintiff's recovery for the loss of such earnings to nominal damages only was necessary; and an exception to the refusal of the trial justice so to direct would have presented the defendant's objection to this court for review. No such request, and no such exception, appear in the case, and there is nothing to indicate that in assessing the amount of damages awarded to the plaintiff the jury allowed him more than a nominal sum for the loss of his earnings. *Feeney v. Railroad Co.*, 116 N. Y. 377, 22 N. E. Rep. 402. The judgment and order appealed from should therefore be affirmed, with costs to the respondent. All concur.

MCINTIRE v. WIEGAND.

(City Court of New York, General Term. April 2, 1890.)

PLEADING—ANSWER—INCONSISTENT DEFENSES.

An answer by one of several defendants, which denies that defendants executed the instrument sued on, and for a further defense alleges that the answering defendant was induced by fraud to sign the instrument, will be taken as an admission of the execution, with the qualification as to the fraud against the answering defendant, since the rule allowing inconsistent defenses will not be construed so as to permit such contradictory averments.

Action by Thomas McIntire against William Wiegand and Herman Wiegand, on an undertaking on arrest, executed by the defendants in an action heretofore commenced in this court, wherein one Sophia Wilkins was plaintiff, and the plaintiff herein was defendant, to recover damages for an alleged breach of promise to marry and seduction, and resulted in a verdict for the defendant, (plaintiff herein.) The defendants in this action were the plaintiff's sureties in said action. Defendant Wiegand alone appears. The first, fourth, and fifth paragraphs of the answer referred to in the opinion are as follows: "*First.* This defendant has not any knowledge or information, sufficient to form a belief, as to whether the defendants herein, or either of them, at any time, executed or filed with the clerk of the city court of New York, or elsewhere, for the benefit of Thomas McIntire, the plaintiff, or any one else, pursuant to the statute in such case made and provided or otherwise, a written undertaking, a copy of which, or a substantial copy of which, is annexed to the complaint, or made to form a part of it, as alleged in the paragraph or subdivision of the complaint marked '*First.*' * * * *Fourth.* And, for a further and separate defense to the cause of action stated in the complaint, this defendant alleges that, at about the time of the commencement of the action of Wilkins against McIntire, mentioned in the complaint, but this defendant has no precise recollection of the date, the plaintiff in said action called upon this defendant, and requested him to sign a paper, stating that she was in trouble; that thereupon this defendant inquired of her what the nature of the paper was, and that thereupon she told him

that it was of no importance, and that her attorney desired it; and that thereupon this defendant, without reading said paper or knowing the contents thereof, signed the same, which paper this defendant believes to be the paper known and designated as an undertaking in the paragraph or subdivision of the complaint marked 'First;' and this defendant avers that he never appeared before any notary public, commissioner of deeds, or any other officer qualified to administer oaths or take acknowledgments, in relation to said paper so signed by him, and that he never swore to the same, or any part of it, and never acknowledged the execution of it before any such officer. *Fifth.* This defendant further alleges, as a further and separate defense herein, that the judgment, mentioned in the paragraph or subdivision of the complaint marked 'Sixth' therein, was brought about and induced by reason, as this defendant is informed and verily believes, of an amicable arrangement between the plaintiff and the defendant in the said action of Wilkins against McIntire."

Argued before MOADAM, C. J., and EHRLICH and MCGOWN, JJ.
Lexow & Leo, for appellant. *A. H. Berrick*, for respondent.

PER CURIAM. The first and fourth paragraphs of the answer, interpreted together, must be taken as an admission that the defendants executed the undertaking sued upon, with the qualification that Wiegand was induced to sign it through the fraud of Pauline Wilkins, the plaintiff in the action therein referred to. These paragraphs can be construed in no other way. While inconsistent defenses are allowed to be pleaded, courts have never gone to the extent of holding that a defendant may plead—*First*, that he never executed the instrument sued upon; *second*, that he did execute it, but by means of fraud. No one could safely swear to such a plea, and no court could sanction a practice which encourages parties to take such a risk. We therefore regard the denial in the first paragraph of the answer as controlled by the admission in the fourth paragraph thereof. It would certainly be so regarded at the trial. The fourth paragraph fails to set forth any legal defense. No fraud is attributed to the plaintiff herein, and he is not chargeable with the acts of others not in privity with him. *Kelly v. Christal*, 16 Hun, 242; *Coleman v. Bean*, 1 Abb. Dec. 394; *Onderdonk v. Voorhis*, 36 N. Y. 358; *George v. Bischoff*, 68 Ill. 236; *Wayman v. Taylor*, 1 Dana, 527; *Harrison v. Wilkin*, 69 N. Y. 412.

Whether the undertaking was acknowledged or jurat sworn to is of no consequence in this action, as the omission of both would have constituted but a mere irregularity in the original action that might have been waived by the parties thereto. The fifth paragraph pleads no defense. Whether the judgment recovered was the result of a trial, default, or amicable arrangement is of no consequence. The judgment fixed the rights of the parties, and, if there was any collusion, the sureties should have applied for relief in the original action. The arbitrary use by the defendant of the term "amicable," in reference to the judgment, does not detract from its force, or impair its effect. There is no merit in the appeal, and the order appealed from must be affirmed, with costs.

GRAY v. ALABAMA NAT. BANK.

(City Court of New York, Trial Term. April 21, 1890.)

CONDITIONAL SALES—"SATISFACTORY" TO BUYER.

A contract to make steel-plate bank-drafts, "a satisfactory design" to be furnished the purchaser, involves a matter of taste, and the purchaser may reject the work without assigning any reason for his dissatisfaction.

Action by Olin D. Gray, as assignee of the August Gast Bank-Note & Lithographing Company of St. Louis, against the Alabama National Bank, for an alleged breach of a written order, given by defendant to plaintiff's assignor, to make a quantity of steel-plate bank-drafts; the order reciting that it was given on the understanding that "I [defendant] am to have a satisfactory design for" the drafts. The designs furnished were rejected as unsatisfactory.

William B. Ellison, for plaintiff. *E. H. Brandin*, for defendant.

MCADAM, C. J. Lithography is an art,—so is steel-plate engraving, and whether the work produced is good, bad, or indifferent, is one of artistic opinion, taste, or fancy. Bank-note engraving at the present time involves skill, artistic taste, scenic effect, and arrangement. Some people are fastidious about their checks and drafts, and want them equal in appearance to bank-notes. Common printed checks or drafts procurable at the banks or stationers may suit the ordinary requirements of trade, but not the peculiar fancies of individuals who seek to satisfy their notions, and gratify their exceptional taste. As a consequence, no two specially designed checks or drafts are exactly alike,—a circumstance that proves that taste and fancy have much, if not all, to do with the selection finally made. Some checks are neat, not gaudy; others are loud and showy. They vary in size, appearance, style of print, lithography, and engraving. The variety of vignette is innumerable. Stationers keep books in which may be found all sorts and kinds of patterns and designs, and even those are modified to suit the peculiar notion or fancy, original or otherwise, of the customer. From all this it will be assumed that the order given by the defendant embraced a subject involving taste, fancy, and judgment, respecting which minds might differ. The condition inserted in the order, that it was given upon the understanding that the president of the defendant should first have a satisfactory design, means a design satisfactory to him, and that the order was not to become operative as a contract until this condition precedent was performed. Suggesting an alteration in the first design was not a waiver of the condition, as the manner of making the change was not mechanical, but involved the exercise of taste and fancy.

Whether it was wise or business-like to act on an order which left the approval of the design to the mental operation of the mind and judgment of the defendant's president is not open for discussion. The time for that line of thought has passed. Such was the condition assented to, and the rights of the parties must be determined from the contract as it is. This fixes their obligations, and they cannot be altered or enlarged. There is no doubt of the general proposition that, where one party agrees to do a thing to the satisfaction of the other, and the excellence of the work is a matter of taste, such, for instance, as a portrait, bust, suit of clothes, dramatic play, or a particular piece of furniture, the employer may reject it without assigning any reason for his dissatisfaction. In such a case the law cannot relieve against the folly of the employe by inquiring whether the dissatisfaction of the employer was based upon reasonable grounds or not. It is even doubtful whether it can inquire into the good faith of the employer's decision. *Glenny v. Lacy*, 1 N. Y. Supp. 513; *Printing-Press Co. v. Thorp*, 36 Fed. Rep. 414; *Seeley v. Welles*, 13 Atl. Rep. 736, and cases cited. Parties must stand to their contract as they made it; and, if one party agrees to furnish an

article that is satisfactory to the other, he constitutes the latter the sole arbiter of his own satisfaction. If, however, the task to be performed does not involve matter of taste, fancy, or judgment, but of common experience, such as an ordinary job of mechanical work, or the quality of material, a different rule applies, and in such cases the law will say that what in reason ought to satisfy a contracting party does satisfy him. *Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. Rep. 749; and see *City of Brooklyn v. Railroad Co.*, 47 N. Y. 475; *Misell v. Insurance Co.*, 76 N. Y. 117. The present case falls within the rule first stated. For these reasons there must be judgment for the defendant.

FLETCHER v. SEVERS.

(City Court of New York, Trial Term. April 23, 1890.)

1. DESCENT AND DISTRIBUTION—NEXT OF KIN—PER CAPITA.

8 Rev. St. N. Y. (8th Ed.) p. 105, § 90, subd. 5, provides that "in case there be no widow and no children, and no representatives of a child, then the whole surplus shall be distributed to the next of kin in equal degree to the deceased and the legal representatives." Subdivision 9 provides that "where the descendants or next of kin of the deceased, entitled to share in his estate, shall all be in equal degree to the deceased, their shares shall be equal." *Held*, that where the next of kin of a decedent are all the children of her deceased brothers and sisters, they take *per capita*, and not *per stirpes*, though subdivision 11 provides that "no representation shall be admitted among collaterals after brothers' and sisters' children."

2. SAME—COMPROMISE OF WILL CONTEST.

Where the contest of a will between the legatee and the testator's next of kin is compromised by the payment to the next of kin of a sum of money, whereupon the contest is abandoned, the sum thus paid will be distributed as the proceeds of an intestate estate.

Action by Phoebe C. Fletcher against John Severs. Trial was had by the court without a jury.

Henry B. B. Stapler, for plaintiff. *B. Metzger*, for defendant.

MCADAM, C. J. The action, in form on contract, is to determine and enforce the rights of the plaintiff and her sister and brother on the one hand, and those of their cousin Gurnee on the other, to a fund arising under an agreement for the settlement of a controversy with the defendant Severs as to the validity of the will of Anna Clausman, deceased, an aunt of the parties, of which will Severs was executor and beneficiary. Anna Clausman left, her surviving, as her only next of kin, Phoebe C. Fletcher, Sally C. Stewart, Mary Ann Townsend, John Cox, Samuel Cox, children of Effie Cox, a deceased sister of the testatrix, and Jesse Gurnee, a son of Margaret Gurnee, another deceased sister of said testatrix. The will was drawn in favor of the defendant Severs. Its validity was contested by the said next of kin. They were successful in the surrogate's court, but unsuccessful on appeal. A compromise was finally effected between the attorneys for the respective parties, by the terms of which the defendant agreed to pay to the contestants \$2,000 in consideration of their withdrawing further opposition to the probate of said will, and the execution by them of general releases to the said Severs, which compromise was authorized by the contestants. The question has arisen between the plaintiff and her brothers and sisters, as the children of one deceased sister of the testatrix, on the one hand, and Jesse Gurnee, a child of another deceased sister, on the other, as to the proportion of said fund which the said Jesse Gurnee is entitled to receive; and he has refused to execute the release called for by the agreement of settlement on the ground that he is entitled to receive by representation the proportion of said fund which his mother, Margaret Gurnee, would have taken had she survived the testatrix, while the children of Effie Cox claim that Jesse Gurnee is only entitled to share equally with them in said fund, as they are all nieces and nephews of said deceased. This is the question presented for determination.

It is submitted on behalf of the plaintiff that, as the fund to be distributed arises from a contract, the object of which was to secure an adjudication that the will was invalid, and that as a consequence the maker of said will died intestate, the fund in question must be treated, so far as its distribution is concerned, as the proceeds of an intestate estate. If the contest had been successful, the whole fund would have been clothed with that character. As only a part of the fund has been released from the operation of the will, the character of intestacy adheres to the portion released. If this view be correct, it follows that the inquiry must be, what are the rights of the parties in question to the fund regarded as an intestate estate? This question must be governed by the interpretation of those provisions of the statute of distributions relating to the rights of next of kin in an intestate estate. By subdivision 5 of section 90 of said statute, it is provided that, "in case there be no widow and no children, and no representatives of a child, then the whole surplus shall be distributed to the next of kin in equal degree to the deceased and the legal representatives." 3 Rev. St. (6th Ed.) p. 105. By subdivision 9 of the same section of the statute, it is provided as follows: "Where the descendants or next of kin of the deceased, entitled to share in his estate, shall be all in equal degree to the deceased, their shares shall be equal." The children of the two deceased sisters of the said deceased are all in equal degree to the deceased; that is, they are all her nieces and nephews. Says Redfield on Surrogate's Practice: "There is little difficulty in determining questions of distribution, except where there are no descendants and no widow. In such cases the whole surplus is to be distributed 'to the next of kin in equal degree to the deceased, and the legal representatives;' and it frequently becomes necessary to determine who are of an equal degree of consanguinity to the deceased, and how far the distribution may be made among those who are of unequal degrees of relationship to the decedent. In determining the persons who are next of kin of a decedent 'in equal degree,' the rule of the civil and common law is to count up from either of the persons related to the common ancestor, and then down to the other person related, reckoning a degree to each person ascending and descending." Page 607, (3d Ed.) Following this rule, we find that nieces and nephews of a testator or intestate are all in the third degree of kindred to the deceased. Id. 608. From these considerations, it would seem that the defendant Gurnee is only entitled to an equal share with the other next of kin of the deceased in the fund in question. The position that, under subdivision 11, the defendant Gurnee is by inference entitled to take the share by representation which his mother would have taken, is untenable. The subdivision last referred to is as follows: "No representation shall be admitted among collaterals after brothers' and sisters' children." 3 Rev. St. (6th Ed.) 105. The right of brothers' and sisters' children to succeed by representation is preserved, but subject to whatever modification may be necessary to make effective all the provisions of the statute, interpreting one so as to advance the purpose and intent of all.

If Margaret Gurnee, one of the sisters, had lived, she would no doubt have taken half of the whole estate, and the children of Effie Cox would have taken by representation the other half; and in that event the literal provisions of the statute would have read in harmony without the aid of interpretation. But both sisters died before the decedent, and those entitled to take are all in the third degree of kindred to the deceased, and must, under the statute, share in the estate *per capita*, and take an equal part of the fund. *Hurtin v. Proal*, 3 Bradf. Sur. 414. If the decedent had also left an uncle and aunt, they would have been in equal degree of relationship to her, and the estate would have been divided *per capita* among the uncle, aunt, nieces, and nephew; and claim of title by representation would not have defeated the result. *Durant v. Prestwood*, 1 Atk. 454. If the next of kin had been of unequal degree, the rule as to taking by representation would have been appli-

cable. Under the circumstances, the plaintiff and the defendant Gurnee are entitled to share equally in the fund in controversy; and therefore the plaintiff is entitled to one-sixth part thereof, to-wit, the sum of \$330, of which there still remains to be paid to her the sum of \$180, and for this amount she is entitled to judgment.

RILEY *et al.* v. STERN *et al.*

(City Court of New York, Special Term. November 12, 1889.)

PARTIES—MISJOINDER OF DEFENDANTS—SUBSTITUTION.

Under Code Civil Proc. N. Y. § 723, providing that the court may strike out parties, and add others, where a person is improperly joined in the complaint with others as a defendant, the court may strike out the name of such person, and substitute one who should have been made a defendant.

At chambers. Action by W. H. Riley and Adolph Friedlieb against Solomon Stern, Moses Stern, and Henry Stern, as constituting the firm of S. & M. Stern. The answer of the two first-named defendants denied that Henry Stern was at any time a member of the firm, and alleged the firm was composed of said two first-named defendants and one Bernard Pasternak. Plaintiffs now move to have the name of Bernard Pasternak substituted for Henry Stern.

S. F. Kneeland, for plaintiffs. *L. S. Marx* and *A. H. Barick*, for defendants.

MCADAM, C. J. The court may strike out parties, and add others. Code, § 723. The only limitation on the power is that a sole defendant cannot be stricken out, and another substituted in his place. *Spence v. Griswold*, 7 N. Y. Supp. 145; *Davis v. Mayor*, 14 N. Y. 506, 527; *New York, etc., Assn. v. Remington, etc., Works*, 89 N. Y. 22. Motion to strike out the names of Henry Stern granted on payment to his attorney of \$10 costs, and application to join the name of Bernard Pasternak with those of the two remaining defendants granted, without costs.

ANDERSON v. HORN.

(City Court of New York, Special Term. June 10, 1889.)

JUDGMENT—MOTION TO VACATE—MISNOMER OF DEFENDANT.

Where defendant is sued in the name of John Horn, which the complaint alleges is his correct name, and defendant answers in the name of John A. Horan, which he alleges is his correct name, and the answer is returned, and judgment taken by default, a motion to vacate the judgment will not be passed on until the court has ascertained which is defendant's name.

At chambers. Action by Mary A. Anderson against John Horn. After the answer had been served, and plaintiff's attorneys had admitted service, they returned the answer because defendant was described as John A. Horan, stating that they had no such suit in their office, and, receiving no reply, proceeded in the usual six days to enter judgment in favor of plaintiff. Defendant now moves to vacate the judgment, and all subsequent proceedings.

James J. Thornley, for plaintiff. *McCall & Arnold*, for defendant.

MCADAM, C. J. A defendant ought to be sued in the surname of his ancestors, and the Christian name given to him in baptism. *Bank v. Magee*, 20 N. Y. 855, 863. If the defendant is known by two names, he may be sued by either, (*Eagleton v. Son*, 5 Rob., N. Y., 640,) or that by which he is generally known, though not his real name, (*Cooper v. Burr*, 45 Barb. 9;) or, if the real name be unknown, he may be sued by a fictitious name, adding a description identifying the person intended, (Code Civil Proc. § 451,) such as "the man in command of the ship *Hornet*," (*Pindar v. Black*, 4 How. Pr.

95.) This liberality in practice fails, however, to prevent the ever-recurring confusion caused by misnaming the defendant,—an error which becomes more difficult to repair as the proceeding advances. The plaintiff charges that the defendant engaged board under the name of "John Howard," and that his correct name is "John Horn," and by this name the defendant was sued. He undertook to defend in the name of "John A. Horan," which he claims to be his correct cognomen. His plea was returned. It is not a case of misspelling or of *idem sonans*, but of misnomer or nothing. The court must first ascertain the defendant's true name or his *alias dictus* before it can undertake to decide whether he has been correctly proceeded against or not. When the facts are settled, there will be no trouble in correctly applying the law. The parties must appear in court for oral examination on June 11th, at 2 P. M. On the conclusion of the examination the application will be decided.

JOHNSON v. MON LEE *et al.*

(City Court of New York, Trial Term. April 8, 1890.)

PARTNERSHIP—POWER OF PARTNER TO BIND FIRM.

Where a partner is designated on the cards of the firm as "general manager," opens bank accounts in behalf of the firm, and appears to be the leading partner, it cannot be objected, in an action on a note indorsed by such member in the firm name, that he was forbidden by the articles of partnership to make the indorsement, where plaintiff denies that he knew of the restriction in the articles, which were in the Chinese language, and the proceeds of other similar notes discounted by plaintiff are traced to banks in which the firm accounts were kept.

Action by Seth R. Johnson against Mon Lee and others, on a note for \$1,980.34, subject to credits aggregating \$179.80, leaving a balance due of \$1,800.54. It was made in the firm name of Mansingson & Co., to the order of said firm, and indorsed by Mansingson & Co., Chu Fong, Quong Hong Luong & Co. There was also a waiver of protest and notice. The names Mansingson & Co. and Quong Hong Luong & Co. were put upon the note by Chu Fong, who was a member of both firms. The defense is that the note is a forgery by Chu Fong, at the procurement of the plaintiff, without consideration, and without the knowledge or consent of the firms whose names appear as parties, and for the purpose of defrauding them, and that Chu Fong, as a member of Mansingson & Co., was forbidden to make such indorsements by the articles of copartnership, which provide that no member of said firm shall enter into any such obligation without the consent of all other members thereof first had and obtained. The note in suit brought to a close a series of transactions had between the plaintiff, on the one hand, and Chu Fong upon the other, in the course of which large numbers of notes, purporting to have been made by Chinese firms and individuals, were discounted by the plaintiff, and it was claimed by the defendants that these transactions were so interwoven, one with the other, by renewed notes and otherwise, that it was impossible to consider one without investigating all. Defendants contend that Chu Fong was ignorant of business methods and of crime; that the plaintiff instructed him in the art of forgery. All this was denied by plaintiff, who contends the note was given to take up other notes of the firm of Mansingson & Co., the makers, and Quong Hong Luong & Co., the indorsers, and that he knew of no restriction on the power of Chu Fong, a partner in both of said firms, to execute said instrument.

Edward C. James, for plaintiff. *W. C. Beecher & B. T. Morgan*, for defendants.

MCADAM, C. J. Chu Fong, the individual who figures most prominently in the various transactions with the plaintiff, is an intelligent Chinaman, with a fair knowledge of English. He was a member, not only in the firm of Mansingson & Co., but Quong Hong Luong & Co. His partners had every

faith in him up till about the time he broke off his transactions with the plaintiff, when his partners for the first time charged him with wrong-doing, and caused his arrest as a criminal. That he may have wronged them is true; but the question to be determined is whether the consequences of his acts are to be borne by them or visited upon the public. That he entered into an alliance with the plaintiff to ruin the two firms of which he was a member is highly improbable, to say the least. Neither he nor the plaintiff could be benefited by such a consummation. That the plaintiff instructed Chu Fong in the art of forgery, or furnished him with a book of signatures, and taught him to make notes in the names of his own and other firms, is still more improbable. That Chu Fong became the pliant tool of the plaintiff, and forged notes bearing the names of Chinese firms, which the plaintiff, knowing all the facts concerning them, took to his bank, had discounted on his own responsibility, gave Chu Fong checks for the amounts of the discounts, had him draw the money, and hand it back to the plaintiff, is too unlikely to invite belief. The books of the bank and the plaintiff's deposit book show the discounts and the checks given to Chu Fong, but show no return of the money to the plaintiff or to his credit. The checks, when traced, show that the money was not returned to the plaintiff. Indeed, a large portion of the proceeds found their way to the Bowery Bank, in which Chu Fong had opened accounts in the names of the two firms, and made deposits to their credit. These, and like circumstances, convince me that the plaintiff is a *bono fide* holder for value, without notice of any infirmity in the notes or his title to them. The act of Chu Fong in willfully misrepresenting the purchase price of the Brooklyn property, in lying about the Pell-Street property, and the Kearsing notes, and fraudulently imposing on Mr. Brownell, clearly demonstrate that he is not to be believed. A man that will willfully and fraudulently lie as to one thing, cannot inspire confidence in his declarations. Chu Fong claims that he was the fool,—the plaintiff, the knave; that, at the time both were engaged in a conspiracy, he thought it lawful, while the plaintiff knew the contrary; that, though he perpetrated the acts of forgery, the plaintiff got all the money, and kept it. Chu Fong asks the court to believe too much. His story is unreasonable, inherently improbable, and, viewed in the light of his conduct, wholly unreliable. The claim that the plaintiff first schooled Chu Fong into a knowledge of making notes is negated by the fact that the first note was filled up by a clerk in Howe & Hummel's office. That firm was his attorneys at the time, and so, all through the case, are circumstances, small in themselves, but significantly strong when put together, tending to discredit Fong. In short, the evidence, carefully considered, justifies the conclusion that Fong is what his partners have termed him,—a criminal. The plaintiff was indiscreet in making so many discounts without consulting the other members of Fong's firms; but indiscretion is not crime, and want of judgment not evidence of bad faith. A little wisdom would have told the plaintiff that no man could pay 60 per cent. a year for the use of money, and last long. At this rate, money doubles itself in one year and eight months. The plaintiff swears that he took Fong's statement in regard to the parties to the notes before discounting them; that Fong explained the financial standing of each to every note he gave, told why they needed the money, and how they could pay it back, and why they could pay the large interest exacted, and still make money. It would seem that, led on by the temptation of 5 per cent. a month for the use of money he obtained from his bank at 6 per cent. a year, the plaintiff was lured into discounts, till, at the close of the transactions, there was, as he swears, a loss to him of about \$15,000. Usury is not pleaded, and that feature of the case need not be considered.

The defendants' evidence that the plaintiff was advised of the restriction upon the powers of any of the partners of Mansington & Co. to execute promissory notes or other obligations is indefinite. The agreement containing the

limitation was written in Chinese characters, which the plaintiff could not read, and there is no claim that he was even shown a translation of it. The plaintiff denies that he had knowledge or notice of the condition, and, upon the evidence, I find he had no information in respect thereto. The provisions of the partnership articles, limiting the ordinary powers of the partners, although binding on them, do not affect the plaintiff, who dealt with the partner with notice thereof. Private instructions or limitations only charge those in the secret, and not the general public. 2 Lawson, Rights & Rem. § 647. The partners of Chu Fong deny any knowledge that he opened a bank account in their names, or that he was having firm paper discounted. On these features of the case it will be found that some of the checks on the Bowery Bank contain the picture of a Chinaman and the printed name of "Mansingson & Co." and on the carls of the firm appeared the name of Chu Fong as "general manager." He was evidently the leading man in both firms. Next it appears that notes were issued by Chu Fong in the firm names to people other than the plaintiff, and these were, upon inquiry, found to be sanctioned by other members of the firm. But whether the defendants had knowledge or notice is not necessary to charge them. Chu Fong was a member of both firms, and, as such, the accredited agent of each. They held him out to the world as worthy of confidence, and are liable for his misconduct. The liability of a firm for the fraud of one of its members in procuring money upon false pretenses is sustained by several authorities: *Rapp v. Latham*, 2 Barn. & Ald. 795; *Stall v. Bank*, 18 Wend. 466; *Bank v. Aymar*, 3 Hill, 262; *Griswold v. Haven*, 25 N. Y. 595; *Bank v. Bradner*, 44 N. Y. 680; *Chester v. Dickerson*, 54 N. Y. 1; *Bradner v. Strang*, 89 N. Y. 299. See, also, the following authors: Colly. Partn. (Perk. Ed.) §§ 445, 447; Lindl. Partn. (Ewell's 2d Amer. Ed.) 150; 2 Lawson, Rights & Rem. § 650; Story, Partn. § 108. Judge Story, in his work on Partnership, says: "This whole doctrine proceeds upon the intelligible ground that, where one of two innocent persons must suffer by the acts of a third person, he shall suffer who has been the cause or occasion of the confidence and credit reposed in said third person." Section 108. Mr. Collyer places the language of Judge Story at the head of the section in which he treats of this class of liabilities, and expressly applies the principle to the case of negotiable securities fraudulently issued by one of the partners. Sections 445, 447. Mr. Lindley also places the liability upon the same ground, and illustrates it by the case of *Rapp v. Latham*, *supra*. This principle has been applied where firms were not the recipient of the money fraudulently obtained. *Griswold v. Haven*, 25 N. Y. 595; *Bank v. Bradner*, 44 N. Y. 680. And in the case of agency it was applied where neither the principal nor agent received any benefit from the fraud, but were in fact the victims of it. *Armour v. Railroad Co.*, 65 N. Y. 111; *Bank v. Railway Co.*, 72 N. Y. 188; *Bank v. Railroad Co.*, 106 N. Y. 195, 12 N. E. Rep. 433. In cases where the firm has received the benefit of the fraud, the innocent partners have always been held liable. *Chester v. Dickerson*, 54 N. Y. 1, 11; *Bradner v. Strang*, 89 N. Y. 299; affirmed 114 U. S. 555, 5 Sup. Ct. Rep. 1038; *Rapp v. Latham*, 2 Barn. & Ald. 795. In this case the firm or principal is estopped from denying the authority of the partner or agent to issue the false instrument. *Bank v. Aymar*, 3 Hill, 267, 268; *Farmers', etc.*, *Bank v. Butchers', etc.*, *Bank*, 16 N. Y. 135-137; *Griswold v. Haven*, 25 N. Y. 602. In *Bank v. Aymar*, *supra*, it is laid down that where an agent executes an instrument in the name of his principal, purporting to act by authority, such act is equivalent to an express declaration that the instrument is executed in the business of the principal, and for his benefit, and the latter is estopped to deny that the authority has been pursued. In *Farmers', etc.*, *Bank v. Butchers', etc.*, *Bank*, *supra*, SELDEN, J., says: "The giving of a note in the partnership name by one of the partners is a virtual representation that it is given in the partnership business, and, if negotiable, this representation is

deemed in law to have been made to every subsequent *bona fide* holder of the note." In *Griswold v. Haven*, *supra*, SELDEN, J., says: "The mere assumption by a partner or agent of power to execute such paper is a virtual representation to all who may take it of the existence of every fact essential to the powers."

So far as the plaintiff is concerned, the apparent authority of Chu Fong was the real authority, and binds his partners. The presumption of law is that all commercial paper which bears the signature of the firm executed by one of the partners, is the paper of the partnership. The burden of proof is on the firm to show the want of authority of the partner, and it will then devolve on the plaintiff to show that he is a *bona fide* holder for value. 5 Wait, Act. & Def. 129; Cow. Treat. § 200. Indeed, it may be regarded as settled that a promissory note made by one partner in the firm name, though outside the partnership business, and without the knowledge or consent of the other partners, is binding on the firm in the hands of a *bona fide* holder for value. *Bank v. Morgan*, 73 N. Y. 593. A partner may likewise secure a firm note not yet due by issuing new notes to enable the creditor to bring a suit thereon at once. *Nealis v. Adler*, 19 Abb. N. C. 385. And where one is a member of several firms, he may draw and indorse the same paper as the representative of each. *Miller v. Bank*, 48 Pa. St. 514. The fact that the plaintiff filled up the note after it was signed, does not impair or vitiate it, or deprive it of negotiable qualities. *Bank v. Bradner*, 44 N. Y. 680; and see *Harris v. Berger*, 15 N. Y. St. Rep. 389. Upon the entire case the plaintiff is entitled to judgment for \$1,800.54, with interest, aggregating \$1,841.56, with costs.

In re FOLEY'S WILL.

(Surrogate's Court, New York County. April 24, 1890.)

TRUSTS—VALIDITY—UNCERTAIN BENEFICIARY.

A direction in a will that the residue of testatrix's estate be "placed" in the hands of her trustee, and "bestowed" as he may "wisely direct," creates a trust which is invalid for want of a defined beneficiary entitled to enforce its execution.

Application for probate of the will of Jane Foley, deceased.

Booraem, Hamilton & Beckett, for proponent. *Edward J. Knauer*, special guardian.

RANSOM, S. Issue is raised by the special guardian that the residuary clause of testatrix's will is invalid, and that as to the residuum she died intestate. The clause of the will in question is as follows: "And that the residue of my estate be placed in the hands of the aforesaid Rev. Charles H. Colton, pastor of St. Stephen's Church, in East 29th street, city of New York, to be bestowed in a manner which he may wisely direct." It is not contended that the above provision creates a valid trust. The proponent claims that no trust has been created, and that the legatee takes the residue absolutely.

A leading case, and one cited with approval by the court of appeals of this state, (*Foose v. Whitmore*, 82 N. Y. 405,) states the rule thus: That "the real question always is whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion." *Williams v. Williams*, 1 Sim. (N. S.) 358. The intention of the testator must govern, and for this the context of the will must be looked to, first to ascertain his wishes, and then to see whether he intended to impose an obligation on his legatee to carry them into effect; or, having expressed his wishes, he intended to leave it to

the legatee to act on them or not, in his discretion. *Foose v. Whitmore, supra*. The language of the clause in question shows an undoubted intention on the part of the testatrix to create a trust, probably for charitable purposes, leaving to the discretion of the trustee to whose benefit, and in what manner, the fund should be applied, and not whether it should be applied. The accepted meaning and understanding of the verb employed in the clause indicates this. To bestow is to give, confer, impart, not to the trustee, but to some one or some object he may "wisely direct." Had the testatrix added to the clause the designation of a *cestui que trust*, it could not be seriously contended that a valid trust had not been created.

The learned counsel for proponent relies upon the case of *Willets v. Willets*, 35 Hun, 401. He failed to discover that this case was reversed by the court of appeals, and reported in 103 N. Y. 650, *mem.*, on the opinion of ANDREWS, J., at special term. The language of the will in that case was as follows: "I do give and bequeath to my son, * * * my friends, * * * and my nephew, * * * and my son-in-law, * * * the sum of one hundred thousand dollars, relying upon them to dispose of the same for the benefit of such charitable and benevolent and educational purposes as they shall judge will most promote the comfort and improve the condition of the poor, or, in case any of my descendants should become poor and needy, then to apply in whole or in part to such descendants." This was held by the general term to be an absolute gift to these persons. ANDREWS, J., in his opinion, says: "With regard to the ninth bequest, I am unable to concur in the views of the counsel for the executors and legatees named in the provision of the will therein referred to. As was said by the court in reference to a similar provision in a will, it is an attempt to create a trust not authorized by the laws of this state. *Lefevre v. Lefevre*, 2 Thomp. & C. 341. It seems to me that the intention of the testator is clear. He leaves \$100,000 to the seven persons named, who are to take and hold the money, not severally, but jointly, and apply it, in their discretion, to the uses and purposes mentioned. The money, or such part of it as shall not be so applied during the lives of all seven, is to go to the survivors, and, if any shall remain so long unapplied, to the sole survivor. It is true that it has been frequently decided that expressions in a will importing recommendation, hope, confidence, and desire do not raise a trust. The numerous cases to this effect are collected in *Leading Cases in Equity*, volume 2, pp. 1833-1866, [*Harding v. Glyn.*] It will be found, however, upon examination, that all these cases are of a class different from that to which the one under consideration belongs. They are cases in which it was entirely clear that the testator intended that the devisees or legatees named in the will should receive the property to their own use, accompanied by recommendations or suggestions that some of the provisions should afterwards, in the discretion of the devisee or legatee, be made for some other person or persons. In many cases the testator merely intimates how it would be agreeable to him to have the property disposed of upon the death of the devisee or legatee. In many others the property is given absolutely to the devisee or legatee, with a suggestion or hint that something should be given to other relatives or friends of the testator. In the present case, it is apparent that the testator did not intend to bequeath the \$100,000 to the seven persons named for their own use, but to make them the medium through which the \$100,000 should be distributed to others. The words 'survivors or survivor' do not refer to the date of the testator's death. Where a devise or bequest is made to several persons absolutely, those words do not often refer to the date of the testator's death, and of course indicate that the property devised or bequeathed is to go to the persons or person who survives the testator. The will cannot be so construed in the present case. Aside from the evident intent to make provision for the benefit of the poor, or for his descendants who might at some remote period become poor and needy, it is hardly possible that the testator,

who was well advanced in years when his will was executed, should have thought it possible that all the seven but one might die before him, or have deemed it necessary to provide for the contingency by bequeathing the money to the 'survivors,' if that word had reference to his own decease. The invalidity of provisions of the kind in question is well established: *Levy v. Levy*, 38 N. Y. 97; *Bascom v. Albertson*, 34 N. Y. 584; *Lafere v. Lafere*, 2 Thomp. & C. 341; *In re Abbott*, 3 Redf. Sur. 303. And I am of the opinion that the bequest is invalid, and that the \$100,000 must go to and form part of the residuary estate." See Court of Appeals Cases, vol. 38, 1886.

In *Phillips v. Phillips*, 112 N. Y. 197, 19 N. E. Rep. 411, it is said that the primary question in every case is the intention of the testator, and whether, in the use of precatory words, he meant merely to advise or influence the discretion of the devisee, or himself to control or direct the disposition intended. The provision of the will construed in the above case was as follows: "If she [the executrix] find it always convenient to pay my sister Caroline Buck the sum of three hundred dollars a year, and also to give my brother, Edwin W., during his life, the interest on ten thousand dollars, or seven hundred dollars per year, I wish it to be done." The court held that the testator meant to charge upon the gift to the wife the annuities to his sister and brother, provided only that their payment should not occasion her inconvenience. How much stronger the language of the will in question is than the above. The testatrix directs her estate to be "placed" in the hands of the trustee, and "bestowed" as he may "wisely direct." The discretion lodged in him relates to the manner, and to whom, the residuary estate shall be bestowed. I hold, therefore, that a trust has been created by the provision of the will in question, which, however, is invalid because of the absence of a defined beneficiary entitled to enforce its execution. *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. Rep. 305; *Prichard v. Thompson*, 95 N. Y. 76. My decision in *Re Van Swearingen*,¹ is not in conflict with the decision herein. There the language of the will, "to dispose of as they may deem proper," is clearly precatory, and expressive only of the testator's belief, wish, and recommendation. This testatrix, as to the residuary estate, died intestate. Submit decree admitting the will to probate, and in accordance with the above decision.

¹The opinion referred to, filed October 26, 1888, is as follows: **RANSOM, S.** The question in this case is upon the construction of the residuary clause. Counsel for the next of kin contend that the words, "to dispose of as they may deem proper," following the gift of the residue to A. and B., and the survivor of them, show sufficient indication of the testator's intention to create a trust, even though the objects of it are uncertain, and that, by a well-known rule of law, the bequest falls, and the next of kin should become the beneficial owners, and that, as they are brothers and sisters of decedent, they are not subject to the tax. Counsel for the executors, who are also the residuary legatees, claim that the residuary legatees take an absolute gift, and that the natural construction of the subsequent precatory words is that they express the testator's belief or wish, without imposing a trust, and that the words, "to dispose of as they may deem proper," are much too vague for the creation of a trust, and that the donees should enjoy the gift absolutely. This reasoning of the counsel for the executors would seem to be correct, and an order may be entered confirming the appraiser's report assessing and fixing the tax.

*In re STEWART'S ESTATE.**(Surrogate's Court, New York County. April 16, 1890.)***LEGACY TAX—LEGATEE APPOINTED BY TRUSTEE.**

Where property is left by will to a trustee with power to appoint the legatees, the latter take as by the will whenever the power is exercised, and the property is subject to the legacy tax provided for by Laws N. Y. 1887, c. 718, § 1, in the same manner as when the legatees are named by the will.

Motion to confirm the report of the appraiser of the estate of Cornelia M. Stewart, deceased. For proceedings to revoke probate of decedent's will, see 5 N. Y. Supp. 82.

Horace Russel and Jabish Holmes, Jr., for executors. *A. W. Everts* and *William G. Choate*, for Rosalie Butler. *Martin & Smith*, for Sarah N. Smith. *William T. Gilbert*, for the Cathedral of the Incarnation. *Theodore W. Meyers*, comptroller.

RANSOM, S. Mrs. Stewart died on the 25th day of October, 1886, and by her will and codicils thereto left one-half of her residuary estate to Henry Hilton as trustee, with power of appointment to and among such of the legatees, and in such proportions, as he might see fit. On January 16, 1890, he made such appointment among certain of the legatees, whose property in the estate, in virtue of such appointment, is liable to the tax. The appraiser, who had been appointed prior to the exercise of the power of appointment, did not report until after it had been exercised, and included in his report, as subject to the tax, the amount apportioned to the legatees by the trustee acting under his power.

It is claimed by counsel for the executors and these appointees that such amounts are not subject to the tax, because the act contemplates only the interests accruing at the date of death of the decedent, and as these amounts were not determinable until the power of appointment had been exercised, and as it was impossible to ascertain whether any or all of said residuary estate was or would be subject to the tax, therefore that, as the estates were such as were not contemplated by the act, being mere possibilities, and not even expectant or contingent, they were exempt, and contend that *RUGER, C. J.*, in *Re Cager's Will*, 111 N. Y. 350, 13 N. E. Rep. 866, 19 N. Y. St. Rep. 497, in delivering the opinion of the court, considered just such a case. He says: "Whether an appraisal of the value of these devises, for the purpose of taxation, may be made where they eventually come to the possession of the devisees, we are not called upon now to determine. It may be that the tax will be altogether lost to the state if an appraisal is not now allowed; but, if so, the fault lies in the act itself, and not in the construction which its language requires to be put upon it." This language of the learned judge is *obiter*, but entitled to great consideration. It is not, however, binding upon the courts below, nor is that case at all *apropos*. It is true that at the date of the death of Mrs. Stewart the appraiser could not determine either the value of the estate which might eventually become taxable, or the persons to whom it would pass; and he could not, therefore, make any appraisal. It has been the practice of this court to suspend all proceedings as to such contingent estates until such contingencies happen, with a view to the appointment of an appraiser at that time to make the appraisement. In *Re Wallace's Estate*, 4 N. Y. Supp. 465, which was decided by me, I said: "The appraiser should only report upon the property now subject to the tax; and when the contingency happens, and the number and interests of the collateral heirs are definitely and exactly determined, another appraisement should then be made, and the tax assessed upon their interests then to be ascertained." In *Re Clark's Estate*, 5 N. Y. Supp. 199, I used substantially the same language, in holding that until the contingency is decided the matter must remain suspended, and then it can be

determined to whom the property will pass, and whether or not it is subject to the tax. The claim that, at the death of this decedent, there was no estate that could be held subject to the tax, and that, therefore, there can be no tax assessed now, cannot be sustained. It is a well-settled principle of the law that, where parties take under a power of appointment, they take under the instrument creating the power, so that the parties named by Henry Hilton under the power given him must be regarded as the persons selected by Mrs. Stewart. It is true that their interests did not accrue until the date when the power was exercised, to-wit, January 16, 1880, at which date, also, the tax upon their interests accrued; thus entitling them to the rebate of interest, if paid within six months from that date. By section 4 of the act of 1887, (which, by chapter 479, Laws 1889, is made applicable,) if the tax is paid within 18 months from the death of decedent, no interest is charged. By section 5 of the same act, it is provided that "the penalty of ten per cent. per annum, imposed by section 4 hereof, for the non-payment of said tax, shall not be charged where in cases by reason of claims made upon the estate, necessary litigation, or other unavoidable cause of delay, the estate of any decedent, or a part thereof, cannot be settled at the end of eighteen months from the death of the decedent, and in such cases only six per cent. per annum shall be charged upon the said tax from the expiration of said eighteen months until the cause of such delay is removed."

It is claimed here that the proceeding instituted by Rosalie Butler on October 28, 1887, (see *In re Stewart's Will*, 5 N. Y. Supp. 32,) effected a stay of all proceedings in virtue of section 2650 of the Code of Civil Procedure, which provides that the executor must suspend, until a decree is made upon the petition for revocation of probate, all proceedings relating to the estate, except for the recovery or preservation of property, the collection and payment of debts, and such other acts as he is expressly allowed to perform by an order of the surrogate made upon notice to the petitioner. Section 406 of the Code provides, when the commencement of an action has been stayed by injunction or other order of the court or judge, or by statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action. Neither of these two sections affect this case. There is no provision of law suspending the payment of interest during the time of the litigation, or unavoidable cause of delay. Section 5 of the act of 1887 only relieves from the penalty, but not from the interest. I must hold, therefore, that the tax on the one-half of the residuary estate passing by the will to Charles J. Clinch and Sarah N. Smith must bear interest at the rate of 6 per cent. per annum from April 25, 1888, 18 months after Mrs. Stewart's death, and that, if the tax and interest is not paid immediately upon the entry of the order confirming the report of the appraiser, interest at the rate of 10 per cent. per annum from the date of the entry of the order must be paid. Submit order confirming the report of the appraiser, and assessing and fixing the tax.

In re RANSOM'S ESTATE.

(Surrogate's Court, New York County. April 5, 1890.)

EQUITABLE CONVERSION—TESTAMENTARY POWER OF SALE.

A testator devised a farm, with the stock, horses, etc., thereon, to four persons as joint tenants, the income to be divided in a specified manner. In the event that the income should become insufficient to pay expenses and a dividend to the beneficiaries, he empowered the executors to sell the property, and to pay the proceeds, one-half to one of the beneficiaries, and the other half to the other three, "the survivor and survivors, share and share alike." *Held* that, after the farm had become unprofitable, and after a sale of part of the stock by the executors, the entire property, by virtue of the power of sale, was converted into personality, and from a joint tenancy to a tenancy in common, and that the heirs of one of the beneficiaries, who thereafter died, were entitled to her share of the proceeds from the sale of the entire property.

Construction of the will of Charles B. Ransom, deceased.

William H. Newman, for petitioner. *Fullerton & Rushmore*, for respondent.

RANSOM, S. By the second clause of the testator's will he gave a farm, together with stock, horses, etc., thereon, to a brother-in-law and three sisters, as joint tenants. He directed that the income and profits of said farm be divided, one-half thereof to go to the brother-in-law, and the other half to the three sisters. As a consideration for and condition of the devise to the brother-in-law, he was to conduct and manage the farm. In the event that the farm would not pay expenses and a dividend to the beneficiaries, the executors were given power of sale, and directed to pay over the proceeds to the same persons, and in the same proportions, as the income was directed to be disposed of. On June 9, 1886, the executor sold a part of the stock on the farm for \$1,185. In May, 1887, he sold the remainder of the stock, etc., for \$2,000, and the farm for \$13,000, subject to a mortgage thereon. Between the dates of the first and second sales Mrs. Jones, one of the three sisters, died, leaving issue. By the terms of the testator's will, giving the executors a power of sale in the event specified, an equitable conversion was effected of the real estate. Immediately upon the happening of that event, there vested in the beneficiaries an undivided interest in the property as personality, in the proportions specified in the will. *Moncrief v. Ross*, 50 N. Y. 436; *Manice v. Manice*, 43 N. Y. 303; *Savage v. Burnham*, 17 N. Y. 569; *Greenland v. Waddell*, 116 N. Y. 240, 22 N. E. Rep. 367.

It is contended by the executor that the proceeds retained the character of the joint tenancy after the happening of the event by which the conversion was effected, and that, consequently, the representatives of the deceased sister are not entitled to share in the proceeds. It is manifest, from the language employed by the testator, that he intended to alter the character of the estate, as well as the character of the property, from and after the happening of the event specified. The direction is "to pay over the proceeds thereof, one-half part to said William Frost, and the other one-half to my said three sisters, the survivor or survivors, share and share alike." If it were intended to preserve the joint tenancy, why provide for the payment to survivors? In a joint tenancy, the estate would ultimately vest in but a single owner. The use of the words, "share and share alike," are likewise repugnant to the notion of a joint tenancy. The intention of the testator is very clear. Had the sister died before the happening of the event, all her interest in the property would have ceased. Having survived that event, there vested in her an undivided one-third interest in the property mentioned. The vesting of this interest was not dependent upon the exercise by the executors of the power of sale, for, as is stated in the text-books as an elementary principle upon which the doctrine of conversion is founded, "it would be obviously unreasonable that the rights of parties beneficially interested should depend upon the acts of persons through whose instrumentality the conversion is to be effected, and in whom no discretion is expressed to be reposed." But the court is not compelled to rely upon this principle. As a matter of fact, an actual conversion did take place, as to a portion of the property, before the death of Mrs. Jones. It will not be questioned that, as to that extent, it was conclusively established that the event provided for in the will had arisen. But, if the event had arisen so far as to justify the sale as to a portion of the property, the same event would justify the sale of all. It may be suggested that because the portion sold was personality, it should not affect the realty. But it seems that where the testator has blended the proceeds of real and personal property, where legatees take a temporary interest, it is to be inferred that he does not intend them to be subsequently separated. 2 Jarm. Wills, 219, 220.

In re GOBLE'S WILL.

(Surrogate's Court, Orange County. March 10, 1890.)

1. WILLS—CONSTRUCTION—"CHILDREN."

A bequest of testator's residuary estate, to be divided among "all my children, share and share alike, except that the share which my daughter M., deceased, would have had, had she survived me, shall be paid to my daughter E., and the share which my son W. would have had, had he survived me, shall be paid to my grandson J.," does not include the child of a daughter who was dead when the will was made, but was not referred to therein.

2. SAME—ADVANCEMENTS.

A bequest of testator's residuary estate to his children equally, "subject also to the advancements heretofore made by me to my sons N. and J., and the sum of \$1,000 shall be charged against and be deducted by my executor from the distributive share of my son N. in such residuary, and the sum of \$2,500 shall be charged against and be deducted from the distributive share of my son J.," fixes the advancements to be deducted from the sons' shares at the amounts therein named.

3. SAME—INTEREST ON LEGACY.

Testator bequeathed \$1,000 to his granddaughter, the only child of a deceased daughter, but who was not supported by testator, "to be paid to her when she attains the age of 21 years," and gave the residue of his estate to his wife for life. He further provided that, on the death of his wife, the residuary estate should be divided among certain other persons. *Held*, that the granddaughter was entitled to interest on the \$1,000 after one year from testator's death.

Judicial settlement of the accounts of Montgomery H. Vernon, executor of the will of Elias O. Goble, deceased. Decedent, after a bequest to Edna Miller, the only child of a deceased daughter, of \$1,000, "to be paid to her when she attains the age of 21 years," gave the residue of his estate to his wife for life. The will further directed that "on the death of my wife, I direct my surviving executor to divide all my said residuary estate among all my children, share and share alike, except that the share or interest which my daughter Mary E. Wood, deceased, would have had, had she survived me, shall be paid to my daughter Ella L., and the share or interest which my son William T. Goble would have had, had he survived me, shall be paid to my grandson James O. Goble, the son of the said William T. Goble, deceased; and such distribution of my residuary estate shall be subject also to the advancements heretofore made by me to my sons Nathan Goble and John R. Goble, and the sum of \$1,000 shall be charged against and be deducted by my executor from the distributive share of my son Nathan Goble in such residuary, and the sum of \$2,500 shall be charged against and deducted from the distributive share of my son John R. Goble in such residuary."

John J. Beattie, for the executor. *L. D. Blanchard*, for Anna M. Blanchard. *B. R. Champion*, special guardian, for Edna Miller.

COLEMAN, S. The first question presented for my consideration is whether Edna Miller is entitled to any income upon her legacy, and, if so, from what time? The legatee is a granddaughter of the testator, but was not supported by him. The legacy cannot, therefore, be presumed to have been given for her maintenance, and clearly, if entitled to interest at all, is only entitled to interest from one year after the testator's death. As a general rule, legacies will not carry interest before the time for their payment, whether vested or not. If the testator is a parent (or *in loco parentis*) of the legatee, and the legatee is a minor, interest is allowed as maintenance, but this exception to the rule is not extended to grandchildren. *Williams, Ex'rs*, 1429, (original page;) *Lupton v. Lupton*, 2 Johns. Ch. 614; *Van Bramer v. Hoffman's Ex'rs*, 2 Johns. Cas. 200. It has, however, been held that where a fund is severed immediately from the testator's death, for the benefit of the object of the gift, not only is the gift vested, but carries the interim income. *Dundas v. Wolfe-Murray*, 1 Hem. & M. 425. I have not been able to find any case in this state where the court has made this distinction, but I can see no reason

why, under a similar state of facts, it might not be so held. In *Dundas v. Wolfe-Murray* the testatrix directed that her executors raise £5,000 out of a designated fund, to be held in trust, to pay the same to five children of her sister, the shares of such as were sons to be paid to them on attaining 21 years of age, and to the daughters at 21 years or at marriage. The balance of the fund, from which the £5,000 was to be raised, she disposed of in other ways. The vice-chancellor says: "I think the testatrix intended to make a complete and immediate separation of the two funds. * * * I am of the opinion, therefore, that this was a vested interest, and not only so, but that it was to be severed for the benefit of the objects of the gift, and that the plaintiffs are consequently entitled to the intermediate income." The legacy to Edna Miller is vested, only the time of payment being deferred. The legacy must be held for her until that time by the executor or his successors in the trust. It is true that the testator does not say that she is to receive the income derived from the fund in the mean time, nor does he say that any one else shall receive it, for the gift to his wife is of all the rest and residue of his property for her life, and upon her death such residue is to be distributed. Edna does not share, as I shall show hereafter, as the representative of her mother in that distribution, this provision being already made for her. For these reasons, I think the testator intended this sum of \$1,000 to be set apart for the benefit of his granddaughter, with all the advantages which might accrue therefrom, to be accumulated and received by her, however, only when she should become 21 years of age.

The next question for consideration is whether Edna Miller, as the only child of her deceased mother, is entitled to share in the distribution of the residuary estate, as being included in the term "children." Her mother was dead at the time the will was made, and the case, therefore, does not come within the statutory provision. The word "children" ordinarily, does not extend further than immediate descendants. Where, however, the testator uses the word "children" and the word "issue," indiscriminately, the meaning of the word "issue" may be given to the word "children," and thus include "grandchildren." *Prowitt v. Rodman*, 87 N. Y. 42. It is claimed by the special guardian that the testator did not use the word "children" in its limited sense in this case, because the testator goes on to say who shall take the shares of his deceased children, Mary E. Wood and William T. Goble. On the other hand, the counsel for the executor claims that this very fact excludes the idea, and that the testator, by so doing, pointed out the exceptions he intended to make. I think the latter view of the case the correct one, and I am confirmed in this opinion by the further fact that the testator had earlier in the will made provision for his granddaughter Edna Miller, and it is not probable he intended her to take that much more than his other children.

I now come to the question of advancements. The testator directs the distribution of the residuary estate subject to the advancements heretofore made by him. Among the papers belonging to the deceased, there were found after his death by his executors the papers, signed by his son Nathan Goble, of which the following were copies: "Received of Elias O. Goble fifteen hundred dollars, as part of my portion of said Goble's estate. April 1, 1865. NATHAN GOBLE." "\$965. April 1, 1870. Received of E. O. Goble nine hundred and sixty-five dollars, in full of all demands to this date. NATHAN GOBLE." "\$500. Florida, December 17, 1874. On demand, I promise to pay to E. O. Goble or bearer, five hundred dollars, for value received, with interest. NATHAN GOBLE." The will was made January 12, 1884, and Elias O. Goble died June 12, 1888. If he had not mentioned advancements made by him to his children prior to the making of the will, the presumption would have been that he had taken them into consideration in determining the provision made in the will for his son Nathan. *Clark v. Kingsley*, 37 Hun, 246; *Arnold v. Haroun*, 43 Hun, 278. But he directs the distribution to be made

subject to advancements heretofore made, and it is necessary to determine whether the testator intended to fix the amount of those advancements by the sums which he directed should be deducted from the shares of Nathan and John R., or whether the sums named by him were to be added to such advancements. The sums named by him are not stated to be the amounts of these advancements, nor to be the amount which is to be withheld on account of them. The direction is that the distribution shall be subject to advancements heretofore made, and the sum of \$—— shall be charged against and deducted from the share of, etc. The amount advanced to Nathan is much larger than the sum directed to be charged against his share. No evidence, however, seems to exist of advancements to John, and yet a much larger sum is charged against his share than Nathan's. Was it the testator's purpose, by adding the sums named by him to the evidence of advancements held by him against Nathan, to cover advancements to John of which he had no evidence, and thus equalize the distribution? I confess to a considerable doubt as to what he intended. It is quite apparent that the testator used the \$1,000 and the \$2,500 to represent advancements made by him to these sons, although as we know they did not cover all advances made. Nathan had more than \$1,000. We cannot know how the testator arrived at the two sums fixed by him, and it appears to me that the only safe course to pursue is to assume that these sums were fixed by him as the amounts which he wished deducted from his son's shares on account of advancements theretofore made to them by him. It is significant that no such expression as "further" or "additional" is used in the phrase commencing, "and the sum of \$1,000 shall be charged," etc. The decree will therefore direct the executors to retain the legacy of \$1,000 to Edna Miller, and invest the same for her benefit during her minority, and that she be paid the same, with accumulations, when she becomes 21 years of age; that in making the distribution of the residuary estate the executor divide the same among the children of the testator who are now living, and to the representatives of such as were living at the time the will was made; and that in making such distribution the share of the testator's son Nathan be charged with the sum of \$1,000 advancements, and the share of John R. with \$2,500 advancements.

In re BROOKS' ESTATE.

(Surrogate's Court, Orange County. February 17, 1890.)

1. CONSTRUCTION OF WILL—LEGACY IN TRUST.

A testator gave \$2,000 to his executors in trust for his nephew, to be so managed as to best promote his future welfare and happiness, and to that end left "the disposition and management of said sum, both interest and principal, should it be necessary," to their "better judgment and discretion." *Held*, the legacy vested in the nephew at testator's death, subject to the control of the executors, and at his death passed to his personal representatives, and not to the residuary legatees.

2. LEGACY IN LIEU OF DOWER—ABATEMENT.

A legacy given in lieu of dower, even though it exceed in value the dower right relinquished, does not abate on the failure of the estate to pay legacies in full.

Proceedings for the judicial settlement of the accounts of Charles M. Thompson, as executor of the will of Benjamin F. Brooks, deceased.

J. W. Gott, for the executor. *J. W. Bartram*, for Celia A. Brooks.

COLEMAN, S. The testator provided in his will as follows: *First*. I gave and devise to my wife, Celia Ann, \$2,500, in lieu of dower; also I give and devise to my executors hereinafter named \$2,000, in trust for my nephew Ellsworth Mather. And it is my will that this sum shall be so managed and used as will best promote the future welfare, comfort, and happiness of the said Ellsworth Mather, and to that end I shall leave the disposition and management of the said sum, both interest and principal, should it be necessary, to

the better judgment and discretion of my executor hereinafter named. * * * All the rest and residue of my real and personal estate, of, whatsoever or wheresoever, and which has not hereinbefore been disposed of, after paying my debts, legacies, and funeral expenses, I give * * * to my two nieces. * * * "The estate is insufficient to pay the legacies in full. The legacy to the widow is conceded to be in value many times the actual value of the dower right released, and it is claimed that the excess in value should ratably abate with the other legacies. The principle is well established that legacies given in lieu of dower do not abate, and, while I do not find any case in which it is stated that it makes no difference whether the legacy exceeds in amount the value of the dower right relinquished, I do find several cases in which it was stated that such was the fact, and no significance apparently was attached to it. *Orton v. Orton*, 3 Abb. Dec. 411. The testator died July 11, 1888, and his nephew has since died, having received only \$174.50 on account of the said legacy.

The question now arises, who takes the principal of the legacy,—the representatives of the deceased nephew or the residuary legatees? In *Roper on Legacies*, at page 640, several instances are given where executors were directed to purchase annuities for legatees during life, and the legatee died soon after the testator, and before the money had been invested in the annuities, where it was held that the fund vested in the legatee at the death of the testator, and passed to the representatives of the legatee; and at page 647, other cases in which legacies were given to trustees in trust to apply the produce to the maintenance during minority, and then to settle the same upon the legatee or his issue, in the discretion of the trustees. The legatee, having attained majority, but dying before settlement made, was held to have become absolutely entitled upon his death so as to be able to bequeath the fund by his will. These cases differ from the present, in that in those cases to have carried out the directions of the testator would have completely taken away from the residue the amount of the legacy, and the testator clearly so intended. Here such intention is not so plain; the gift is of \$2,000, in trust to the executors "for my nephew." The trust is the disposition and management "of the sum," principal and interest, if necessary, for the nephew's best interests. In their discretion, they might have paid out to or for him the whole income and fund, and I think could have invested the whole fund in annuities payable during his life. The case of *Campbell v. Brownrigg*, 1 Phil. Ch. 301, it seems to me is an authority in this case. The testator bequeathed 50,000 sicca rupees to his daughter for her use, in the following manner: to be invested in government securities, interest to be paid to her during her life-time, and if she married, and had children, such children to take the principal. The remainder of his property he gave between three legatees. The daughter survived the testator, and was married, but had no children. The question arose whether the fund belonged to the personal representatives of the daughter or to the residuary legatees. The chancellor, overruling the decision of the vice-chancellor, held that the use only was controlled, and that the daughter took subject to that restriction, and when it ceased it remained, by virtue of the gift, her absolute property. In *Hone's Ex'rs v. Van Schaick*, 20 Wend. 564, legacies were given, not to be paid without the written approbation of the parents, who were to fix a discreet and proper time for the payment, and it was held that the legatees took a vested interest immediately on the death of the testator. I have been unable to find in the Reports of this state any authority which settles the law of this case, but upon the authority of *Campbell v. Brownrigg*, *supra*, and our statute relating to uses, I conclude that the legacy to Ellsworth Mather vested in him at the death of his uncle, the testator, subject only to the control of the executor during the life of the said Ellsworth, and at his death passed to his legal representatives, and not to the residuary legatees of the testator.

In re ROGER'S ESTATE.

(Surrogate's Court, Orange County. February 28, 1890.)

DESCENT AND DISTRIBUTION—LEGACY TAX—LEGACY TO PAY DEBT.

Testator's will gave to H. "any and all benefit, so far as his interest may appear and be proved," in the moneys payable at testator's death under his membership in an insurance association; the balance to testator's wife. The insurance was effected to secure testator's debt to H. Held that, as H. took nothing unless he proved a debt against the estate, the money he would receive was not, within Laws N. Y. 1887, c. 718, § 1, taxing legacies.

Proceedings to collect the collateral inheritance and legacy tax on the estate of John L. Rogers, deceased.

D. A. Scott, for Mary E. Rogers, widow. *Theodore Miller*, for John B. Hillyer.

COLEMAN, S. By an instrument which has been admitted to probate as the will of John L. Rogers, who died a resident of this county, October 12, 1889, it is provided as follows: "I hereby give and bequeath to J. B. Hillyer, of 74 Broadway, New York city, any and all benefit, so far as his interest may appear and be proved. The balance and remainder to my wife, * * * any and all benefit and moneys which may accrue or become due and payable at my decease under and by virtue of my membership in the Northwestern Masonic Aid Association of Chicago." It appears that the testator, in order to secure an indebtedness to J. B. Hillyer, effected an insurance upon his life with the Masonic Aid Association, and there is now due Hillyer upon this indebtedness \$5,163.39, as ascertained and reported by the appraiser appointed under chapter 713, Laws 1887. It is claimed that this sum is not liable to the tax imposed by the act mentioned; that is not a gift, legacy, or inheritance within the meaning of that act. The act is entitled "An act to tax gifts, legacies, and collateral inheritances," and the property made subject to tax by section 1 is all property which shall pass by will, or by the intestate laws of this state, from any person who may die seised or possessed of the same. It does not appear to whom the insurance would have been payable if there had been no will, and I do not suppose that is material in this proceeding; for, if the will had not contained the provision in favor of Hillyer, the wife would have taken it all under the will, and the fund, therefore, would not be taxable. Whether Hillyer takes anything under the will depends upon his being able to prove a debt. He takes nothing if there was no debt. So that, while he may be entitled to receive something by virtue of the will, he does not get it as a gift, but as payment of a debt. It may be that, unless he had been provided for in this way by the will, Hillyer would not have been able to collect his debt, by reason of the terms of the contract of insurance; still, as I have said, whatever he may get, even by virtue of the will, is simply the payment of his debt. The words "give and bequeath" are employed by the testator, but I do not think that thereby any added force or character was given Hillyer's claim, and the use of them accomplished nothing more than the usual general direction in wills to pay debts and funeral expenses. I am therefore of opinion that the money received by Hillyer is not a gift, legacy, or inheritance, or property which has passed by will from a person who has died seised or possessed of the same. A bequest in satisfaction of a debt has been held to be within the definition of a legacy, (*Orton v. Orton*, 3 Abb. Dec. 411, 414,) but I doubt if the word "legacy" is used in so broad a sense in this act. A legacy naturally implies bounty or benevolence, (*Lockyer v. Simpson*, Mos. 300; *Clark v. Sewell*, 3 Atk. 98;) and it has been held that so far as a legacy is applied to pay a debt it is no legacy, and to be a payment and not a gift, (*Ravilins v. Powell*, 1 P. Wins. 299; *Cuthbert v. Peacock*, 1 Salk. 155.) Having reached this conclusion, it is not necessary to consider whether,

under the circumstances, the money being received as a benefit from an aid association after death of a member, it can properly be considered property that has passed "from a person who may died seised or possessed of the same," which I am inclined very much to doubt.

In re CAPRON'S ESTATE.

(Surrogate's Court, Orange County. March 11, 1890.)

DESCENT AND DISTRIBUTION—LEGACY TAX—STEP-CHILDREN.

At the time of testatrix's marriage, about 30 years before her death, her husband had four daughters by a former wife. One was married, and the other three lived with their father and testatrix until they married. They called testatrix "mother," and received a mother's care from her. The same friendly relations continued after the marriage of the daughters. Held that, as to the three daughters who were unmarried at the time of testatrix's marriage, testatrix had, "for not less than 10 years prior to her death, stood in the mutually recognized relation of parent," within the legacy tax law, so as to exempt legacies to them, but that this relation did not exist as to the other daughter.

Proceedings for the collection of the collateral inheritance and legacy tax on the estate of Helen Capron, deceased.

J. G. Graham, for the executrix.

COLEMAN, S. The testatrix died September 17, 1888, and by her will, after giving a number of specific legacies of small value, gave all the residue of her property to four daughters of her deceased husband by a former wife. At the time of her marriage to the father of these legatees, some 35 years ago, the youngest of them was 9, the next older 16, and a third 22, years of age. These three remained at home with their father and step-mother until their respective marriages. The fourth daughter had married and left home before the marriage of testatrix. While the three younger daughters remained at home the testatrix looked after their education, training, deportment, and clothing. She gave them the care and protection of a mother; and they recognized her right to do so, and always addressed her as mother, and she spoke of them as her children. After their marriage the same friendly relations and manner of address continued so far as they could, under their changed circumstances. She did not, however, contribute to their support except in the matter of care of themselves and their clothing. The question now arises whether the testatrix, "for not less than ten years prior to her death, stood in the mutually recognized relation of a parent" to these legatees, so as to bring them within the class excepted from taxation. A step-parent does not necessarily stand in the relation of a parent, within the meaning of this act, to step-children. Whether they do or not depends on the circumstances of each case. I think, in order to constitute this relation, some time during the continuance of the intercourse between the persons there should be a period of dependence on the part of the younger, a time when the younger required and received parental care, though not necessarily a dependence for support and maintenance; for this the natural mother does not generally provide. This relation must therefore begin in youth, though not of necessity during legal minority; and it should not be confounded with relations which, growing out of mutual needs or wishes, have resulted in warmest friendships, and some times in forming a household, but one in which the parental element is lacking. I find parties, in seeking exemption from this tax, frequently mistake this latter relation for the parental one. It often happens, indeed it is usually the case, that in after years, as the children grow to womanhood and manhood, they separate from their parents, and establish homes of their own; but they are no less parents and children. So, too, this relation may continue between persons who have come by force of circumstances to occupy that relation, even after they have discontinued liv-

ing together. In this case the testatrix and these legatees continued their interest in each other till her death, frequently visiting each other, continuing their previous style of address,—they in time coming to care for her comfort; and when she dies they become her chief legatees. From these observations it results, and I therefore conclude, that the testatrix did not stand in the relation of a parent to the oldest of the four legatees,—the one who had married and left home before her father's marriage,—but that she did so to the other three.

In re STEWARD'S ESTATE.

(Surrogate's Court, Chautauqua County. April 19, 1890.)

1. DESCENT AND DISTRIBUTION—RIGHTS OF WIDOW—EXEMPTION—APPRAISEMENT.

Laws N. Y. 1889, c. 406, § 1, gives a widow of a decedent leaving children a life-interest in \$1,000 worth of decedent's land "in addition to" her dower. Section 3 provides that there shall also be appraised and set apart to the widow household furniture, provisions, etc., not exceeding \$150; and in case the interest of a widow in the realty of her deceased husband, "in addition to her dower right, and together with said \$150," shall be of less value than \$1,000, then there shall also be set apart to her personal property which, together with the realty, shall amount to \$1,000 in value. *Held*, that the value of the additional amount of personal property to be set apart to the widow under section 3 is the difference between \$1,000 and the present value of the life-interest in the \$1,000 worth of land given her by section 1, excluding the value of her dower and the \$150 of household goods, etc.; the words "in addition to her dower right, and together with said \$150," used in section 3, being construed to mean "exclusive of her dower right and said \$150." *In re Daygett's Estate*, 9 N. Y. Supp. 652, disapproved.

2. EXECUTORS AND ADMINISTRATORS—APPRAISEMENT—POWERS OF SURROGATE.

Surrogate's courts, in ordering an appraisal of a decedent's estate, have the incidental power to judicially ascertain the incumbrances on the land and the widow's age, so as to determine the value of her dower interest, and, in the order appointing appraisers, to instruct them in regard thereto.

On motion for correction of inventory of the estate of Warner Steward, deceased.

Norman M. Allen, for petitioner. *George H. Frost*, for contestants.

SHERMAN, S. The question involved relates to the construction of chapter 406 of the Laws of 1889, as to the duties of appraisers in making inventory in case of husband dying intestate, and leaving widow and descendants. The petitioners claim that the dower right of the widow, and the \$150 mentioned in the act, should be added to her life-interest in land valued at \$1,000, and, if these amount to less than \$1,000, the difference to make that sum should be set off to her and the minor children in personal property, and not otherwise. The contestants claim that the dower right of the widow and the \$150 should be excluded in making the appraisal, and that only the life-interest of the widow in the land valued at \$1,000 should be included, and that the difference to make \$1,000 should be set off to the widow and minor children in personal property. The amount in controversy in this case is \$429.65, which the appraisers have set off to the widow and minor children in personal property, which sum, the petitioners claim, should be wholly disallowed. The deceased died intestate September 16, 1889, leaving a widow, aged 43 years, and five children, of whom three are minors and two of full age, and one grandchild, a minor son of a deceased daughter of said Warner Steward, deceased, by his former deceased first wife, and two other grandchildren, also minors, named Earl and Floyd Cadwell, sons of another deceased daughter of said Steward by his said first wife, long since deceased. The two Cadwell grandchildren appear herein by their counsel and special guardian, and ask for the correction of the inventory by wholly disallowing said \$429.65. The deceased died seised of land of the value of \$5,825, and personal property appraised at \$2,225.40, besides the articles set off to his widow under the Re-

vised Statutes, and the \$150 in personal property given by chapter 157, Laws 1842. The deceased intestate owed no debts.

The following is a copy of the act in question, here given for convenient reference in considering the question involved:

Chapter 406, Laws 1889: "An act to amend chapter two of part two of the Revised Statutes, as amended by chapter three hundred and twenty of the Laws of one thousand eight hundred and thirty, by making an additional section to said chapter, and to amend section two of chapter one hundred and fifty-seven of the Laws of one thousand eight hundred and forty-two, entitled 'An act to extend the exemption of household furniture and working tools from distress for rent and sale under execution,' relating to the descent of real estate and distribution of personal property. Approved by the governor June 7, 1889; passed, three-fifths being present.

"The people of the state of New York, represented in senate and assembly, do enact as follows: Section 1. Chapter two of part two of the Revised Statutes, as amended by chapter three hundred and twenty of the Laws of one thousand eight hundred and thirty, is hereby amended by making an additional section to said chapter, to be known as section thirty, and said section shall read as follows: 'Sec. 30. If the intestate shall leave a widow and a descendant or descendants, then such widow, in addition to any interest to which she may be entitled under the preceding sections of said chapter two, shall be entitled to the use, during her life, of an additional portion of the estate, not exceeding in value one thousand dollars; and, in case the intestate shall leave a widow and no descendant or descendants, then the widow shall be entitled to the absolute ownership in fee of such additional portion of the estate.' Sec. 2. Section two of chapter one hundred and fifty-seven of the Laws of one thousand eight hundred and forty-two, entitled 'An act to extend the exemption of household furniture and working tools from distress for rent and sale under execution,' as amended, is hereby amended so as to read as follows: 'Sec. 2. When a man having a family shall die, leaving a widow or minor child or children, there shall be inventoried by the appraisers, and set apart for the use of such widow and child or children, or for the use of such child or children, in the manner now prescribed by the ninth section of title third, chapter sixth, of part second, of the Revised Statutes, necessary household furniture, provisions or other personal property, in the discretion of said appraisers, to the value of not exceeding one hundred and fifty dollars, in addition to the articles of personal property now exempt from appraisal by said section; and in case the interest of a widow in the real estate of a deceased husband, in addition to her dower right, and together with said one hundred and fifty dollars, shall be of less value than one thousand dollars, then said appraisers shall set apart for the use of such widow, or for the use of such widow or child and children, in the manner hereinbefore prescribed, personal property which, together with said real estate, shall amount to one thousand dollars in value. Said appraisers are authorized to make an appraisal of the real estate to which the widow may be entitled, for the purposes of this section. The provisions of this section shall apply where a man dies intestate, as well as where he leaves a last will and testament.' Sec. 3. This act shall take effect immediately."

In this case the dower right of the widow is conceded to be over \$1,100, and the value of her life-interest in the \$1,000, under above section 1, is \$570.35, which sum is all the widow receives under this new statute by its construction as claimed by the petitioners, being \$429.65 less than a widow having no children would receive who would take \$1,000 in land in fee-simple, and no personal property; a most gross and unjust discrimination in favor of the childless widow against the widow having minor children, as in this case, to support and educate, and who are entitled to share with her the benefits of this new statute,—an injustice the legislature never intended to per-

petrate. On the contrary, it intended by this new law to ameliorate in some degree the injustice done by former statutes to the widow and her minor children, by giving them in all cases an increased allowance from the real and personal property of the deceased intestate or testate husband, making such increase in every case just \$1,000, where there may be sufficient property to do it. Under the construction claimed by the petitioners, each of the two petitioning grandchildren would receive from the personal property of this estate just \$20.80 more than under the construction claimed by the contestants. If a just and fair construction of this act grants it, they should, of course, have it. In *Re Daggett's Estate*, reported in 9 N. Y. Supp. 652, in which the opinion is written by a learned surrogate whose opinions are read with interest and respect by the legal profession, and in whose opinion I regret to be unable to concur, the surrogate adds the dower right and the \$150, and the value of the widow's life-interest in land valued at \$1,000, and sets off the balance in personal property to make the \$1,000, being \$255 less than such widow would have had if the dower right and the \$150 had been excluded, and also \$255 less than she, in any event, would have received if her husband had died leaving no descendant, as in that case she would have received land in fee-simple valued at \$1,000, exclusive of her dower and the \$150. Again, if the husband, in the case cited, had died leaving no child or descendant, and no personal property, but land, as stated, of the value of \$1,150, the widow would have taken \$1,000 in land in fee-simple, while the widow having children by her deceased husband would only take the life-use of the same land, stated in the case cited as valued at \$275; the childless widow in such case taking about \$725 more under this act than the widow having children, and that exclusive of her \$150 and dower. Most of the estates coming before surrogate courts are small in value; in many cases the husband dying intestate, and leaving a widow with minor children to support and educate, and a house and lot or other real estate worth from \$1,000 to \$1,500, and very little personal property beyond enough to pay funeral expenses and expenses of administration. In such cases the widow without descendants would take nearly the entire estate, while the one left by her deceased husband with minor children to educate and support would have very little or nothing aside from her life-interest in the real estate.

The first sentence of section 2 of the act is a copy of section 2 of chapter 157 of the Laws of 1842, which extended the exemption of household furniture and working tools from distress and sale under execution, and gave the widow \$150 in household furniture or other personal property more than was authorized by statute prior to the act of 1842. The remaining portion of section 2 applies to a husband dying intestate as well as testate, and commences by stating that, in case the interest of the widow in the real estate of the deceased husband, in addition to her dower right, and together with said \$150, shall be of less value than \$1,000, the appraisers shall set apart enough personal property to make that amount, and provides that the appraisers may appraise the real estate of which the widow may be entitled for the purposes of such section. It was conceded on the argument of this case, and I think correctly so, that the dower right and the \$150 are "together" to be either both included or excluded in determining the amount of personal property to be set off to the widow.

The following conceded errors in section 1 are not important, except in demonstrating the exceedingly bungling manner in which this very important statute, as affecting the rights of widows, orphans, and creditors, and fruitful of litigation, was drawn and passed by the legislature, and in materially aiding in interpreting the meaning of the words, "in addition to her dower right, and together with said \$150," in the second sentence of section 2: (1) The first mistake in section 1 of the amendment by adding section 30 is in its reference to chapter 2, pt. 2, Rev. St. The "interest" of the widow referred

to in section 80 must relate to her dower right, which is not granted by said part 2, c. 2, but is given by chapter 1 of same part 2 under the head of "Estates in Dower," containing 25 sections. Chapter 2 of part 2, containing 29 sections, relates wholly to title to real property and by descent. (2) Another mistake in section 1 is in the use of the words, "in addition to any interest to which she may be entitled," etc. Such words are mere surplusage. The right of dower is a common-law right confirmed by statute, while the right of a widow to personal property of her deceased husband is not given by the common law, but by statute, and neither right can be taken away or abridged except by positive statutory enactment. (3) The words in section 1, "of an additional portion of the estate," and "of such additional portion of the estate," are also words of surplusage, and are only important in ascertaining the meaning of the words in the second sentence in section 2, "in addition to her dower right, and together with said \$150." And here comes the pivotal question, whether the legislature intended the latter words, "in addition to her dower right, and together with said \$150," to have the same meaning as the words "over and above" or "exclusive of" would have had in the same connection, or, on the other hand, the same meaning as the single word "including," which substituted words, in either case, the wayfaring man could easily understand. For "wayfaring," see Webst. Dict.; Judges, xix. 17; Isaiah, xxxv. 8. In my opinion, the above words, "in addition to her dower right, and together with said \$150," were intended by the legislature as words of addition, but in the same sense as the above like quoted words in section 1, and, in view of the whole context of the act, to convey the same meaning that the words "over and above her dower right" would have had in the same connection; the "addition" being in adding the value of her dower and \$150 to her share in the personal property.

This statute, so far as it relates to dower and the \$150, being remedial, the elementary writers upon the construction of statutes, as well as the decisions of our highest courts, concur that it must receive a liberal and equitable construction, in order to accomplish the humane purposes of its enactment, in the interest of widows and minor children; that in doing so, in order to ascertain the true intent of the legislature, the courts are bound to consider the whole context of the act, restraining the letter, and disregarding the mere technicalities and surplusage, so as more effectually to conserve the beneficial end in view, and prevent a failure of the remedy. 1 Bl. Comm. 87; 1 Kent, Comm. 462, 464, 465; *King v. Inhabitants*, 16 East, 122; Hale, P. C. 364; *Fulmerston v. Steward*, Plow. 109; *Heydon's Case*, 3 Coke, 7; *People v. Insurance Co.*, 15 Johns. 380; *In re New York, etc., Bridge*, 72 N. Y. 530. In the last-cited case, Chief Justice CHURCH says: "If practicable, effect must be given to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature." Chancellor KENT says, in his Commentaries: "The true meaning of the statute is generally and properly to be sought from the body of the act itself. But such is the imperfection of human language, and the want of technical skill in the makers of the law, that statutes often give occasion to the most perplexing and distressing doubts and discussions arising from the ambiguity that attends them." Illustrations might be given *ad infinitum* to show the gross injustice of this act to widows and minor children, under the construction claimed by the petitioners. Take the supposed case of a husband dying intestate, leaving a widow aged 80 years, and minor children, and seised of title to land in fee-simple of the value of \$1,200, including her dower right. It would in such case be the duty of the appraisers to first appraise the dower right of the widow in the land, which would be \$260, and deduct that from the \$1,200, leaving \$940, and then appraise the life-interest of the widow in land worth \$940, which would be about \$611, and then adding to this sum the \$150, and her dower of \$260, would make \$1,021. The widow in such case would receive no personal property what-

ever, the amount being in excess of the \$1,000 mentioned in the act. The same husband in this supposed case dying intestate, and leaving no descendants, his widow would take land in fee of the value of \$1,000, besides her dower therein, valued at \$260, less \$40, and no additional personal property, but would take much more personal property under the statutes of distribution that she would, having children. It was claimed and conceded that a very reputable female relative of a former honorable member of the legislature, in one of the assembly districts of an adjoining county, who, having a child by a former deceased husband, and had married a worthy gentleman owning real and personal property valued at nearly \$1,500, and who, quite unsatisfactorily to his affianced, had neglected to make his last will and testament, is the real *mater* of this remarkable progeny, as affecting the rights of widows, children, and creditors as well; the "occult significance" of which, in the language of the learned surrogate of the same county, reported in *Re Daggett's Estate*, is "unfathomable," the honorable law-makers of this state being only its sponsors. Should they not now see that this *antenati*, uncouth, deformed, yet lusty and promising child, be at least bound with swaddling cloth, and decently clad, and so brought up, that it may have a fair chance for life in the evolutions of this progressive age?

It has been claimed that the act in question is inoperative for the reason that appraisers have no authority to administer oaths to ascertain judicially the ages of widows of husbands dying intestate, necessary in appraising the value of their dower interests under rule 70 of the supreme court, and to take proofs of incumbrances on lands of deceased husbands necessary in appraising the dower right and value of use of land during life. I am inclined to the belief that these are duties which belong to the surrogate courts, as incident to the power to order an appraisal, to be exercised by them judicially before appointing the appraisers, and to give instructions as to the same to the appraisers, in the orders appointing them. If such courts do not now possess the necessary authority, it would seem that the legislature should grant it, either to such courts or to some other. I direct decree denying the petition in this proceeding to revoke or amend the appraisal, with the costs payable out of the estate.

In re HOPE.

(Executive Chamber. November, 1889.)

1. EXTRADITION—WHO SUBJECT TO—ESCAPED CONVICTS.

Const. U. S. art. 4, § 2, subd. 2, providing that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state shall * * * be delivered up to be removed to the state having jurisdiction of the crime," authorizes the extradition of a person who escapes after conviction.

2. SAME—ARREST FOR DIFFERENT OFFENSE.

A defendant who is brought into a state by extradition proceedings, cannot, at the expiration of the term of imprisonment imposed, be arrested on a requisition from another state until he has had reasonable time to return to the state from which he was extradited.

James Hope was brought from California to New York under a requisition from the governor of New York, was convicted of the crime charged, and sentenced to a term of imprisonment. After his term had expired, and before an opportunity had been given him to return to California, he was arrested on a requisition from the governor of Delaware to the governor of New York, and he now applies to the governor of New York to vacate the warrant of arrest.

Charles W. Brooke, for petitioner.

HILL, Governor. The governor of Delaware has issued a requisition upon me for the return to that state of the prisoner, James Hope. The papers ac-

companying the requisition consist of a copy of an indictment against Hope for burglary, and a record of conviction thereunder in Delaware, showing his sentence for 10 years, and proof by affidavit that he escaped from jail with over 9 years of such sentence unserved. His return to that state is demanded for the purpose of compelling him to serve out the remainder of his unexpired sentence. The requisition was honored by me *pro forma*, and the prisoner arrested, and now, after a full hearing has been had, the question arises whether the warrant should not be revoked. Mr. Charles W. Brooke, the prisoner's counsel, insists that the requisition should be revoked, upon the ground that there is no authority under the constitution and the laws for the extradition of an escaped convicted prisoner. He argues that a person can only be returned to another state to answer a charge made against him upon which no conviction has yet been had. The broad ground is taken that there is no legal remedy whatever provided to secure his return where a convicted felon escapes from one state into another. If this be true, it is new doctrine, indeed, and discloses a lamentable defect in our criminal laws. The constitutional provision relating to interstate extradition, (article 4, § 2, subd. 2,) declares that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall * * * be delivered up, to be removed to the state having jurisdiction of the crime." It is seriously urged that a person cannot be deemed to be "charged" with a crime when he has already been convicted for such crime. It seems to be claimed that the "charge" no longer exists because it is deemed merged in the conviction. It is also urged that the law-writers have laid it down in the books that the declared object of an extradition is the removal of the person charged with the crime for the purpose of his being subsequently tried upon the charge presented against him, and that extradition cannot be invoked for any other purpose. This is ordinarily so, and correctly states the general rule. These expressions to be found in the books, however, have reference, not to exceptional instances, but to the usual class of cases where offenders have fled from one state to another prior to apprehension or conviction. Such flights are common, while escapes after conviction are rare. It is clear that in enunciating a general proposition there was no intention of excluding or exempting convicted escaped persons from liability to extradition. No narrow or strained construction should be placed upon the word "charged," as used in the constitution in the federal statute. It is broad enough to include all classes of persons duly accused of crime. A person can be said to be "charged" with crime as well after his conviction as before. The conviction simply establishes the charge conclusively. An unsatisfied judgment of conviction still constitutes a "charge" within the true intent and meaning of the constitution. An indictment or affidavit merely presents the charge, while a conviction proves it. To warrant extradition the statute requires an indictment or affidavit charging a crime, but if, in addition thereto, there is also presented a record of conviction, the case is not weakened but rather strengthened. The public purpose to be effected by extradition must be taken into consideration in determining the question. Its object is to prevent the successful escape of all persons accused of crime, whether convicted or unconvicted, and to secure their return to the state from whence they fled, for the purpose of punishment. It is invoked to aid the administration of criminal justice, and to more certainly insure the punishment of the guilty. The construction contended for by the prisoner's counsel would defeat the ends of justice in many instances, and it is conceded that there is no express decision favoring it. It has been usual to grant extradition in similar cases. The *Case of Carter*¹ (decided by me on July 10, 1885) was just such a case, although this precise point was not then raised. In *Dolan's Case*, 101 Mass.

¹Not reported.

219, and in *Hollon v. Hopkins*, 21 Kan. 638, the prisoners were returned by extradition to other states to serve out unexpired sentences, and no such question seems to have been raised as to the legality of the proceedings. This first point raised by the prisoner's counsel seems altogether too technical, and I am constrained to overrule it.

The next question presented is not without merit. It was shown upon the hearing before me that Hope did not voluntarily come into this state, but was brought here in 1887 from the state of California, on a requisition from the governor of this state, to answer a charge of crime made against him, and that since he has been incarcerated in the Auburn prison; and it appears that upon his term of imprisonment expiring, he has been arrested under or by virtue of the requisition in question from the governor of Delaware. It is conceded that such arrest was made before a reasonable time and opportunity had been given him, after his release from Auburn, to return to California, where he claims he desired and intended to go. This state of facts presents an interesting question upon which there have been conflicting decisions for many years. Upon principle, I think, it is clear that where a prisoner is brought into this state from another state or country upon extradition proceedings, he cannot properly be tried upon any other charge than that mentioned in the requisition, and that upon his acquittal, or if convicted, then upon the expiration of his imprisonment, he is entitled to a reasonable time in which to return to the other state or country from which he was thus forcibly taken before he can be again arrested. The recent decision of the supreme court of the United States (*U. S. v. Rauscher*, 119 U. S. 407-429, 7 Sup. Ct. Rep. 234,) must be deemed to settle this question in accordance with the doctrine above stated. Although, in that case, the prisoner was brought from a foreign country, the decision is applicable to this case, because in principle there is no practical difference between the case of a fugitive brought from a neighboring state under the constitution and laws of the United States and one brought from a foreign country under the provisions of its treaties. In the *Rauscher Case*, above cited, all the conflicting authorities in both the federal and state courts are reviewed and considered in the able opinion of the court by Mr. Justice MILLER, and the principle here contended for is expressly approved. This being the decision of the highest court in the land upon a question which must be regarded as essentially federal in its character, it should be respected and followed, not only by all federal courts, but by all state courts as well. The cases which have held heretofore, either expressly or impliedly, a contrary doctrine—and there are many (*Adrianse v. Lagrave*, 59 N. Y. 110; *U. S. v. Lawrence*, 13 Blatchf. 295; *Hackney v. Welsh*, 107 Ind. 253, 8 N. E. Rep. 141; *Williams v. Bacon*, 10 Wend. 636)—should no longer be regarded as good authority upon this particular question. This is the view taken in the recent cases of *State v. Hall*, 40 Kan. 388, 19 Pac. Rep. 918, and *In re Reinitz*, 39 Fed. Rep. 204, 23 Abb. N. C. 69, in each of which the *Rauscher Case* is followed. It is believed that the decision in the *Rauscher Case* will be cheerfully acquiesced in by the courts and officials of all the states, not solely because it is the interpretation of the law from our highest court, but also because it will be found upon reflection to be entirely correct in principle. It is in harmony with the views expressed by the best text-writers upon extradition. It is in accordance with common sense. It will render extradition proceedings entirely consistent, and prevent unseemly conflicts of jurisdiction. The true theory, which now seems to be firmly established, is that a state should not be allowed to obtain jurisdiction of a fugitive from justice, and then to take advantage of that jurisdiction thus obtained, and use it for another and different purpose; that a fugitive surrendered on one charge is exempt from prosecution on any other; that he is within the state by compulsion of law upon a single accusation, and has a right to have that disposed of, and then to depart in peace; and that if, after

his release, he remains in the state beyond a reasonable time, he then can be arrested, but not otherwise. It follows from what has been here stated that the arrest in this case was premature, and that the warrant heretofore issued should be revoked.

In re PIERCE.

(Supreme Court, Special Term, New York County. December, 1889.)

VENDOR AND VENDEE—RIGHTS OF VENDEE—DAMAGES FOR OPENING STREET.

Where a deed of land, executed two years after the report of the commissioners awarding damages for opening a street through the same was confirmed, recites that it excepted "from said premises so much thereof as has been taken for the opening of Girard avenue," but did not refer to the award which had been made for the part taken, the vendee is not entitled to the damages awarded.

At Chambers. Petition by Madeline Pierce for an order that the comptroller of the city of New York be directed to pay to her damages awarded by the board of commissioners of estimate and assessments for injuries caused by opening Girard avenue to property conveyed to her after the report of the commissioners had been confirmed.

G. A. Moses, for petitioner. *Varnum & Harrison*, for respondent Harrison.

LAWRENCE, J. It was held in *King v. City of New York*, 102 N. Y. 171, 6 N. E. Rep. 395, that where, under a statute closing a highway, damages were directed to be awarded and paid to the owners of premises injured by the closing, the right to such damages was personal, and belonged to one who was the owner at the time of the closing, although before the award he had conveyed his title; and in that case it was also held, the owner having conveyed the premises after the statutory closing of the highway bounding the lands conveyed by the highway, that the deed did not convey an easement in the highway which entitled the grantee to the damages subsequently awarded, and that the latter was chargeable with knowledge that the highway no longer existed, and was to be presumed to have purchased in view of that fact. The principles established by that case seem to me to be decisive of this motion. The report of the commissioners of estimates and assessment in the matter of Girard avenue was confirmed on the 23d of January, 1888. The deed to the petitioner from Mr. Harrison, who at the time was the owner of the premises for which the award now claimed was granted, was executed on the 26th of September, 1889, and recorded October 8, 1889. The description of the premises conveyed contains this clause: "Excepting, however, from said premises, so much thereof as has been taken for the opening of Girard avenue." There is no allusion in the deed to the award which had been made for the portion of the premises taken for Girard avenue, and it is clear that the petitioner could not have supposed that she was purchasing either said premises, or the award made for the taking of the same, inasmuch as her deed bears date 22 months after the confirmation of the report of the commissioners of estimate and assessment. If there is anything in the case of *Mayor v. Curran*, 3 N. Y. Supp. 533, which is in conflict with these views, I must be controlled in disposing of this motion by the case of *King v. Mayor*, above referred to. The prayer of the petitioner must therefore be denied.

DIDSBURY v. VAN TASSEL.

(Supreme Court, General Term, Second Department. May 12, 1890.)

1. HOLIDAYS—CHRISTMAS DAY—SERVICE OF PROCESS.

Laws N. Y. 1881, c. 80, providing that certain days and half-days, including Christmas day, shall be considered Sunday, for the purpose of presenting and protesting commercial paper, and for the purpose of transacting business in a public office within the state, does not diminish the number of judicial days, and service of a summons on Christmas day is valid.

2. SHERIFFS AND CONSTABLES—ACTION FOR ESCAPE—PLEADING.

Though an action lies for an escape from jail limits against the sheriff individually, the addition of his official title is merely *descriptio personæ*, and cannot be assigned as error.

Appeal from special term, Dutchess county.

Action by George W. Didsbury against J. Wesley Van Tassel, as sheriff of Dutchess county. Defendant appeals from an order denying his motion to set aside service of the summons.

Argued before DYKMAN and PRATT, JJ.

C. Morschauser, for appellant. A. H. P. Seeger, for respondent.

DYKMAN, J. This action was commenced against the sheriff for an escape from the jail limits, and the summons was served on the under-sheriff on the 25th day of December, 1889. Thereupon a motion was made at special term to set aside the service because it was made on Christmas day, which was a holiday, and on the under-sheriff instead of the sheriff. It seems also that an objection was raised against the form of the action, because it was not commenced against the sheriff individually; but, even if that objection can be made available upon a motion to set aside the service, it is baseless. The action is against the sheriff individually, and the addition of his official title is only by way of description, and is a superfluous addition.

The service upon the under-sheriff was justified by the third subdivision of section 426 of the Code of Civil Procedure, by the following language: "If the action is against a sheriff for a cause specified in section one hundred and fifty-eight of this act, [which this action is,] by delivering it to the defendant in person, or to his under-sheriff in person."

The objection to the service because it was made on Christmas day is based upon chapter 30 of the Laws of 1881; and the solution of the question involved depends upon the exposition of that statute, which has never been construed or expounded by the supreme court or court of appeals, so far as we can ascertain; yet it is often brought forward as it was in this case, and its consideration becomes appropriate and necessary. The title of the act is "An act to amend chapter 27 of the Laws of 1875, entitled, 'An act to designate the holidays to be observed in the acceptance and payment of bills of exchange, bank-checks, and promissory notes;'" and the second section amends the title of the act of 1875 by adding thereto the words, "and relating to the closing of public offices."

It is to be observed, generally, that no law in this state has ever interdicted the service of any legal process, or the holding of any court, on a holiday. Such days have heretofore been designated for certain specified purposes connected with commercial paper, and in no statute creating them have legal proceedings ever received mention. No court can be opened for the transaction of business on the day of any general or special election, or on Sunday, with some exceptions unimportant here; and that is the extent of such inhibition in this state. Beyond those days, legal proceedings are left untrammelled; and courts may be opened, and litigation may be continued, on any other day. Neither has the new law set up any different rule. It neither has, nor professes to have, any application to the courts or their operations.

or any judicial transactions. It embraces but one subject, and amends an act to designate the holidays to be observed in protesting of bills, checks, and notes, and closing public offices; and the text of the law adheres with fidelity to the restricting phrase of the title. The first portion of section 1 [as amended by Laws 1887, c. 289] recapitulates certain days, including Christmas day and every Saturday afternoon, which "shall, for all purposes whatever, as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank-checks, and promissory notes, made after the passage of this act, be treated and considered as the first day of the week, commonly called 'Sunday,' and as public holidays or half-holidays." Then follow other provisions specifically relating to paper bills, down to the insertion of a provision continuing every Saturday as a secular day, down to 12 o'clock noon, unless it be a whole holiday. Then the section closes with these words: "And the days and half-days aforesaid shall be considered as the first day of the week, commonly called 'Sunday,' and as public holidays or half-holidays, for all purposes whatsoever, as regards the transaction of business in the public offices of this state, or counties of this state." There is nothing new in this law, except the annexation of labor day and Saturday afternoon to the former holidays, and the purposes for which they are so set apart from secularity are specifically stated to be for purposes connected with commercial paper; and no language is employed to give the statute any broader scope, or wider operation, or any application to any other subject. Then the days and half-days specified are, by the closing sentence quoted, declared to be considered as Sundays and public holidays or half-holidays for all purposes respecting the transaction of business in the public offices of this state, and the counties therein.

Holidays are periods of relaxation and amusement and exemption from labor, and it was the object of the law under view to enlarge their number, and provide for their enjoyment. That end was attained by considering the designated holiday as Sunday for all purposes of business in the public offices, and authorizing the protest of dishonored paper the day before. The closure of the banks and public offices was thus secured, and that released a large number of persons. The civilians employed the Latin term "*dies juridicus*" to denote the days for legal purposes or judicial proceedings, and the term "*dies non juridicus*" was used by them to designate the days in which judicial proceedings were prohibited; but, with the exception of Sunday, we have no such days, and there is no reason for their augmentation. The avenues of approach to the courts should be open on all secular days; and great inconvenience, and positive loss and injury, will result from their diminution. We cannot, therefore, impute to the legislature an intention to diminish the number of judicial days, without unequivocal language expressive of such a design. The legislature has declared this to be an act to designate the holidays to be observed in the acceptance and payments of bills of exchange, bank-checks, and promissory notes, and relating to the closing of public offices; and no design is expressed, either in the title or the text, to embrace any other subject in this legislation. If the legislature entertained the purposes of abridging the days or limiting the times in which actions could be commenced in this state, it would have employed plain, unequivocal language for the accomplishment of that end. It would have been easy to prohibit the commencement of actions and the transaction of legal business upon holidays, and make them Sundays for all purposes, but it was not done; and the issuance and service of legal process remains unrestricted as it was anterior to this law, and holidays are yet juridical. Our examination has failed to discover any case where judicial proceedings have been set aside or nullified because they were instituted, continued, or terminated on a legal holiday. The defendant cannot escape from the service, and the other grounds of appeal are untenable. The order should be affirmed, with costs and disbursements.

DUNN v. O'KEEFE.

(Supreme Court, General Term, Third Department. May 26, 1890.)

1. JUSTICES OF THE PEACE—PROCEDURE—ABSENCE OF DEFENDANT.

Where the summons in a justice's court is returnable at 9 A. M., and the justice calls the case at 9:45, and, in the absence of defendant, waits until 10 before proceeding, it is a compliance with Code Civil Proc. N. Y. § 2893, requiring the justice to wait one hour after the hour specified in the summons for its return, unless the parties sooner appear.

2. NEGLIGENCE—EVIDENCE—OFFER TO SETTLE.

Where defendant, after driving into and breaking plaintiff's wagon, requests plaintiff to have the wagon repaired, and promises to pay the cost thereof, and plaintiff acts on the promise, it is a substantial confession by defendant of his negligence, and an agreement as to the measure of damages.

Appeal from Washington county court.

Action by James Dunn against John O'Keefe, originally commenced in a justice's court, to recover damages from defendant for negligently running into and breaking plaintiff's wagon. The justice rendered judgment in favor of plaintiff for \$16.10, the amount it cost to repair the wagon, and \$2.15 costs. The county court affirmed the judgment, and defendant again appeals. Code Civil Proc. N. Y. § 2893, provides that, upon the return of a summons duly served, the justice must wait one hour after the hour specified therein for its return, unless the parties sooner appear.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

C. R. Patterson, for appellant. F. A. Pratt, for respondent.

LANDON, J. The defendant did not appear in the justice's court. The summons was returnable at 9 A. M. The justice called the case at 9:45 A. M., but waited until 10 before proceeding with it. This was a compliance with the statute, which requires the justice to wait one hour. Code Civil Proc. § 2893.

The plaintiff's testimony tended to prove his case. The circumstances detailed justified the inference that the plaintiff was free from negligence, and that his wagon was broken by means of the defendant's negligence. The defendant, in his subsequent conversation with plaintiff, requested him to have the wagon repaired, and promised to pay the cost thereof. This was a substantial confession of his negligence, and an agreement as to the measure of damages. The plaintiff acted upon it. Substantial justice was done. Judgment affirmed, with costs. All concur.

DUNN v. HERBS *et al.*

(Supreme Court, General Term, Third Department. May 26, 1890.)

MORTGAGES—FORECLOSURE—RELEASE OF PURCHASER.

A purchaser at a foreclosure sale should be relieved from his purchase where the lot sold contains only 8 or 9 acres instead of 89 acres, as described in the notice of sale, and he made his bid in the honest belief it contained the larger quantity.

Appeal from special term, Columbia county.

This is an appeal by A. Paul Dunn from an order vacating a sale in foreclosure proceedings instituted by him, and directing the referee to repay to the purchasers, Frederick C. Herbs and Magnus D. Herbs, the amount paid by them on account of their purchase.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

William Lounsbury, for appellant. Chancellor Hawver, for respondents.

LEARNED, P. J. This order should be affirmed. The purchaser bid off two pieces of property, sold together,—one of a little less than three acres, the other described to be 89 acres. By an honest misapprehension, he supposed

the piece of 89 acres to be one which belongs to the plaintiff, but which was in fact not sold. The piece which the purchaser in fact bought is of much less value than that which he supposed he was buying, and contains, as would seem, 8 or 9 acres, not 89. The utmost fairness must be observed in judicial sales; and a purchaser will not be compelled to complete his sale when he has bid, under an honest misapprehension, and discovers that he has not bought the property for which he thought he was bidding, and at once applies for relief. We do not say that the plaintiff intended to deceive, but probably the selling of the two pieces together tended to lead the purchaser into the mistake which he made. Order affirmed, with \$10 costs and printing disbursements. All concur.

BARTLETT v. HALLIGAN.

(Supreme Court, General Term, Fifth Department. April 11, 1890.)

SHERIFFS AND CONSTABLES—CONTEMPT—LIABILITY OF DEPUTY.

A deputy-sheriff cannot be held for contempt, in refusing to pay over money collected on execution, where it appears that the deputy paid the money so collected to the sheriff, who on the same day paid it back to the deputy in settlement of wages due. Distinguishing *Whitman v. Haines*, 4 N. Y. Supp. 48.

Appeal from special term, Wyoming county.

Action by Myron E. Bartlett against James Halligan. An order was entered denying a motion to punish Allen B. Divers, late under-sheriff of Wyoming county, for not paying over moneys collected by him on an execution, and plaintiff appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

M. E. & F. M. Bartlett, for appellant. *Frank W. Brown*, for respondent.

CORLETT, J. In July, 1887, the plaintiff recovered a judgment against the defendant, Halligan, for \$81.74. Soon after, execution was delivered to Divers, the deputy-sheriff, to collect the judgment. He did so in full. Daniel W. Hough was sheriff of the county. After the deputy had collected the execution the plaintiff demanded the money from him, which he refused to pay. The deputy's affidavit shows that he paid the money to the sheriff, and that on the same day the sheriff paid it back to him, to apply on wages due from the sheriff to him. A motion was made at special term, Justice CHILDS presiding, to punish the deputy for contempt for not paying over the moneys collected by him on the execution. This was denied on the ground that the proceedings should have been against the sheriff, and that the court had no power to punish the deputy. The justice wrote an opinion, which appears in the case.

In *Colvin v. Holbrook*, 2 N. Y. 126, it was decided that a deputy-sheriff owes no duty, and is under no obligations, to a third person, in respect to moneys in his hands, and that a request to pay could not create an obligation or confer a legal right. The sheriff was alone responsible. All the cases are to the same effect. *Terrilliger v. Wheeler*, 35 Barb. 620-623; *Davis v. Fiske*, 17 Wkly. Dig. 380; *Ross v. Campbell*, 19 Hun, 615; *Newman v. Beckwith*, 5 Lans. 80, (this case was reversed in 61 N. Y. 205, but not upon the question involved here.) The learned counsel for the appellant calls attention to *Whitman v. Haines*, 4 N. Y. Supp. 48, as an authority in favor of his position. In that case, Davidson, sheriff of New York county, directed his deputy, Schaffer, to execute certain attachments, out of which he realized considerable money. The sheriff failed, and such proceedings were had that the court decided: "It is ordered that Alexander V. Davidson, late sheriff of the city and county of New York, and his attorney, Edward J. Shelley, and each and every of the deputies and ex-deputies and clerks and assistants of the late sheriff, forthwith deposit in the United States Trust Company of New

York, to the credit of said five actions, any and all moneys now in their hands, or in the hands of any of them, or which may hereafter come into their hands, or into the hands of any of them, or under their control, by virtue of the warrants of attachment, or any of them, granted in the above-entitled actions, or any of them." A copy of this order was served on the deputy, Schaffer, who declined to obey it. The court held that he was guilty of contempt, and said: "The deputies are servants of the sheriff, and in law they are considered but one officer;" citing *Pond v. Leman*, 45 Barb. 154. It will thus be seen that this authority is in full accord with the cases above cited. The deputy is not an officer, but a mere servant of the sheriff designated as deputy, and in contempt proceedings the sheriff is liable, but he is not. The order must be affirmed. All concur.

ROTHCHILD *et al.* v. GRAND TRUNK RY. CO. OF CANADA.

(*Supreme Court, Special Term, Monroe County. March, 1890.*)

1. CORPORATIONS—ACTIONS—PLEADING—CORPORATE EXISTENCE.

A complaint which alleges that defendant is a corporation, but which fails to allege whether it is a foreign or domestic corporation, is not demurrable, as not stating facts sufficient to constitute a cause of action.

2. ACTIONS—FORM—TORT AND CONTRACT.

Where a complaint states facts which constitute a cause of action *ex contractu*, an averment of negligence on the part of defendant will not make the action one *ex delicto*.

Action by Bernard Rothchild and others against the Grand Trunk Railway Company of Canada. Defendant demurs to the complaint on the grounds—*First*, that the court had no jurisdiction; *second*, that there was a misjoinder of causes of action; and, *third*, that there were not sufficient facts stated to constitute a cause of action. Code Civil Proc. N. Y. § 1775, is as follows: "In an action brought by or against a corporation the complaint must aver that the plaintiff, or the defendant, as the case may be, is a corporation; must state whether it is a domestic corporation or a foreign corporation; and, if the latter, the state, country, or government by or under whose laws it was created. But the plaintiff need not set forth, or specially refer to, any act or proceeding by or under which the corporation was created."

David Hays, for plaintiffs. *Geo. F. Brownell*, for defendant.

ADAMS, J. No particular stress was laid upon the ground of demurrer first above stated, when the case was argued, nor does the brief of the defendant's counsel disclose sufficient confidence in the correctness of his position in that regard to render it necessary to consider the question at length; and it is perhaps sufficient to say that, if the second and third grounds of demurrer are not well taken, there can be no doubt as to the jurisdiction of the court. The theory of the defendant's counsel appears to be that the pleader has united a cause of action upon contract with one for tort, and that consequently the complaint is demurrable. It is contended, however, that, even if this were so, the two causes of action arise out of the same transaction, and may therefore be properly united. It is difficult to see why, under our present practice, this contention is not well founded, (Code Civil Proc. § 484, subd. 9;) and there certainly is abundant authority for it, (*Adams v. Bissell*, 28 Barb. 382; *Badger v. Benedict*, 4 Abb. Pr. 176; *Robinson v. Flint*, 16 How. Pr. 240; *Polley v. Wilkisson*, 5 Civil Proc. R. 185.) However, it is not necessary to determine this question, inasmuch as the complaint can bear but one construction, which is that the various causes of action set forth therein are practically the same, and that they are all founded upon an alleged breach of the defendant's contract as a common carrier. It is true that they are set forth in separate counts, and with allegations which are obviously designed to pre-

vent any variance between the pleading and the proof, but this method of pleading is authorized by the Code and recognized by the courts. *Blank v Hartshorn*, 37 Hun, 101.

Nor does the fact that the pleader, in alleging a breach of the contract, has chosen to employ the term "negligence," necessarily characterize the action as one of tort. It had been frequently held that, where the controlling facts set forth in a complaint constitute a cause of action *ex contractu*, the mere presence of an averment of fraud or negligence does not make the action one *ex delicto*, (*Jones v. Walker*, 63 N. Y. 612; *Ledwith v. McKim*, 53 N. Y. 307; *Sparman v. Keim*, 88 N. Y. 245;) and the form adopted by the pleader in this case appears to be sanctioned by recognized authority in the matter of pleading. (2 Chit. Pl. 356.)

The most serious question in the case, and the one concerning which the authorities differ, is that which arises upon the third ground of demurrer. The complaint alleges that the defendant is a corporation doing business in this state, but omits to aver whether it is a domestic or a foreign corporation, or under the laws of what state, country, or government it was created. In this respect it is clearly defective, (Code Civil Proc. § 1775,) and the defendant insists that, by reason of this defect, "facts sufficient to constitute a cause of action" are not stated. The attention of the court has been directed to several recent adjudications directly in point, which clearly sustain the position of defendant's counsel,¹ and which, in the absence of others of equal weight, cited by the plaintiff, would undoubtedly be controlling, but the position taken by Mr. Justice BRADLEY in the case of *Furniture Co. v. Grumme*, 10 Civil Proc. R. 176, that this defect is one of form, and not of substance, and one, therefore, which cannot be taken advantage of by demurrer, commends itself to the judgment of the court as a precedent which may be safely followed. The design of the section above referred to is unquestionably "to advise, by statement in the complaint, whether the corporation is domestic or foreign," but this allegation does not constitute any part of the cause of action, which is just as complete without it as with it. Indeed, a cause of action would be stated if the entire allegation as to the corporate character of the defendant were omitted. *Fox v. Preserving Co.*, 93 N. Y. 54-57. Such an omission, or the one of which defendant complains, like his failure to state in the complaint the name of the county which the plaintiff designates as the place of trial, as required by section 481, may be taken advantage of by motion, but not by demurrer. The correctness of this view of the question can be easily demonstrated by the application of a simple test. The defendant, by interposing a demurrer, admits the truth of all the allegations in the complaint. We have, then, as conceded facts, that the defendant is a corporation; that on or about April 27, 1889, it agreed with plaintiff, for a good and valuable consideration, to carry from Detroit to Buffalo two trunks, containing goods of the value of \$1,000; and that it has failed to fulfill on its part, to plaintiff's damage of the sum stated. What element is here lacking to make this a full and complete statement of a cause of action? The demurrer must be overruled, with leave to answer within 20 days, upon payment of costs.

¹See *Bank v. Rogers*, 1 N. Y. Supp. 757; *Society v. Anderson*, 3 N. Y. Supp. 49; *Bank v. Jackson*, 4 N. Y. Supp. 433; *Oesterreicher v. Publishing Co.*, 5 N. Y. Supp. 9; *Society v. Foote*, *Id.* 293.

RILEY v. GITTERMAN *et al.*, (two cases.)

(Supreme Court, General Term, Second Department. December 9, 1899.)

1. ABATEMENT AND REVIVAL—DEATH OF PARTY PENDING APPEAL.

Code Civil Proc. N. Y. §§ 755-765, provide for the revival of an action on the death of a "plaintiff" or "defendant." Section 1297 provides that, on the death of the adverse party after judgment, an appeal may be taken as if he were living, "but it cannot be heard until the heir, devisee, executor, or administrator * * * has been substituted as the respondent." Section 1298 provides that, when either party dies pending an appeal, "if an order substituting another person in his place is not made within three months after his death, * * * the court in which the appeal is pending may * * * make an order requiring all persons interested in the decedent's estate to show cause before it why the judgment * * * should not be reversed or affirmed or the appeal dismissed." Section 1786 provides that, on the death of either party to an action to recover a chattel, the cause of action survives to or against his executor or administrator. *Held* that, on the death of appellant in an action to recover chattels before argument of the appeal, the court of appeals may revive the action in the name of appellants' assignee for benefit of creditors.

2. SAME—CORRECTION OF IMPROPER ORDER.

An improper order of revival made by the court of appeals cannot be collaterally attacked, but can be remedied only by an application to vacate the order.

Appeal from circuit court, New York county.

Two actions by Julia A. Riley, as administratrix of the estate of Thomas M. Riley, deceased, against Henry Gitterman and William Sulzbacher. One of the actions was to recover on an undertaking, given by defendants as sureties for one Louis Siedenbach, on an appeal by him from a judgment in an action theretofore pending between himself as plaintiff and Julia A. Riley (plaintiff herein) as defendant. The action of *Siedenbach v. Riley* was originally brought against Thomas M. Riley, then sheriff of Kings county, to recover property taken by said Riley under execution. Thomas M. Riley died pending this action, and it was revived against his administratrix. Judgment was rendered against Siedenbach, who appealed to the general term, and gave the undertaking referred to above. The judgment was affirmed by the general term, (42 Hun, 656, *mem.*) and Siedenbach then appealed to the court of appeals. The other action by said Julia A. Riley was to recover on the undertaking given on appeal to the court of appeals, where the judgment of the general term was affirmed. 19 N. E. Rep. 275. Pending his appeal to the court of appeals, Siedenbach died, and the action was ordered to be revived and continued in the name of William Sulzbacher, to whom Siedenbach had executed a general assignment for benefit of creditors. Defendants insist that they are relieved from liability because the court of appeals did not revive the action in the name of Siedenbach's administrator. Both actions were tried before the court, a jury being waived, and the following opinion was delivered:

"CULLEN, J. As to the objection that the judgment of affirmance is a nullity, because the action was not properly revived in the court of appeals, I think it is not well taken. Sections 755-765, Code, are re-enactments or modifications of the Code, which it was held did not apply to the court of appeals. *Hastings v. McKinley*, 8 How. Pr. 175. Section 1736, Code, makes special provisions for revival of actions in replevin, but this, like the section above mentioned, only applies to the original action, not to appeals. Sections 1297 and 1298 apply to appeals, but section 1297 is by its terms plainly confined to the case of the death of a party before appeal taken. Section 1298 applies to cases like the present,—the death of a party after appeal taken,—but it authorizes the dismissal of an appeal upon the proceedings provided, in case of no order being made substituting some other person in place of the party; but it does not at all prescribe how, or in what person, that substitution shall be made. The procedure, therefore, remains as it existed under the old Code. In *Hastings v. McKinley*, *supra*, it was intimated that the court might have

proceeded to hear the cause and render judgment as of a day before the death of the party, but the court deemed it proper to follow, as far as practicable, the course prescribed in courts of original jurisdiction. The power to revive an action in the name of an assignee, after the death of the assignor, is settled. *Schell v. Devlin*, 82 N. Y. 333. It matters not that the action is in replevin, if I am right in the opinion that the special provisions as to revival in that character of action have no application to appeals. The court of appeals thus having the power to revive the action in the manner followed in the case, it follows that the order of revival made by the court is conclusive. *Rogers v. Paterson*, 4 Paige, 413. If the order was improperly made, the party aggrieved must apply to the court to vacate the order, but it cannot be questioned collaterally. These two actions are not upon the same bond, and therefore the causes of action are different. The pendency of one is hence no bar to the maintenance of the other, but, as the parties are the same, and the satisfaction in the first case will discharge both liabilities, I think the proceedings in the second action should be stayed after judgment."

Code Civil Proc. N. Y. §§ 755-765, relating to abatement and revival of actions, provide when and how an action may be revived on the death of a "plaintiff" or "defendant." Section 1297 provides that, "where the adverse party has died since the making of the order or the rendering of the judgment appealed from, * * * an appeal may be taken as if he was living; but it cannot be heard until the heir, devisee, executor, or administrator, as the case requires, has been substituted as the respondent." Section 1298 provides that "where either party to an appeal dies before the appeal is heard, or has heretofore died, and the appeal has not been heard, if an order substituting another person in his place is not made within three months after his death, * * * the court in which the appeal is pending may, in its discretion, make an order requiring all persons interested in the decedent's estate to show cause before it why the judgment or order appealed from should not be reversed or affirmed, or the appeal dismissed, as the case requires." Section 1786 provides that, "in an action to recover a chattel, the cause of action survives or continues, notwithstanding the death of either party, in favor of or against his executor or administrator."

Judgment with costs for plaintiff in both actions, and defendants appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Donohue, Newcombe & Cardozo, for appellants. *Thomas E. Pearsall*, for respondent.

No opinion. Judgment affirmed, on opinion of CULLEN, J.

ANDERSON v. TOMKINS.

(Supreme Court, Special Term, New York County. September 30, 1899.)

ATTACHMENT—DEPOSIT IN LIEU OF BAIL—ACTION AGAINST CLERK.

Code Civil Proc. N. Y. § 677, which provides that plaintiff in attachment may, by leave of court, bring any action in the name of himself and the sheriff that the sheriff might bring to recover property attached or its value or on an undertaking, does not authorize plaintiff to bring such action against the clerk to recover money deposited by defendant in lieu of bail.

Action by Byron W. Anderson against George Tomkins for broker's commissions. Plaintiff moves for leave to sue the clerk for money deposited by defendant in lieu of bail. Code Civil Proc. N. Y. § 677, provides that plaintiff in attachment, "by leave of the court, * * * may bring and maintain in the name of himself and the sheriff jointly, by his own attorney, and at his own expense, any action which, by the provisions of this title, may be brought by the sheriff to recover property attached or the value thereof, or a demand attached, or upon an undertaking given as prescribed in that title, by a person other than the plaintiff."

Henry Pressprich, for plaintiff. *Wilcox & Goodwin*, for defendant.

BARRETT, J. The provisions of sections 677 and 678 of the Code of Civil Procedure are not applicable to money deposited in court in lieu of bail, and the court cannot permit an action against its clerk for obedience of its lawful orders. The money so deposited came within the provisions of another system, namely, those with regard to arrest and bail. The attachment creditor might ask to be heard before the money so deposited is ordered to be paid over to the third person, under section 586. He must also ask for directions or instructions to the clerk, but the matter cannot be impleaded in an ordinary action, and subjected to damages and costs for simply doing his duty under judicial order. This is an attempt on the plaintiff's part to sue the court through its officer. The money is in court, and can be withdrawn by the order or direction of the court. The application must therefore be denied.

ELSWORTH *et al.* v. HINTON *et al.*

(*Supreme Court, Special Term, New York County. October, 1899.*)

DISCOVERY—PRODUCTION OF BOOKS AND PAPERS.

On a proceeding to settle a trustee's accounts, the court, at special term, may order the production of books and papers before the referee, to whom the matter has been referred, so that they may be examined by the *cestuis que trustent*.

Henry Elsworth and another, executors of the will of Edward Elsworth, filed a complaint against Mrs. Sarah Hinton and others, beneficiaries under the will of Edward Elsworth, deceased, for an account of their testator's transactions as trustee under the will of Henry Elsworth, deceased. The accounting was decreed, and a reference ordered. Defendants move that plaintiffs be required to produce before the referee all books and papers in their possession relating to the trusteeship. For former report, see 4 N. Y. Supp. 573.

William A. Coursen, for plaintiffs. *Carlisle Norwood, Jr.*, for defendants.

ANDREWS, J. There can be no doubt that the court has the power to require plaintiffs to produce their books of account for inspection, upon the accounting which is now pending before the referee. The court of chancery always had such powers, and it is now expressly conferred upon the court, and upon a referee authorized to hear testimony, by section 867 of the Code. The accounting is a part, and a very important part, of the trial, and is had before the referee merely because that method of procedure is more convenient for litigants and the court. Whether the books should actually be deposited and left in the office of the referee, during the pendency of the reference, or for some fixed period, depends upon how many books there are, their size, and whether the referee has a secure and convenient place in which to keep them. I have also no doubt that the court has the power to amend the interlocutory decree by inserting a provision requiring the production of the books before the referee. Motion granted. with \$10 costs to abide the event.

*In re FALLS' ESTATE.**(Supreme Court, General Term, Fourth Department. February, 1890.)***APPEAL—REVIEW—MATTER NOT APPARENT ON RECORD.**

Code Civil Proc. N. Y. § 2545, provides that, on the trial of an issue of fact, "the surrogate must file in his office his decision in writing, which must state separately the facts found and the conclusions of law. Either party may, upon the settlement of a case, request a finding upon any question of fact, or a ruling upon any question of law; and an exception may be taken to such a finding or ruling, or to a refusal to find or rule accordingly. An appeal from a decree or an order of the surrogate's court brings up for review * * * each decision to which an exception is duly taken by the appellant, as prescribed in this section." *Held*, that a case on appeal from a decree of the surrogate which does not contain a decision in writing stating "separately the facts found and conclusions of law," as required by section 2545, presents no question for review, and will be remanded for proper proceedings.

Appeal from surrogate's court, Otsego county.

Proceeding for the settlement of the accounts of Daniel Falls, as administrator of Richard Falls, deceased. Scott G. Falls, one of the heirs at law and a legatee named in the will of his father, Richard Falls, appeals from a decree and judgment of the surrogate's court entered on the 13th of September, 1888; and in his notice of appeal he states that he intends to bring up for review that portion of said decree or judgment which purports to construe the will of Richard Falls, deceased, and he specifies that portion of the decree which adjudges "that the said Daniel Falls, as such administrator with the will annexed, out of the balance in his hands for distribution, pay over to himself or retain in his hands, as trustee under the last will and testament of Richard Falls, deceased, and for the use and benefit of Scott G. Falls, as by such will directed, the sum of \$3,135.84." The appeal-book contains a certificate dated March 10, 1888, signed by Mary A. Shanessy, Nancy E. Falls, James A. Falls, and Scott G. Falls, that they have examined the account of Daniel Falls, as administrator, and "find his account (which is hereto annexed) in all respects correct; and we do hereby consent that the surrogate of the county of Otsego may order and decree that said account be judicially settled, and the said administrator be discharged from his said trust; and that such other or further order or decree be made in the premises as shall be just and proper, without notice to us, we hereby waiving the issuing of, and service upon us of, a citation for a final accounting before the said surrogate." That certificate was acknowledged on the 21st of March, 1888. It appears that Richard Falls died April 4, 1881, leaving a will which was admitted to probate June 22, 1881, and that letters of administration with the will annexed were issued to Daniel Falls. The appeal-book contains an account of Daniel Falls, as administrator, with the estate of Richard Falls, deceased, wherein he charges himself the amount of the inventory on file, \$13,472.70, and certain other sums specified in the account; and he credits himself with certain sums paid out, mentioned in schedules annexed to his account, and his account is verified with the usual oath of an administrator, on the 13th day of September, 1888. The appeal-book shows that on the 26th of July, 1888, the administrator, in person and by counsel, appeared before the surrogate, and that Scott G. Falls appeared by counsel, and read in evidence a consent signed by Mary A. Shanessy, Nancy E. Falls, and James A. Falls. It was admitted that Scott G. Falls, Mary A. Shanessy, Nancy E. Falls, and James A. Falls are the only children of Richard Falls, deceased, and that they are all of full age, and residents of the county of Otsego. An instrument bearing date the 28th day of May, 1888, executed by Mary A. Shanessy, Nancy E. Falls, and James A. Falls was read in evidence, consenting and requesting the administrator "to pay over to Scott G. Falls * * * all moneys and property in the hands of said Daniel Falls, as trustee, administrator, or otherwise, which he may have received in trust for the said Scott G. Falls, under any or either

of the provisions of said last will and testament, and which were given in trust to said Scott G. Falls by the terms of said last will and testament; hereby desiring and asking that said property and moneys, the use of which was or might be intended for the said Scott G. Falls under and by virtue of the said will, may become his absolutely, and without hindrance or any trust attached thereto; * * * that the said surrogate do make and enter the necessary and proper order releasing and discharging the said Daniel Falls, as administrator aforesaid, from his trusteeship, so far as it may relate or pertain to the matter of said Scott G. Falls, and also releasing said administrator and his bondsmen from any further liability on account of the legacy or legacies bequeathed in trust or otherwise to and for the said Scott G. Falls by virtue of the last will and testament aforesaid; and we do hereby severally and collectively release and discharge the said Daniel Falls, as such administrator or otherwise, from any and all claims and liability to us, or either of us, or which we may or can have or pretend to have by reason of his so paying over and delivering to said Scott G. Falls the property and moneys aforesaid." The instrument also contained an indemnity of Daniel Falls, as administrator, against all liability, cost, and charges "that may grow or arise out of and from the act of said administrator paying and delivering to said Scott G. Falls the money and property aforesaid."

That instrument was acknowledged on the 1st day of June, 1888. The will of Richards Falls was read in evidence. It does not appear that any other evidence was taken before the surrogate. He thereupon, on the 13th day of September, entered a decree, which contains a summary of the accounts of the administrator, which decree contains a statement that the surrogate "finds the state and condition of the said accounts to be as stated, and set forth in the summary statement thereof made by the said surrogate as finally settled and adjusted by him, which is above and herewith recorded." The decree then proceeds to state "that the said accounts be, and the same hereby are, finally and judicially settled and allowed as so filed and adjusted as aforesaid." It is "further ordered, adjudged, and decreed that the said Daniel Falls, as such administrator with will annexed, out of the balance in his hands for distribution, pay over to himself or retain in his hands as trustee under the last will and testament of Richard Falls, deceased, and for the use and benefit of Scott G. Falls, as by such will directed, the sum of \$3,135.84." It is further ordered that "upon filing with the said surrogate his vouchers and satisfactory evidence, showing that he has paid the several sums as above directed, and has otherwise fully complied with the several provisions of this decree, he be finally discharged from his said trust, and that a decree be entered accordingly." Upon the 8th day of October a supplementary decree was entered reciting the filing of certain vouchers, and thereupon it was "ordered that he be, and he is hereby, discharged from his trust as such administrator with the will annexed." On the 1st day of August, 1889, Scott G. Falls filed an exception to a portion of the decree entered on the 13th of September, 1888, being that portion which directed Daniel Falls, as administrator with the will annexed, "out of the balance in his hands for distribution, pay over to himself or retain in his hands as trustee under the last will and testament of Richard Falls, deceased, and for the use and benefit of Scott G. Falls as by such will directed, the sum of \$3,135.84;" and it was also stated in the exception that "the said Scott G. Falls excepts to each and every part of such decree as herein set out." The notice of appeal is set out, and the surrogate, on the 2d of September, 1889, executed a certificate, which is found at the close of the appeal papers, and it contains the following language: "The foregoing case contains all the evidence and all the proceedings given and had in the above-entitled proceedings before me as surrogate of Otsego county, together with copies of all papers used in said proceeding; and, it appearing to me that a proper presentation of this case for review so requires, I hereby dis-

rect that the evidence and exhibits be stated in full, so far as is done in the foregoing; and the parties, by their respective counsel, have voluntarily appeared before me for the settlement of said case, and, notice of settlement being waived by the attorney for the respondent, the said case is hereby signed by me, and ordered to be filed."

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

A. P. Barber, for appellant. Melville Keyes, for respondent.

HARDIN, P. J. Section 2545 of the Code of Civil Procedure provides that "an exception may be taken to a ruling by a surrogate, upon the trial by him of an issue of fact, including a finding, or a refusal to find, upon a question of fact, in a case where such an exception may be taken to a ruling of the court upon a trial, without a jury, of an issue of fact, as prescribed in article third of title first of chapter tenth of this act. * * * Upon such a trial the surrogate must file in his office his decision in writing, which must state separately the facts found and the conclusions of law. Either party may, upon the settlement of the case, request a finding upon any question of fact, or a ruling upon any question of law, and an exception may be taken to such a finding or ruling, or to a refusal to find or rule accordingly. An appeal from a decree or an order of the surrogate's court brings up for review, by each court to which the appeal is carried, each decision to which an exception is duly taken by the appellant as prescribed in this section." In *Hartwell v. McMaster*, 4 Redf. Sur. 389, Surrogate COFFIN recognizes the duty of a surrogate to observe the provisions of section 2545 in respect to a separate statement of facts found, and the conclusions of law reached thereon. In *Angvine v. Jackson*, 103 N. Y. 471, 9 N. E. Rep. 56, it appears that certain findings of fact were made by the surrogate, and conclusions of law thereon, and, after referring thereto, FINCH, J., said: "No exception was taken to any of these findings. The case recites an exception to the surrogate's decree, and each and every part of it. We have repeatedly pointed out the uselessness of such an exception. *Ward v. Craig*, 87 N. Y. 550; *Hepburn v. Montgomery*, 97 N. Y. 617. It indicates no specific error; it directs attention to no finding; and leaves court and counsel in the dark as to the precise cause of complaint. The case further shows a series of findings which the surrogate was requested to make, and which requests were refused. There was no exception to the refusal. The contestants appealed, and upon this case, which contained no exception raising any question of fact or law, and in which no errors in the admission or rejection of evidence are even claimed to exist, the general term reversed the decree of the surrogate, and ordered issues to be tried by a jury, (35 Hun, 668,) entirely disregarding the provisions of the Code. Those provisions point out the practice to be followed with care and precision. Section 2545. The surrogate is required to file in his office his decision stating separately the facts found and the conclusions of law. Either party may except to the findings of fact or of law, and upon the settlement of the case may request findings, and take exceptions to a refusal, and the appeal brings up for review in the appellate court any question of fact or law thus raised by exceptions taken. The purpose was to assimilate the practice upon appeals from a surrogate's decree in the prescribed cases to that which regulated appeals from a judgment rendered by the court or a referee, and to substitute a system which would point out specific errors, and evolve the exact questions intended to be reviewed. Nothing of this kind was before the general term, and, without some exception to some ruling or determination, that tribunal was powerless to reverse." In *Hewlett v. Elmer*, 103 N. Y. 157, 8 N. E. Rep. 387, the practice upon the trial by a surrogate's court is considered, and it is stated that, by section 2545, "the practice upon a trial by a surrogate's court of a question of fact, and the preparation of papers on which an appeal shall be heard, are assimilated to the proceedings on and

after trial of an action by the court." The court of appeals again in *Re Hood*, 104 N. Y. 103, 10 N. E. Rep. 85, referred to the practice prescribed by section 2545 of the Code of Civil Procedure, and said, viz.: "It is the duty of the party appealing to procure to be made such findings or refusals as will present, through appropriate exceptions, the question he desires to argue. If he omits to do this, no question is presented for review." At page 106, FINCH, J., says: "If he suffers this necessary step to be omitted, he will find himself without the means of reviewing the rulings of which he complains."

Having found the appellant's practice irregular, we are constrained to allow him an opportunity to apply to the surrogate for a "decision in writing, which must state separately the facts found and conclusions of law," in accordance with the requirements of section 2545 of the Code of Civil Procedure. We think the formula for disposition of this case should be the same as that which we adopted in *Dwight v. Railroad Co.*, 8 N. Y. Supp. 789, (decided at this term.) Case sent back for such action and proceedings as counsel may deem advisable.

MERWIN, J., concurs; MARTIN, J., not voting.

MOORE *et al.* v. NEW YORK BOWERY FIRE INS. CO.

(Supreme Court, General Term, Fourth Department. February, 1890.)

1. INSURANCE—NEGLECT OF AGENTS.

On May 12th, plaintiffs, desiring to insure their premises, applied to one N., who had possession of blanks issued by defendant company, but no written appointment from it, and N. made out the application and forwarded it to S., defendant's agent in a neighboring town, who acknowledged the receipt, and stated that he would advise N. as soon as he heard from the company. About May 18th, S. was notified that the company declined the risk, but omitted to so inform N. until after a loss, which occurred on June 6th. The premium for the insurance had been previously paid to N. by plaintiffs. *Held*, that the negligence of S. in failing to notify plaintiffs that the risk had been declined rendered defendant liable.

2. SAME—IMPLIED POWERS OF AGENTS.

Evidence that S. was carrying on business for defendant in three extensive counties, and that some of the territory prescribed for him by defendant was 150 miles from its home office, warranted the inference that defendant understood that S. would call to his assistance the services of clerks or solicitors.

3. SAME—EMPLOYEES OF AGENT.

An insurance agent can authorize his clerk to contract for risks, deliver policies, and collect premiums in cash or securities; and the act of the clerk in such cases is the act of the agent, and binds the company as effectually as if it were done by the agent in person.

Appeal from judgment on report of referee.

An action by George B. Moore and Charles J. Pierce against the New York Bowery Fire Insurance Company to recover upon "a contract to procure a policy of insurance, which would insure the plaintiffs for a term of six months from loss or damage by fire to their creamery, situated on Main street, in North Harperville." Plaintiffs negotiated in May, 1887, for an insurance upon the creamery building in the sum of \$300, and \$800 on fixtures therein, and \$200 on butter packages, milk-cans, and butter therein contained. The rate was three-quarters per cent. of \$13.50 for the period of six months. On the 6th of June, 1887, the property was totally destroyed by fire, and the damages caused by such fire exceeded \$1,800, the amount of insurance mentioned in negotiations which the plaintiffs had with one Nichols, who had possession of certain blanks issued by the defendant. Prior to the 12th day of May, 1887, the plaintiffs had had some negotiations with Nichols, and on that day the plaintiffs informed Nichols that they desired to insure their property to the extent of \$1,800. He made a memorandum of the insurance desired by them, told them that he would take their application, and that if it was accepted by the company the policy would be dated from that day; but

that if it was not accepted they would know in a few days, and that he would send it on to Mr. Sage, to see whether it would be accepted or not. After the interview with the plaintiffs on the 12th day of May, 1887, and on the same day, Nichols made out an application to the defendant for \$1,800, and forwarded it to Mr. Sage, at Catskill, unsigned, accompanied by a letter informing Sage that the plaintiffs wanted the insurance. Sage held the commission as agent for the defendant, and resided at Catskill when he received the application in question with a letter from Nichols on the 16th day of May, 1887, and on that day, he communicated to the defendant at New York that he had received the application for an insurance of \$1,800 on the creamery; and on the same day Sage wrote to Nichols to the effect that he had received the application for an insurance on the creamery, and that he would advise him as soon as he heard from the defendant. On or about the 18th day of May, 1887, Mr. Patterson, the assistant secretary of the defendant, wrote to Mr. Sage that the company declined the risk upon the creamery. That letter was received by Sage in due course of mail, but he omitted to notify Nichols of the fact that defendant had declined to take the risk until after the fire, which occurred on June 6, 1887. Upon that day, Nichols telephoned to Sage that the creamery had burned, and Sage telegraphed to Nichols that the application of Moore & Co. was not accepted by the defendant. The premium for the insurance was paid, in accordance with the negotiations had with Nichols, by the plaintiffs to him on the 30th day of May, 1887, by their check, which he received as cash payment for the premium. Nichols had no written appointment from the defendant. He used, however, blanks which were furnished by the company in filling out applications for insurance. The referee found as conclusions of law, viz.: "(1) The writing of Nichols on the 12th day of May, 1887, together with the acts of the defendant and the agent, Sage, and by reason of the writing not being repudiated within a reasonable time after it was submitted to the defendant, became and was a valid and subsisting contract of insurance at the time of the fire, according to the terms of the writing, and in the form of the standard stock policy of the state of New York, and was, as such, binding on the defendant. (2) The defendant's failure to pay the loss before the commencement of this action was a breach of the contract, which entitled the plaintiffs to recover their damages." Exceptions were filed to the referee's report, and several exceptions were taken during the progress of the trial.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Hallock, Jennings & Chase and *A. H. Sawyer*, for appellant. *Grant & Wyckoff*, for respondents.

HARDIN, P. J. 1. On the 16th of May, 1887, Sage held a commission from the defendant, which authorized him to act as its agent in conducting the business of fire insurance. The language of the commission is very similar to the language used in the commission of McCoy, quoted in the opinion of the court, as found in 50 N. Y. 406, (*Ellis v. Insurance Co.*), as in that case the defendant had delivered a quantity of blank policies of insurance and other papers relating to the business, and the question in that case was whether McCoy was authorized to make a contract binding upon his principal for the issuing of a policy of insurance; and, in discussing that question, GROVER, J., said: "In determining this question, the prevailing usage in transacting such business must be regarded, as it is an elementary principle that the delegation of an authority to transact any business includes an authority to transact it in the usual way, and to do the acts usual in its accomplishment. It must also be kept in mind that he was clothed with full authority to make all necessary surveys to determine the risk, its duration, and the rate of premium, without any reference to a consultation with the company or any of its officers; in short, to negotiate and conclude all the terms of the contract, and

to consummate it by filling up and countersigning the policy. This necessarily includes power to make a preliminary contract for the issuing of a policy; as it is manifest that no policy could ever be issued in the absence of such a contract. The question is whether this preliminary contract is binding upon the company; in other words, whether, when made, and the premium therefor paid by the assured, the company is bound, before the policy is actually filled up, countersigned, and delivered. It is clear that, if binding upon the company at all for the shortest period of time, it will so continue until, by some act of the assured, or in some other way, it is discharged therefrom. Mere lapse of time, short of the running of the statute of limitations, will not have this effect. The usage of making agreements for insurance, and paying the premiums providing for the issuing of policies thereafter, to be dated at and in force from the time of making the agreement, is so general that judicial notice must be taken of it. It would, upon principle, follow that an unrestricted authority to negotiate a contract of insurance by issuing a policy included authority to make a valid preliminary contract for such issue." When *Angell v. Insurance Co.*, 59 N. Y. 178, was tried before me at the Jefferson circuit, I followed the principle laid down in the case from which the quotation had been made, and the determination made at that circuit, as well as the case of *Ellis v. Insurance Co.*, *supra*, were approved by the court of appeals in deciding the case of *Angell v. Insurance Co.*, 59 N. Y. 178. From the evidence found in the appeal-book, it is very apparent that Sage knew, on the 16th day of May, 1887, that the plaintiffs had made application for insurance in the sum of \$1,800, and that they had agreed upon the terms, and that the insurance was to take effect from the 12th day of May, 1887. If he had then issued a policy to them, he would have done so in pursuance of his authority as the agent of the defendant. On the 16th, he knew that the plaintiffs relied upon the defendant as an insurer of their property. Doubtless, when he received the application, he should have rejected the same; but his silence and acquiescence in the application, so far as the plaintiffs had any knowledge thereof, was, in effect, an approval of the application, and a consent on the part of the defendant to enter into the contract of insurance which was contemplated by the parties to the negotiations, and evidenced in part by the application furnished to Sage. He allowed the plaintiffs to repose upon the faith that they had effected valid insurance with the defendant until after the fire occurred. If he had been more diligent in the discharge of his duty to the defendants as well as to the plaintiffs, as soon as he learned that the defendant desired to reject the application for the insurance of the plaintiff's property, he would have communicated that fact to the plaintiffs. This he wholly omitted to do. By reason of his omission, the plaintiffs were authorized to assume that their contract for a policy of the defendant was valid and binding. The cases to which we have already referred clearly sustain the position that it was within the scope of the agency of Sage to make the contract claimed by the plaintiffs. He had not only an apparent authority, but an actual authority, to make such contract. It is a familiar rule that, "where confidence has been reposed in an agent, and an apparent authority conferred upon him, that the principal must suffer from an actual exercise of authority not exceeding the appearance of that which is granted. When one of two innocent persons must suffer in such a case, that person must bear the loss who reposed the confidence." See opinion of DWIGHT, C., in *Armour v. Railroad Co.*, 65 N. Y. 121.

We see nothing in the commission of Sage, which he received from the defendant, or in the authority which he received from it, or in the authority inferable from his course of business with the defendant, or the nature of the business in which he was engaged, which would warrant us in saying that only such acts as he personally supervised in the accomplishment of the business of the defendant could be binding upon the defendant. Upon

the other hand, we think the inference reasonable that the authority which he derived from the defendant was such that he might call to his aid others in the execution of the details of the business which he undertook for the defendant. He resided at Catskill, and was engaged for the Co-operative Insurance Company, in a line of business which required his personal presence most of the time in Catskill. He was carrying on business for the defendant in three large and extensive counties. Some of the territory embraced within the limits prescribed for him by the defendant was 150 miles distant by rail from its home office. Therefore, the circumstances surrounding his relation to the defendant and its business, in which he was to act as their agent, justify the inference that the defendant understood, during the existence of such agency, that he would call to his aid the services of clerks or solicitors. We think the language used by the court in *Bodine v. Insurance Co.*, 51 N. Y. 123, is quite applicable to the aspect of the case we have been considering. The court said: "We must infer that John Whelp had all the power of ordinary insurance agents. He had acted for this company for nine or ten years in procuring risks for it, and in delivering policies and renewal certificates. His name was indorsed upon the original policy as the company's agent. It was, therefore, according to the decisions above cited, just as competent for him to waive the condition of prepayment as for any other officer or agent of the company. But, conceding this, it is claimed on the part of the appellant that his son, Charles Whelp, had no authority to waive the prepayment of the premium so as to bind the company. Charles had been the clerk and assistant of his father for three or four years. He had procured policies and renewal certificates from the company, and frequently delivered them to the persons insured, waiving prepayment of the premiums. All this he did with the knowledge and assent of his father, and hence we must infer that he was authorized by his father to do it. The agency of John Whelp was not such as to require his personal attention to all the details of the business intrusted to him. We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them, and that they could not transact their business if obliged to attend to all the details in person; and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payment of premiums in cash or securities, and to give credit for premiums or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person." The same view of an agent's authority and the powers of a subordinate assistant was stated by me in delivering the opinion of the court in *Kuney v. Insurance Co.*, when it was before this court on the first appeal, and the same doctrine was repeated when the case was before this court on a second appeal, as appears by the report thereof in 36 Hun, 66.

Sage neglected for a period of 18 days to cancel or revoke the agreement which had been made with the plaintiffs, and during that whole time allowed them to rely upon the arrangement for insurance which had been communicated to him as early as the 16th of May, 1887. We think it reasonable to hold that the defendant is bound by his acts, and that, as one of two parties must suffer by his omission, it should be the defendant rather than the plaintiffs, as it had clothed him with power and apparent authority to make the contract, which he had sanctioned and allowed the plaintiffs to repose upon until after the loss occurred.

2. Although our attention has been called to chapter 488 of the Laws of 1886, providing for a standard fire insurance policy, and to the clause in such a policy, viz., "In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company," we

think, under the circumstances of this case, no such force or effect can be given to the language just quoted as would relieve the defendant from the liability which its agent, Sage, cast upon it by his negligence in discharging his duty.

3. The views which we have already expressed render it unimportant to consider the exceptions taken upon the trial to the admission of some evidence which was perhaps immaterial, as, in the view we have considered the case, it was unimportant.

We think the conclusion reached by the referee should be sustained. Judgment affirmed, with costs.

MARTIN, J., concurs. MERWIN, J., not voting.

GILMORE V. HAM *et ux.*

(*Supreme Court, General Term, Fourth Department. February 15, 1890.*)

1. JUDGMENT—COLLATERAL ATTACK—IRREGULARITIES IN ENTRY.

In an action by a judgment creditor to subject property alleged to have been fraudulently received by defendants from the judgment debtor, plaintiff's judgment against the debtor cannot be attacked by the alleged fraudulent transferees, by reason of mere irregularities in the entry thereof.

2. FRAUDULENT CONVEYANCES—EVIDENCE—CONSIDERATION.

Where one of defendants, in an action to subject to a judgment property alleged to have been fraudulently received from the judgment debtor, had at various times loaned money for the debtor, and received compensation from the borrowers, evidence of the amount received is admissible, as tending to negative any claim for compensation from the debtor.

3. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where the evidence is conflicting, the findings of the trial judge will not be disturbed on appeal.

Appeal from special term, Onondaga county.

Action by William W. Gilmore against Edward E. Ham and Sarah E. Ham, his wife, impleaded with Helen M. Gilmore, on a judgment recovered by plaintiff against said Helen M. Gilmore in February, 1885, for \$2,276.10. The action was commenced in the nature of a creditor's bill to reach property and moneys alleged to have been fraudulently received from the judgment debtor by the other defendants. From a judgment for plaintiff, Ham and wife appeal.

Argued before HARDIN, P. J., and MARTIN and KENNEDY, JJ.

Hunt & Everson, for appellants. *T. K. Fuller*, for respondent.

HARDIN, P. J. 1. Appellants contend that the findings of fact are not sustained by the evidence, and that upon the whole evidence there should be a reversal. Upon a careful examination of the evidence, we find that there was a conflict; and we also find that there was some evidence supporting the findings of fact. If we could accept the testimony of the defendants, and give full credence to the same, we might be able to say that the findings of fact were so far at war with the other evidence that we should interfere; but we do not feel at liberty to take such a view of the case upon the record before us. Both of the appellants were called as witnesses, and gave testimony contradictory of the evidence produced by the plaintiff in respect to the principal transactions in regard to the property of the judgment debtor. It was for the trial court to determine what force and effect should be given to the evidence produced by the defendants. It was for the trial court to determine what credence should be given to the testimony of the defendants as witnesses upon the grave issues involved in the case, and the trial judge was not bound to adopt the statements of such witnesses. In *Elwood v. Telegraph Co.*, 45 N. Y. 549, it was said that "courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of

such witnesses." The doctrine of that case has been amplified and followed in numerous other cases since the decision thereof. *Katanagh v. Wilson*, 70 N. Y. 177; *Gildersleeve v. Landon*, 73 N. Y. 609; *Koehler v. Adler*, 78 N. Y. 237; *Longyear v. Insurance Co.*, 20 Wkly. Dig. 165; *Carbon-Works v. Schad*, 38 Hun. 71. In *Dean v. Van Nostrand*, 23 Wkly. Dig. 97, it was said by the court of appeals that witnesses situated as the defendants are in this action may be disbelieved by the court, even though not contradicted at all. If, upon reading the whole evidence in the case, we were of the impression that had we been sitting as triers we should have found contrary to the findings of fact, still we would not be at liberty to follow such impressions for the purpose of overturning the findings made by the trial judge. We are to give some influence to the circumstance that the trial judge saw and heard the witnesses, and was so situated that he had a better opportunity to judge in regard to the truthfulness of their statements, and to ascertain and determine the actual facts upon the contested issues. In *Baird v. Mayor*, 96 N. Y. 567, it was said, viz.: "In reviewing the determination of a trial court on questions of fact, when the evidence is conflicting, an appellate court is not warranted in reversing, upon the sole ground that, in its opinion, the trial court should have reached a different conclusion. To justify a reversal, it must appear that the proofs so clearly preponderated in favor of a contrary conclusion that it can be said with a reasonable degree of certainty that the trial court erred in its conclusions." After a careful examination of all the evidence found in the appeal-book, and applying the rule which we have just quoted, we find ourselves disinclined to interfere with the findings of fact. It appears in the evidence that Helen M. Gilmore, the judgment debtor, as a part of the assets of her father's estate, received 20 shares of stock in the Washington County National Bank, and that the bank failed, and an assessment of \$1,600 was levied upon the stock; and that at about that time her sister Mrs. Ham and her husband became aware of the facts relating to the failure of the bank, and the liability of Helen to be assessed upon the stock; and to escape that liability they advised and influenced Helen to make such dispositions of her property as would avoid the collection of the assessment. Helen testifies upon that subject, and uses the following language, viz.: "They told me to fix it so there wouldn't anybody get my property away from me. Ham told me if any one came there not to sign any papers, and to tell them I hadn't any money. I signed some papers about the time the bank failed. I think Mr. Randall brought the papers to me to sign. I think at 16 Adams street. I don't know what papers I signed at the time the Greenwich Bank failed. They were not read over to me before I signed them. Ham asked me to sign them. He did not tell me what they were for. I never borrowed any money of Ham. When the Greenwich Bank failed I did not owe Mr. Ham any money. I never owed Ham any money. When the bank failed I sold the property at 16 Adams street. Ham attended to the business of selling that property." We have not overlooked the circumstances disclosed, that this witness was a person of feeble or impaired faculties, and that in the course of her cross-examination she to some extent varied, contradicted, and disowned some of her testimony which she had given in her examination in chief; but, upon a consideration of all the circumstances disclosed in the evidence, we are satisfied that it was the duty of the trial judge to determine from her evidence, and the outlying circumstances and incidents disclosed by the other testimony, whether or not, upon the principal question involved, she testified in accordance with the truth.

2. It is contended by the appellants that there is "not one particle of evidence to support" the finding "that said judgment was based upon a liability that was in existence prior to July, 1878." Upon looking into the several answers of the defendants, Ham and wife, we observe that they state "that, on or about the year 1878 or 1879, the Washington County National Bank, so-

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called, named in plaintiff's complaint, was and became wholly insolvent, and "its stock, and the stock held and owned by the said Helen M. Gilmore, was and became entirely worthless, and the same was wholly lost to her." It appears in the evidence that the bank failed in June, 1878. It appears that the mortgage which Helen Gilmore executed to Ham was dated August 1, 1877, and it was acknowledged on July 5, 1878, and it was recorded on July 5, 1878. After the evidence was given tending to show that that mortgage was made for the purpose of avoiding the liability of Helen, we think, under the pleadings and the evidence as finally submitted to the trial judge, he was entirely warranted in finding that the liability upon which the plaintiff's judgment rests existed prior to July, 1878, and that the exception to the finding is unavailing.

8. Upon the trial the plaintiff offered in evidence the judgment roll against Helen M. Gilmore, which was objected to by the defendants, and it is now contended that the same was insufficient, and that the judgment "was void for want of authority shown or papers filed to justify the entry of said judgment." The judgment was entered in the clerk's office of Onondaga county, February 20, 1885, for \$2,276.70. In the judgment roll was a summons, bearing date February 18, 1885, signed by the plaintiff's attorneys; and also a complaint which was verified on the 10th of February; and also an appearance signed by the attorneys for the defendant bearing date February 19, 1885, addressed to the plaintiff's attorneys; and also an offer to allow the plaintiff "to take judgment against her in this action in the sum of \$2,249.41, with interest thereon from January 31, 1885, and costs of this action. Dated February 19th, 1885. [Signed] HELEN M. GILMORE;" also an acceptance of the offer of judgment signed by the plaintiff's attorneys, and addressed to the defendants' attorneys, with an indorsement thereon in the following words: "Received copy of within notice this 20th day of February, 1885. Defendants' attorneys served by me this 20th day of February, 1885," signed by one of the plaintiff's attorneys; and also a formal judgment, in which it was recited that there had been a personal service of the summons and complaint upon the defendant Helen M. Gilmore, on the 19th day of February, 1885, "and the said defendant having appeared by Baldwin & Kennedy, her attorneys, and having offered in writing to allow the plaintiff to take judgment against her for \$2,249.71, with interest thereon from January 31, 1885, and the costs of this action, which offer the plaintiff within ten days thereafter duly accepted in writing, now, on motion of * * * plaintiff's attorneys, it is adjudged," etc. The judgment is signed by the clerk. Upon the judgment roll is indorsed as follows: "Filed the 20th day of January, 1885, at 2:30 o'clock P. M."

We are of the opinion that the judgment was not void, and that the defendants in this action upon the trial now before us were not in a situation to avail of any irregularities in the entry of the judgment. Somewhat similar objections were considered in *White v. Bogart*, 73 N. Y. 256, and in speaking of them the court, by ALLEN, J., said: "None of the objections to the judgments of White and others go to the jurisdiction of the court over the subject-matter of the actions or the persons of the defendants. All the defects in the proceedings, and in the judgments alleged, are mere irregularities not affecting the jurisdiction,—questions of practice,—and all, if not cured by the statute, might have been supplied by the order of the court, and the judgments made regular in form. For the irregularity complained of, the judgments cannot be attacked collaterally." And in *Bulger v. Rosa*, 47 Hun, 436, it was held that a "general appearance by the attorney for both defendants conferred jurisdiction upon the court of both the subject-matters of the action, and of the persons of the defendants. The defect in the offer was an irregularity only, which did not render the judgment void, but only voidable, upon a motion made by Bulger; and that it could not be attacked collaterally." In that case,

the court below had rejected the judgment rolls, and held that the judgments were void, and for that error the judgment was reversed. We think it was properly held at the special term that the judgment was not open to a successful collateral attack by the appellants, who are not parties to that action, and that the judgment of the plaintiff, evidenced by the roll, was a proper foundation for this creditor's suit.

4. Upon the trial it appeared that the defendant Ham had at various times transacted business for the defendant Helen M. Gilmore, and that in making loans for her he had received compensation therefor from the borrowers. We think it was not error to receive in evidence the extent of compensation which he had received in the transaction of her business, as it tended to negative any claim which otherwise he might have been entitled to in compensation from her, and the exceptions to that class of evidence are unavailing to the appellants here. Nor do we think it was error to receive the evidence in respect to the assets or moneys possessed by Helen M. Gilmore, as it bore upon the questions of dispute as to the extent of her assets, and the dispositions made thereof subsequent to her inheritance from her father. We have looked at the other exceptions referred to by the learned counsel for the appellants, and are of the opinion that they furnish no sufficient ground for an interference with the result reached at the trial. The result reached at the trial seems to be in accordance with the doctrine laid down in *Murtha v. Curley*, 90 N. Y. 372, and the reasons given in the opinion delivered at the special term upon the general features of the case are quite satisfactory, and we have found no adequate ground upon which to interfere with the judgment pronounced at the special term. We must therefore affirm the same. Judgment affirmed, with costs. All concur.

HOEFFNER *et al.* v. SEVESTRE.

(Supreme Court, General Term, First Department. February 14, 1890.)

1. VENDOR AND VENDEE—MARKETABLE TITLE.

Where a testator devises all his property to executors in trust to apply the personality and the rents of the realty to the payment of his debts and of specific legacies, and, after their payment, then over to designated persons, the trust, even if invalid as such, is good as a power. The testator, therefore, did not die intestate as to any of his property; and a purchaser under a decree of sale rendered in an action for the partition of the land, to which all the devisees and legatees were parties, takes a marketable title, though testator's heirs were not represented.

2. ADVERSE POSSESSION—INFANTS.

Even if the heirs, who were then minors, were necessary parties to the partition action, the purchaser, who has been in open and continuous possession for 33 years, has an indefeasible title by adverse possession; Code Civil Proc. N. Y. § 375, providing that, where one is under a disability when his cause of action accrues, the time during which such disability continues shall not be considered in computing the 20 years within which actions for the recovery of land must be brought, but that he must bring his action within 10 years after the disability ceases.

Appeal from special term, New York county.

Action by George Hoepfner and another against August L. Sevestre. The court dismissed the complaint on its merits. Plaintiffs appeal.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

John M. Bowers, for appellants. *Frederic De P. Foster* and *Russell Benedict*, for respondent.

BARRETT, J. This was an action for the specific performance of a contract for the purchase of real estate. The court at special term dismissed the complaint upon the merits, holding that the plaintiffs were unable to convey a marketable title. The question in dispute arises under the will of one David Reynolds, who died in the year 1844. His will was duly probated in this county on the 15th of June, 1844. The material parts of the two clauses of that will which are now presented for consideration read as follows: "*Sec-*

ond. I devise to my executors hereinafter named all my real and personal estate in trust to lease my real estate, and to apply my personal estate, and the rents, issues, and profits of my real estate, to the payment and satisfaction of all my debts hereby made a charge upon my real estate, and to the payment of the annuity or annuities and legacies hereinafter specified. * * *

Eleventh. Upon the full payment and satisfaction of all my debts and expenses before mentioned, and which are made a charge upon my real estate, (and which I direct first to be paid,) and after the payment of the legacies hereinbefore bequeathed, * * * I give, devise, and bequeath all the rest, residue, and remainder of my estate, real and personal, one-fourth to my son James S. Reynolds and his children; one-fourth to my son John George Reynolds and his children; one-fourth to my daughter Caroline, the wife of Burn W. Budd, and her children; one-eighth to my said son Theodore Augustus Reynolds; and the remaining one-eighth to my said grandson Eugene Augustus."

About 11 years after David Reynolds' death, a suit in equity was brought in this court, by one of his residuary devisees, for a construction of the will, and for the partition and sale of property, which included the premises in question. The residuary devisees, and all persons interested in the estate under the will, as legatees or otherwise, were made parties to that action, which resulted in a decree for the sale of these premises, and their purchase by one Krall, from whom, through a line of subsequent conveyances, the present plaintiffs derive their title. The heirs at law of one Isaac R. Reynolds, a deceased son of David, were, however, not made parties to that suit; and this circumstance constitutes the sole objection to the plaintiffs' title. We think the objection was without reasonable foundation. It matters not whether a valid trust was created by the second clause of David Reynolds' will. If a valid trust was so created, the residuary devisees took the fee, from the death of the testator, subject to the execution of such trust. The trustees, it is true, took the legal estate for the purposes of the trust. But upon the termination of the trust, by the fulfillment of its purposes, the devise to the remainder-men took effect. 1 Rev. St. p. 729, § 61. This is one of those cases where two contemporaneous estates in fee are authorized by the Revised Statutes. The estate required for the execution of the trust purposes, of course, takes precedence, but the remainder is nevertheless vested in interest. If, however, the trust was invalid as such, it certainly took effect as a power. In that case the lands passed directly to the residuary devisees, subject to the execution of the power. This is expressly provided where the devise is to trustees to sell or mortgage, without power to receive the rents and profits. *Id.* § 56. The rule laid down in cases where the entire scheme of the testator's will falls with the declared invalidity of the trust has no application here. The residuary devise stands alone. It is not dependent upon, nor is it complicated with, the trust to lease, and to apply the rents to the payment of debts and legacies. And it would be absurd to say, in the face of this direct expression of the testator's intent, that he died intestate. His heirs at law, as such, had, in our judgment, no interest whatever in these premises when the suit for construction, partition, and sale was commenced; and they were not necessary parties thereto. We may add that the decree in that suit completely terminated the trust or the trust power, as the executor's duties under the will may be viewed, and it makes ample provision for every legacy then unpaid.

If, however, these heirs were necessary parties, adverse possession has long since settled all questions upon that head. Forty-five years have elapsed since the death of David Reynolds, and the probate of his will as a will of real estate. Thirty-three years have elapsed since Krall took possession under his deed given in the partition suit. Since then, he or his grantees have been in open and continuous possession, under claim of specific title derived

from the referee's deed in such partition suit, and the subsequent mesne conveyances. This adverse possession was clearly and abundantly established, and it was sufficient, after this great lapse of time, to fortify and complete even an otherwise doubtful title. *Ottinger v. Strasburger*, 33 Hun, 466, and 102 N. Y. 693, *mem.*; *Shriver v. Shriver*, 86 N. Y. 575; and see *Kip v. Hirsch*, 18 Abb. N. C. 167; *Bohm v. Fay*, Id. 175; Wat. Spec. Perf. § 412. It is said that the heirs were infants, and that consequently the adverse possession did not run against them. Their age does not appear in the case. Their father was dead, however, when the suit for construction, etc., was brought. That was in May, 1855. The referee's deed to Krall was recorded on the 11th of July, 1856. Treating the minority of these infants as commencing at the latter date, (though, of course, they must have been born before then,) the statute certainly ran against them 31 years thereafter; and they were barred upon the 12th of July, 1887. The contract sought to be enforced was made on the 2d day of August, 1888. The 20-years statute of limitations is qualified with regard to infants by the provision of the Code (section 375) that the time of "disability is not a part of the time" limited in the act "for commencing the action, * * * except that the time so limited cannot be extended more than ten years after the disability ceases." Thirty-one years from the date when Krall went into possession under the referee's deed is therefore the extreme allowance permissible to these infants under the Code, and the rules which have been laid down in construing prior enactments of a similar character. *Willson v. Betts*, 4 Denio, 201; *Clapp v. Bromagham*, 9 Cow. 580. In our judgment the plaintiffs have a good and marketable title, without resort to adverse possession. But with it, and in view of the great length of time which has elapsed since David Reynolds' death, they have an entirely unexceptionable title. The judgment should therefore be reversed, and a new trial ordered, with costs to the appellants, to abide the event.

VAN BRUNT, P. J., concurs.

BRADY, J. I concur on the ground that the title by adverse possession was sufficiently made out.

APPEAL FROM DENIAL OF MOTION TO SUBMIT FURTHER FINDINGS.

BARRETT, J. In view of the decision upon the main appeal from the judgment, it would be unprofitable to consider the question of practice here presented. This appeal should therefore be dismissed as unnecessary, without costs. All concur.

DRYER v. BROWN.

(*Supreme Court, General Term, Fourth Department. February 11, 1890.*)

EXECUTORS AND ADMINISTRATORS—SPECIAL PROCEEDINGS—STIPULATIONS.

In a special proceeding to determine the validity of claims against a decedent's estate, the parties stipulated that the claimant should serve a complaint, and the executor his answer, and that the issues thus made should be referred. Held that, after the hearing before the referee on the issues made by the pleadings, the executor's motion to amend his answer, so as to set up the statute of limitations, should be allowed without imposing on him the costs of the action so far incurred; it appearing that the stipulation was hastily drawn, and that the executor did not suppose that it changed the general rule in special proceedings, allowing any defense at the hearing, whether pleaded or not.

Appeal from special term, Herkimer county.

Action by Emma E. Dryer against Elon G. Brown, as surviving executor of Harvey Barnard, deceased. For the facts, see 5 N. Y. Supp. 486. The matter is a special proceeding to determine the validity of certain claims

against the estate of the deceased, consisting of four promissory notes. The parties entered into the following stipulation, (page 487:) "It is hereby stipulated by and between the parties and their attorneys in the above-entitled matter that the claimant shall serve a complaint setting forth her claim, and the defendant herein shall serve an answer in the same manner, and subject to the same rules of law, as though the action was pending upon service of summons in the supreme court, and that the issues generally shall be submitted to a referee, and the cause tried therein and thereunder, with the same force and effect as though the action was pending in the supreme court, excepting the subject of costs." The executor accordingly answered the complaint, but failed to set up the statute of limitations. After a hearing before a referee and an appeal to the general term, the executor moved to amend his answer, and also for an inspection of the notes on which the claims are based, as well as certain letters regarding them written by deceased to plaintiff. The following opinion was filed at special term:

"WILLIAMS, J. If this was in fact an action, and not a reference, under the statute, of a disputed claim against an estate, the rule as to costs would then be clear, and I should have no question as to the terms to be imposed as a condition of the proposed amendment of the answer. The difficulty arises out of the peculiar terms of the stipulation entered into between the parties, which seem to make the case an action as to everything excepting costs, and to leave the question of costs to be determined as though the case were still a reference under the statute; and in this condition of things it is not quite clear what the effect of this decision by the general term as to costs is; what is meant by the words, 'costs to abide event,'—whether 'to abide event' means to abide the final direction by the court as to costs, or the final result as to the recovery of the claim. By reason of this uncertainty resulting from the stipulation of the parties, I do not think the amendment proposed should be allowed without clearly protecting plaintiff. This defense might have been alleged in the defendant's answer when originally made. If the stipulation had not been made, the defense could have been urged without a formal statement of it in a pleading. When the parties made the stipulation they evidently, for some unaccountable purpose, saw fit to change the nature of the case, and provide the issues should be made up by pleadings with as much formality as in an action. Therefore it is very likely necessary this defense should be in the answer in order to be urged by the defendant. It is not quite apparent to me why this defense was not originally put in the answer. I should think it was not then understood to be available, by reason of payments indorsed upon the notes, which were not, perhaps, upon the trial, proved to have been made, though indorsed. While I am inclined to allow the amendment to be made, I think I should not permit it except upon the same terms I would impose if the rule as to costs in an action was fully applicable to the case. Such terms would be, all costs and disbursements, as in an action, from the commencement of the first trial until the present time, including \$10 costs of this motion. These costs should be paid as a condition of being allowed to amend, and within 20 days from the date of the service of a copy of the order, with notice of its entry.

"The note upon which plaintiff's claim is founded should, at a convenient time before the new trial begins, be deposited with the county clerk, or some one agreed upon by the parties, so the defendant can examine them, and have them examined by his witnesses. An order to this effect should be made. If the counsel cannot agree upon its terms, I will have to settle it for myself. It does not seem to me the court should order any discovery as to the letters written by the deceased, in custody of the plaintiff. *Dick v. Phillips*, 41 Hun, 608; *Stichter v. Tillinghast*, 43 Hun, 95. An order in accordance with the suggestions herein made will be proposed, and agreed upon by counsel as to form, and submitted to me for signature."

From that portion of the order imposing on him the costs so far incurred, the executor appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

E. D. Mathews, for appellant. *Saylor, Searle & Saylor*, for respondent.

HARDIN, P. J. At our April term, in 1889, we reversed the judgment and orders, (5 N. Y. Supp. 486,) and in the language of the order of reversal are the following words: "A new trial is hereby ordered before another referee, and the present reference to Hon. THEODORE W. DWIGHT, referee, is vacated, with costs to abide the event of the above-entitled matter." That order seems to have been filed in the clerk's office of Oneida county on the 31st day of May, 1889. Thereafter the defendant gave notice of a motion for leave to amend his answer, so as to set up, "or be allowed in proper form to plead the statute of limitations;" "or for such other or further order or relief as to the court may seem just." Leave was granted to serve an amended answer, "setting forth the statute of limitations, upon payment by defendant to plaintiff's attorneys of all plaintiff's costs and disbursements in the action, from the service of notice of trial until the present time, with \$10 costs of this motion in addition thereto; said costs and disbursements to be taxed by the clerk upon the usual notice, and to be allowed to the same extent and amounts as a plaintiff would be entitled to if awarded costs and disbursements in an action tried before a referee, and appealed and decided at general term, with \$10 motion costs in addition thereto. These costs shall be paid as a condition of being allowed to amend; and, within twenty days from date of service of the copy of this order, with notice of its entry, unless said costs are paid as above provided, the motion for leave to amend is denied, with \$10 costs, to be paid by defendant to plaintiff." There is an appeal from that portion of the order which we have quoted. The learned judge at special term, in dealing with the question presented by the application to amend the answer, and in considering the rule as to costs in case the application was granted, found some perplexity, and he observed: "The difficulty arises out of the peculiar terms of the stipulation entered into between the parties, which seems to make the case an action as to everything excepting costs, and to leave the question of costs to be determined as though the case were still a reference under the statute; and in this condition of things it is not quite clear what the effect of the decision by the general term as to costs is,—what is meant by the words 'costs to abide event.' Whether 'to abide event' means 'to abide the final direction by the court as to costs,' or 'the final result as to the recovery of the claim.' By reason of this uncertainty, resulting from the stipulation of the parties, I do not think the amendment proposed should be allowed without clearly protecting plaintiff. This defense might have been alleged in the defendant's answer when originally made. If the stipulation had not been made, the defense might have been urged without a formal statement of it in a pleading. * * * While I am inclined to allow the amendment to be made, I think I should not permit it, except upon the same terms I would impose if the rule as to costs in an action was fully applicable to the case." Doubtless the observation of the learned judge to the effect that, if there had been no stipulation, and no pleadings under the stipulation, this being a special proceeding, any defense which the party had could have been availed of upon the hearing. *Roe v. Boyle*, 81 N. Y. 307; *Bucklin v. Chapin*, 1 Lans. 443. Whether the defendant, who is an executor, will be liable for costs in this action, cannot now be determined. It cannot now be said that his defense is unreasonable, or that costs will finally be adjudged against him as an executor. *Hopkins v. Lott*, 111 N. Y. 577, 19 N. E. Rep. 273; *Pursell v. Fry*, 19 Hun, 595; *Harrison v. Ayers*, 18 Hun, 336.

The notice of motion, as we have already quoted it, was broad enough to allow the special term to vacate the stipulation in respect to pleadings.

Whether the stipulation as to pleadings should have been vacated or not was a question properly before the special term. In the opinion which we delivered when this case was before us upon appeal, we referred to the force and effect to be given to the stipulation, as it then stood in the case. However, in doing so, we observed, viz.: "If the defendant shall be advised that the stipulation ought not to remain, or that he had no right to waive the statute of limitations as a defense, and in doing so has exceeded his authority as an executor, and can make a proper case for relief from the stipulation, he should present such case to the special term, and ask to vacate the stipulation, or to be at liberty to amend his answer setting up the statute of limitations. Dayt. Surr. 318; Will. Ex'rs, 317; *Willcox v. Smith*, 26 Barb. 355." 5 N. Y. Supp. 489. The question of whether the stipulation might have been vacated or not in respect to the service of pleadings was therefore properly before the special term. In an affidavit used upon the motion, referring to the origin of the stipulation, there is found this passage: "The stipulation providing for pleadings was very hastily drawn, while plaintiff's counsel was anxious to take a train for the west. It was never maturely considered. Defendant was not consulted in regard to it until after it had been made. It was made on the spur of the moment." In a verified petition of the defendant, the executor, which was used upon the motion, there may be found this passage: "When this proceeding was commenced, deponent was advised to allow the stipulation above specified, regarding the service of pleadings, to be made, and was advised and supposed that said stipulation, and the said answer to the amended complaint first served herein, would not prevent defendant from relying upon the statute of limitations, or from claiming that said plaintiff's claims were, or part of them were, outlawed; that deponent was advised this was a special proceeding, and that * * * any defense appearing on the trial could be relied upon whether pleaded or not, * * * and deponent and his counsel did not suppose there was any trouble about the pleading, or that the statute of limitations could not be relied upon; that, if there had been any such question suggested upon the trial, deponent and his counsel would have asked to amend the answer to allege the necessary defense in that regard, but deponent was taken entirely by surprise when the referee reported said notes were sustained because the statute of limitations was not pleaded." It is also stated upon the oath of the executor that he had "no authority from any of said legatees to waive said statute of limitations, and deponent is advised and fears he may be held personally liable for said notes and amounts, if the same are established upon any such evidence as was offered on the other trial, and allow to pass on account of lack of pleading of the statute of limitations."

To contradict the facts that are stated in the questions which we have made, we find nothing in the opposing papers. We therefore think the special term might properly have assumed that the facts stated in the moving papers were established. Under such circumstances, we think it would have been proper, and within the discretion and power of a special term, to have vacated the stipulation in respect to the pleadings, and allowed this special proceeding to stand upon the ordinary practice which obtained in respect thereto. It was not within the contemplation of the parties to change this special proceeding, in its essential nature, by the stipulation which was entered into in respect to the pleadings by the attorneys.

These views may properly lead to a reversal of so much of the order as allows the defendant to serve an amended answer upon payment of costs, (all that part of the order appealed from;) and the order of the special term is amended, so as to vacate the stipulation as to pleadings, and striking out the pleadings had thereunder, and allowing the proceeding to stand, to be governed by the usual practice applicable in such cases. The order of the special term is modified by striking therefrom all the provisions as to the amended answer, and

payment of costs as a condition of serving the same, and inserting therein a provision vacating the stipulation as to pleadings, and striking out the pleadings had under the stipulation, and, as so modified, affirmed, without costs to either party of the motion, or upon this appeal.

MERWIN, J., not voting.

MARTIN, J., (*concurring.*) On the 25th day of June, 1889, the appellant made a motion at the Herkimer special term for leave to serve an amended answer in this proceeding, for an inspection and discovery of certain notes and letters claimed to be in the respondent's possession, or for such other or further order or relief as to the court might seem just. The court granted the appellant leave to serve an amended answer, on condition that he pay all the respondent's costs and disbursements from the service of notice of trial until the date of such order, with \$10 costs of the motion; such costs and disbursements to be allowed at the same extent and amount as a plaintiff would be entitled to if awarded costs and disbursements in an action tried before a referee, and appealed and decided at general term. The discovery and inspection was granted as to the notes, but denied as to the letters. The appellant appeals from that portion of the order which denies an inspection of the letters, and also from that part of the order which imposes the payment of costs to the respondent as a condition of leave to serve an amended answer herein.

I concur in the opinion of HARDIN, P. J., that the order appealed from should be modified by striking therefrom all the provisions as to the amended answer, and payment of costs as a condition of serving the same, and inserting therein a provision vacating the stipulation between the parties as to pleadings, and striking out the pleadings served in pursuance of such stipulation. This leaves for consideration only that part of the order which denies an inspection of the letters. An examination of the papers read upon this motion leads me to the conclusion that the order relating to the inspection and discovery of such letters and notes was proper, and should be affirmed. I therefore concur in the opinion of HARDIN, P. J., that the order should be modified as therein stated, and, as modified, should be affirmed, without costs to either party of the motion or upon this appeal.

CHESTER v. JUMEL *et al.*

(*Supreme Court, General Term, First Department. February 14, 1890.*)

NEW TRIAL.—NEWLY-DISCOVERED EVIDENCE.

C. C. recovered property for the heirs of J., under an agreement that he should have $47\frac{1}{4}$ per cent. of the amount recovered. After making the agreement, but before recovering the property, C. C. made an agreement with B., whom he had employed to discover the heirs of J., whereby, "in consideration of the services rendered in discovering the heirs of J., and in settling with them, in advance, the basis of the [above] contract," B. was to have, of the $47\frac{1}{4}$ per cent., $7\frac{1}{4}$ per cent., and, on certain contingencies, 10 per cent. C. C. also made agreements with other persons, securing to them shares of his interest in the agreement with the heirs of J. In an action to settle disputes as to the amounts the various parties were entitled to, it was adjudged that B. was entitled to $7\frac{1}{4}$ per cent. Thereafter the attorney of B. gave D. C. an option to buy the interest of B. within six months. Towards the end of that period, D. C. availed himself of the option, and paid the money. Thereafter C. C. moved to set aside that part of the judgment giving B. $7\frac{1}{4}$ per cent., and for a new trial, on the ground that, before he agreed to give B. the $7\frac{1}{4}$ per cent., the latter falsely represented to him that the heirs of J. had agreed that B. should have that amount of the $47\frac{1}{4}$ per cent. to be allowed for recovering the property. The affidavit of C. C. showed that he had discovered this about the time the option was given to D. C. Affidavits were made by B.'s attorney and by D. C. that they informed C. C. of the option, and of the time when the payment would be made, but that he said nothing of any objection to B.'s claim. It further appeared that C. C. was unfriendly to D. C. *Held*, that a new trial was

properly denied, as the conduct of C. C. showed an intention to defraud D. C.; and, moreover, the contract itself showed that C. C. was not induced to make it by reason of any such misrepresentations, but in consideration of services therein specified.

Appeal from special term, New York county.

Action by Stephen M. Chester against Francois Henry Jumel and others to determine the respective interests of parties to a fund. Charles A. de Chambrun and others appeal from an order denying his motion for a new trial. For former reports see 5 N. Y. Supp. 809 *et seq.*, and 7 N. Y. Supp. 949, *mem.*

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Wheeler, Cortes & Godkin, (Everett P. Wheeler, of counsel,) for appellants. *Edward Winslow Paige*, for respondent.

DANIELS, J. The appellant Chambrun entered into an agreement with certain persons known as the "heirs of the Jumel estate," by which they agreed to transfer to him, and did in fact transfer, $47\frac{1}{2}$ per cent. of the result of legal proceedings commenced to establish their right to participate in the estate of Stephen Jumel. This appellant entered into various agreements with other persons, securing to them shares of the interest to be acquired by him under his agreements. Before the agreement was made, Stanislaus le Bourgeois had been employed by Chambrun to ascertain and discover who the heirs were of this Jumel estate. Both himself and these heirs resided in France, and Chambrun promised Le Bourgeois a compensation for the performance of this service. He did, to a certain extent, perform the service, and ascertained the names and residences of persons sustaining the relation of heirs to the deceased Stephen Jumel; and it was after that the agreement was entered into between Chambrun and the heirs, securing to him this $47\frac{1}{2}$ per cent. of the property to be recovered by his efforts and interposition. After the making of the agreement with the heirs in this manner, Chambrun entered into an agreement with Bourgeois, securing to him $7\frac{1}{2}$ per cent. of the proceeds given to him by his agreement with the heirs of Stephen Jumel. Legal proceedings were instituted, which finally resulted in the recovery of a large amount in favor of these heirs, and, to the extent of $47\frac{1}{2}$ per cent., Chambrun, and those to whom he had parted with various shares of his interest, were interested in the property so recovered. A dispute arose between the persons and the heirs concerning the amounts which they were respectively entitled to receive, and to settle those disputes this action was brought. Issues in the action were referred to a referee, and were heard and decided by him, and his final report was made in May, 1888, and judgment has been entered upon that report.

No serious contest appears to have arisen in the litigation as to the right of Bourgeois to receive $7\frac{1}{2}$ per cent. of the amount which Chambrun was entitled to under the contract obtained by him; and that was finally allowed by the referee, and by the judgment in this action, owing to the force and effect of which the agreement between Chambrun and Bourgeois was deemed entitled to receive. After the recovery of this judgment, and in September, 1888, Chambrun has stated in his affidavit that he discovered the fact to be that Bourgeois was not entitled to receive this $7\frac{1}{2}$ per cent. by reason of any agreement made between himself and the heirs of Jumel; and it is stated by him that Bourgeois represented to him, before any concession of the $7\frac{1}{2}$ per cent. was made, that he had such an agreement with the heirs of Jumel. After the discovery of the alleged fact that no agreement whatever existed between Bourgeois and the heirs of Jumel, and in December, 1888, a motion was made to vacate so much of the judgment as secured to Bourgeois the $7\frac{1}{2}$ per cent., and to direct a new trial on the ground of this newly-discovered evidence. But this motion was denied in the month of November.

To resist the motion it was shown that the defendant Douglas Campbell had, in April, 1888, received from Samuel L. M. Barlow, who was one of the attorneys representing Bourgeois, an option for the purchase of the claim secured to him by the judgment, at any time within six months, for the sum of \$15,000 and interest. Towards the last of October, 1888, it is shown by the affidavit of Barlow, as well as that also of Campbell himself, that the latter elected to avail himself of the option in this manner secured, and then paid to Barlow, upon the purchase price of the interest, the sum of \$5,000; that the residue of the purchase money remained unpaid until the 7th of December, 1888, when it was paid by Mr. Ashbel Green, who had taken an assignment of this interest in the judgment from Campbell. From the affidavit of Barlow, it appears that Chambrun was informed by him of the existence of this option in favor of the defendant Campbell soon after it was given. The defendant Campbell has also sworn to conversations between himself and Chambrun concerning the fact of this option, and he has stated that the question of the validity of the claim of Bourgeois came up frequently in negotiations relating to the settlement of the litigation, but that Chambrun at no time intimated to him that there existed any ground of objection to the claim, except that which had been made, and was necessarily disposed of, upon the trial before the referee. The affidavit of Barlow establishes the further fact, also, that in the early part of December he had a conversation with Chambrun, in which the latter inquired if the remaining sum of money to be paid under the option had in fact been paid, and was then informed that it would be paid that day, or the day following, according to the agreement; but this affiant states that Chambrun in no way informed him of any defect in the claim of Bourgeois, or of any defense existing against it, or that the agreement from himself had been obtained by means of false representations.

Chambrun, in his affidavit, states that he discovered, in September, 1888, that no agreement had been made between the heirs of Jumel and Bourgeois to give to him this sum of 7½ per cent. of the amount mentioned in their agreement with Chambrun. It is plain, therefore, from these affidavits that Chambrun acquired knowledge of the fact that Campbell had secured this option soon after the time when it was given, and that he himself discovered that no such agreement had been made with the heirs of Jumel as he states Bourgeois to have represented to him had been secured. This was before any of the money had been paid, either by Campbell or Green, to obtain the title, which then depended upon the performance of the terms of the offer, and yet Chambrun made no disclosure or representation of the fact, stated to have been discovered by him, to the defendant Campbell, or of his disposition on that account to question so much of the judgment as provided for the payment of this claim to the defendant Bourgeois. From the information he had secured, he knew about the time when the six months' option would expire, and he had reason to believe, inasmuch as the price to be paid for the interest secured to Bourgeois under the judgment was very much less than the claim itself, that the option would be performed, and the interest acquired under it by the defendant Campbell. Yet he at no time gave him the least information or intimation that he should attempt to open so much of the judgment as secured this claim, and again contest it on the ground that it had no actual existence. This failure on his part to disclose what he states he had discovered, and his intention to apply for an opportunity of resisting the enforcement of so much of the judgment, there is reason to believe, as he had become unfriendly with the defendant Campbell, was intended to permit him to pay out the money which was payable under the option, and after that to prevent his recovery of the amount through the assignment of the interest which was to be given to him. He knew all the facts and what was in the future to take place, and in no manner conveyed to Campbell the information which he himself understood would be necessary to protect him against loss;

and to permit him after that to vacate so much of the judgment, and litigate this claim again, would secure to him the advantage of this disingenuous conduct on his part. If he intended to question the right of Campbell under the option to the acquisition of the interest of Bourgeois in the judgment, reasonable fairness required on his part that he should have imparted information of the existence of that intention to Campbell before this money was partially paid over by him to Barlow, and before the residue was paid by Mr. Green. The conduct of the defendant Chambrun appears to have been actuated by the intention to deceive and mislead, for he was informed by Barlow as to the amount remaining unpaid in the early part of December, and that it was to be paid that day or the next day, to complete the rights dependent upon the option. It is not too much to infer from the facts which the affidavits have proved to have taken place that Chambrun intended that Campbell should act in ignorance of what he states to have been his discovery and intention in fulfilling the terms of the option, and then should be deprived of the advantage expected to be thereby secured through the success of the application for a new trial on the ground of newly-discovered evidence. This would be a fraud, if it should be allowed, upon the defendant Campbell; and, in the exercise of the wholesome discretion which has been vested in the courts over applications of this description, it was entirely just that this motion should be denied.

It appears further, by the contract entered into between Chambrun and Bourgeois on the 10th of July, 1876, that it had not been induced by any understanding or belief on the part of Chambrun that Bourgeois had entered into an agreement with the heirs of Jumel for the payment to him of this sum of $7\frac{1}{2}$ per cent. This agreement was made soon after that which had been originally obtained by Chambrun from the heirs of Jumel, and it was embodied and expressed, as it has been found by the referee, in the following language: "NEW YORK, 10 July, 1876. SIR: Pursuant to the contract made under private seal between the heirs Jumel [named Stephen Jumel] and me, dated Mont Marsan, 20 of April of this year, I transfer, substitute, and abandon to you, of the forty-seven and a half per cent. which are given to me in consideration of my discovering the right to the succession, for compensation and expenses in the matter of recovering said inheritance, the sum resulting from such event, of seven and one-half per cent., in consideration of the services you have rendered in discovering heirs of Stephen Jumel who were unknown to me, and in settling with them in advance, and in my absence, and in my name, the basis of the contract of April 20th, 1876. Believe me, sir, yours, ADOLPH DE CHAMBRUN. P. S. If, after having settled with the parties interested with me in said affair, it is possible, after having thus taken, in the first place, personally, for a sum equal to (10%) ten per cent. on the forty per cent., to reserve, which I hope will be the case, a sum in addition to the forty per cent. remaining after the transfer to you of ($7\frac{1}{2}$) seven and a half per cent., in said transaction, I will bring your share to ten per cent." And from the statement in the agreement itself, it appears not that the agreement had been brought about to compensate Bourgeois for a contract entered into between himself and the heirs of Jumel, but that it was made in consideration of the services which Bourgeois had rendered for Chambrun in discovering the heirs of Jumel, who were unknown to Chambrun, and in settling with them in advance the basis of the contract of April 20, 1876. This is a statement of a distinct and different consideration from that mentioned by Chambrun as the one for which he was induced to make this concession of $7\frac{1}{2}$ per cent. to Bourgeois. No such consideration is in any manner referred to, as that the heirs of Jumel had become bound to pay to Bourgeois this $7\frac{1}{2}$ per cent. But the plain concession of the agreement is that it was to be paid to Bourgeois for the services which he had rendered in discovering the heirs, and bringing about the making of this original agreement; and that agree-

ment secured to Chambrun the 47½ per cent. already mentioned. In this state of the agreement between Chambrun and Bourgeois, a new trial of this part of the controversy would be of no service to the former; for it is entirely evident that he has not been induced to part with anything under the belief that Bourgeois had entered into an agreement with the heirs of Jumel for 7½ per cent. of the 47½ secured to Chambrun. Proving that Bourgeois had falsely represented to Chambrun that he had an agreement with the heirs for 7½ per cent. would not have the effect of annulling the agreement made on the 10th of July upon an entirely different and distinct consideration. That agreement, by its terms, was not for the payment to Bourgeois of any sum agreed to be given to him by the heirs of Jumel, but it was for a sum agreed to be given to him by Chambrun for the services mentioned by him in the agreement itself. A new trial of so much of the action as included this 7½ per cent. would, in this state of the facts, be of no service to the defendant Chambrun; for, even though the misrepresentation was made as he has stated it, that could not be allowed to vacate or annul the agreement, made, as it was, upon an entirely different consideration. On the 12th of June, 1883, a further agreement was made between Chambrun and Bourgeois, but it did not change this preceding agreement of the 10th of July, 1876. It provided, in detail, how the amount should be secured and paid to Bourgeois, and was made upon the basis of the entire validity of the agreement of the 10th of July. Upon this ground, as well as that arising out of the conduct of Chambrun himself after he had obtained information of the existence of the option, the court was justified in denying the motion for a new trial; and the order which was made should be affirmed, with \$10 costs, and the disbursements. All concur.

ROTHCHILD v. WILSON *et al.*

(*Supreme Court, Special Term, New York County. December, 1889.*)

1. COSTS—SECURITY—DEFENDANTS APPEARING SEPARATELY.

Under Code Civil Proc. N. Y. § 8273, providing that "the undertaking * * * must be executed to the defendant," several defendants cannot appear separately, and require a non-resident plaintiff to give a separate undertaking to secure the costs of each.

2. SAME—UNDERTAKING—FILING WITHOUT LEAVE OF COURT.

Where an undertaking to secure costs is regular in all respects except that it was filed without leave of court, and without giving defendants an opportunity to be heard as to the amount thereof, such undertaking will not be approved, but leave will be given to plaintiff to apply for an order to show cause why he should not be permitted to file a sufficient undertaking.

At chambers. Plaintiff being a non-resident, and there being numerous defendants, a motion was made to require plaintiff to furnish separate undertakings to secure each defendant, in lieu of an undertaking given by plaintiff to secure all the defendants.

Horwitz & Hirschfeld, for plaintiff. *Wilder, Wilder & Lynch*, for defendant Wilson. *Burnett & Whitney*, for defendant Lane.

LAWRENCE, J. Where the plaintiffs are non-residents, and there are two or more defendants, they cannot appear separately, and each require a bond to him as security for his costs. The statute¹ requires only one bond, which should run to the defendants, and is for the benefit of them all. *Leftwich v. Clinton*, 26 How. Pr. 26. That case was decided under the old Code, and counsel have not referred me to any case which modifies or qualifies that decision.

¹Code Civil Proc. N. Y. § 8273, provides that "the undertaking * * * must be executed to the defendant" etc.

In these cases, it appears that an order was granted *ex parte*, on the motion of the defendant Wilson, requiring the plaintiff to give an undertaking in the sum of \$250, to be applied to the payment of the costs awarded against the plaintiff to the said defendant Peter K. Wilson. That order has not been complied with. The undertaking given on the 12th of October, 1889, being given to all defendants, and, having been excepted to by them as to form and sufficiency, was not in compliance with that order. The undertakings now under consideration were filed voluntarily, without leave of the court, on the 2d of December instant, and are in the sum of \$1,000 each, to secure the costs of all the defendants. This undertaking is correct in form, but, having been filed without leave of the court, and without giving the other party an opportunity to be heard as to the amount of the undertaking, I cannot approve of the same; but leave will be given to the plaintiff to apply for an order to show cause why they should not have leave to file an undertaking in the sum of \$1,000 to secure the defendants for all costs which may be awarded to them in the action.

MOORE v. BAYLIS.

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

1. TRESPASS—DAMAGES—GOODS TAKEN.

In an action for trespass in wrongfully entering on plaintiff's premises for the purpose of carrying away personal property belonging to plaintiff's intestate, the value of plaintiff's property carried away by defendant may be included in the damages.

2. EVIDENCE—OPINION—VALUE OF PROPERTY.

Any person knowing the value of personal property may testify to his opinion as to its value.

Appeal from circuit court, Queens county.

Action for trespass by Elizabeth A. Moore against John Baylis. There was a verdict for plaintiff for \$450. From the judgment entered thereon, defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

B. W. Downing, for appellant. *William R. De Puy*, for respondent.

DYKMAN, J. The appeal in this case is destitute of merit. The defendant made a wrongful entry upon the premises of the plaintiff for the purpose of taking some articles of personal property which he claimed belonged to his intestate. Such unjustifiable entry was sufficient to sustain the action, and, as the plaintiff claimed that some of the articles carried away by the defendant belonged to her, it was left to the jury to find whether the claim was well founded; and, if such was the finding, then the jury was permitted to enhance the damages by including the value of such property so wrongfully appropriated in the verdict to be rendered. The jury rendered a verdict in favor of the plaintiff, and the amount of the verdict indicates that the plaintiff was allowed something for personal property taken in addition to the damages for the wrongful entry. The evidence justifies such a verdict, and the charge was without fault.

The objection to the testimony of witnesses respecting the value of the articles taken was not well founded. Any person who knows the value of personal property may give an opinion on the subject. The judgment and order denying the motion for a new trial should be affirmed, with costs. All concur.

KINGSLEY v. MELCHER *et al.**(Supreme Court, General Term, First Department. May 9, 1890.)***ACCOUNT STATED—IMPEACHMENT.**

In 1871 plaintiff and S., members of a firm conducting an hotel, made an agreement by which plaintiff was to purchase part of S.'s interest, and for a continuance of the business from February 1, 1872, until February 1, 1875, when plaintiff was to purchase the remaining interest of S.; the sale to be made at the cost valuation on that date, to be ascertained according to the inventory of the property, in the manner adopted by the firm. It was further provided that the annual expenses for repairs during the four years succeeding February 1, 1871, should not exceed the average of the same expense for the years prior thereto. The parties knew, from the monthly and annual statements which had been regularly made, precisely what the amount of those repairs were. About February 1, 1875, the executors of S. completed the transfer of his interest to plaintiff, and notes were given for the price upon the basis of a settlement then had. *Held*, that the accounts rendered between plaintiffs and S. prior to 1871, upon which they settled their rights and interests in the business conducted during that period, were stated accounts, the accuracy of which, in the absence of fraud, could not be attacked by plaintiff in a suit brought by him, 10 years after they had been rendered, to open the settlement of 1875.

Appeal from judgment on report of referee.

Action by Junius E. Kingsley to open a settlement alleged to have been made February 1, 1875, in respect of the transfer to him of the interest of Paran Stevens, and of the defendants, James L. Melcher and others, as his executors, in the partnership of J. E. Kingsley & Co., proprietors of the Continental Hotel, Philadelphia. From the judgment entered in favor of plaintiff the defendants appeal.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Burrill, Zabriskie & Burrill, (John E. Burrill, of counsel,) for appellants.
Boats, Choate & Beaman, (Joseph H. Choate, of counsel,) for respondent.

VAN BRUNT, P. J. Many points were suggested upon the argument and in the points of counsel submitted upon this appeal which it is not necessary now to consider. The facts of the case as they appear from the record, so far as they relate to the point upon which the decision of this appeal is based, seem to be about as follows: In March, 1863, the copartnership of Junius E. Kingsley & Co. was organized for the purpose of conducting the business of the Continental Hotel at Philadelphia. The term of the partnership was to end on the 1st of February, 1872. The plaintiff and one Paran Stevens, the defendants' testator, were members of the firm. There were two other partners, whose interests it is not necessary now to notice. By a written agreement made in January, 1871, between the plaintiff and Paran Stevens, provision was made concerning the purchase by the plaintiff from Stevens of three of the ten sixteenths then held by the latter, and for a continuance of the business from the 1st of February, 1872, until the 1st of February, 1875, and for the purchase in February, 1875, of the remaining seven-sixteenths, being the entire interest retained by Stevens. This purchase was to be made at the cost valuation on that day, to be ascertained and made according to the inventory of said property, and in the same manner as has been heretofore followed or adopted by the said firm. It was further provided that the annual expenses for repairs to the furniture and the hotel during the four years succeeding the 1st of February, 1871, should not exceed the average of the same expense for the years prior thereto. Stevens died in April, 1872, leaving a last will and testament, of which the defendants were the executors, but the business was continued throughout the residue of the prescribed term. The plaintiff was the resident manager, and had personal charge of the house and its business, including the supervision of all purchases, receipts, and disbursements. The books were kept by book-keepers acceptable to both parties. Monthly and annual statements were regularly made out and forwarded to Mr. Stevens in his life-time, and to the defendants after his decease. These

statements showed, by separate items, the annual expenses for repairs to the furniture and the hotel. The profits shown by these statements were from time to time drawn by the parties, or settled for between them, in the proportion of their respective interests. On or about February 1, 1875, the defendants Melcher and Stevens went to the hotel at Philadelphia, and there consummated the transfer to the plaintiff of the seven-sixteenths theretofore held by the defendants, and which by the agreement were to be then purchased by the plaintiff. The plaintiff gave to the defendants six notes, each for \$22,047.33, bearing interest, and aggregating for principal \$132,283.98. All of these notes, at the time of the commencement of this action, had been paid, except the last, which matured on the 1st of February, 1878, and on which there remains an unpaid principal sum of \$7,047.33. The plaintiff claimed that in December, 1878, he for the first time discovered errors or imperfections in the account, and this action was commenced on the 1st of July, 1882, upon the ground that the six notes were given for the interest of Stevens in the property, assets, and business of the partnerships, and the payments made under a mutual mistake of all parties that the settlement of accounts which formed the basis for the payments were just, correct, and true, whereas it was not just, correct, and true. It appeared upon the trial that there was allowed to the defendants, under the agreement in respect to repairs, the sum of \$24,000 for seven-sixteenths of the excessive expenses for repairs to the furniture and hotel for the four years succeeding 1872, over the same expenses for the years 1867 to 1871; and it was claimed that the accounts for the four years prior to 1872 were erroneous, in that charges for repairs were not included which should have been included therein. This claim the referee held to be well founded, and his ruling in this respect presents the only question which it is proposed to discuss.

The defendants urged that inaccuracies in the accounts for the four years ending 1st February, 1871, could not be gone into in an action commenced ten years and more after these accounts had been rendered, after the parties had settled their interest thereunder, and long after the death of one of the parties thereto. The referee, however, held that it was not the accounts rendered prior to February, 1871, which were being opened, but that the settlement which was entered into in 1875 was the subject of investigation. It was further claimed upon the part of the defendants that it was the intention of the parties that the accounts as rendered for the four years prior to 1871 were to be the basis upon which the question of repairs was to be determined. The referee, however, held that this claim was not well taken, but that the parties intended not to be governed by the accounts in respect to the repairs for the four years prior to 1871, but by the actual facts; and that therefore the plaintiff had a right to show that, in the accounts for the four years prior to 1871, items of expense for repairs were not entered which should have been entered, and which, if they had been entered, would have shown that the amount allowed for repairs for the four succeeding years was not greater than that which had been actually expended for the four years prior to 1871. If it were necessary in the disposition of this case to determine this question, it seems to be very doubtful whether the position of the referee in this respect can be upheld. By the terms of the agreement, the purchase was to be at the cost of the valuation on the 1st of February, 1875, to be ascertained and made according to the inventory of said property, and in the same manner as has heretofore been followed or adopted; showing conclusively that the parties had in mind at the time of entering into this agreement the practice which had been previously pursued, and the condition of the books and accounts as they had previously existed. It then goes on to say that the annual expenses during the four years succeeding the 1st of February, 1871, shall not exceed the average of the same expenses for the years prior thereto; and the parties knew, from the accounts which were rendered, precisely what the

amount of those repairs were, as charged in those accounts. It seems to us that the probability is strongly in favor of the view that they intended to be governed by the books in entering into that agreement, and the amounts charged in those accounts were to be the basis upon which the excess of expenses for the succeeding four years was to be determined.

The point, however, raised, that the accounts rendered between these parties prior to 1871, upon which they had settled their rights and interests for the business conducted during that period, having become stated accounts, they could not be inquired into in this action, seems to us to be well taken. It is true that it is claimed upon the part of the plaintiff that there is no inquiry into these accounts, or opening of these accounts, so as to affect their character as an account stated, because all that is attacked is the validity of the settlement made in 1875. We think, however, that this claim overlooks one of the important features of an account stated. An account stated is an admission made by one party to another that the accounts between them, consisting of the various items which enter into that account, are as there stated; and from the necessities of the law-merchant it has become a part of the law that, after a lapse of time, such an account and such an admission shall be conclusive between the parties, unless impeached because of fraud or mistake in reference to some of the items contained in the account; and by the statute of limitations such an admission becomes absolute between the parties after the lapse of 10 years, unless tainted by fraud, and even then it becomes conclusive, unless attacked within a certain period after the discovery of the fraud. Now, in the case at bar, there is no pretense that any fraud was perpetrated by Stevens in reference to the accounts from 1867 to 1871. It appears from the evidence in this case that monthly and annual statements were rendered by the plaintiff or his book-keepers, and that plaintiff and Stevens settled upon the basis of these accounts, and that they contained in detail the items which went to make up the balance upon the faith of which they settled; and it is a well-established principle that an account stated becomes stated as to all matters properly included in it. It becomes a stated admission, in writing, to the effect that the account correctly states all the items of account between the parties; and hence it is not only stated as to the balance, but stated as to the items. Now, when this account became so stated that it could not be impeached upon any other ground except that of fraud, then it attained the same dignity as a judicial decree in respect to that account. If there had been a controversy between Kingsley and Stevens as to the amount of expenses for repairs for the four years prior to 1871, and it had been determined judicially that this admission contained in these accounts correctly stated the amount of the repairs, could it for a moment be said that in another proceeding between Kingsley and Stevens or his representatives, in which the question of these expenditures during this period became a necessary subject of investigation, that such judicial determination would not be conclusive evidence upon that point. Now, if a judicial decree would be conclusive, it is difficult to say why a stated account which these parties had no power to impeach or alter or attack has not attained the same dignity.

This being the position of the parties, and these accounts being an admission by the plaintiff to Stevens which he could not attack as to the amount of these repairs, it seems to us that it was an admission which affected and controlled every negotiation had between Stevens and the plaintiff which depended upon the amount which had been expended during the four years prior to 1871. It is true that the action was not brought to open these accounts, but was brought to open this settlement of 1875. But the presentation of this conclusive admission of the plaintiff, that during the four years prior to 1871 the expenses for repairs had been a certain amount, established the case upon the part of the defendant in such a manner that the plaintiff could not attack the same. We think, therefore, that the referee erred in

coming to the conclusion that the inaccuracies in this account from 1867 to 1871 could be shown upon this question of repairs; and, in view of the conclusion at which we have arrived as to this point, it is not deemed necessary to consider the other questions which were presented. But it seems to us that, the referee having erred in the view which he took of the rights of the parties upon the proofs offered before him, the judgment appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

PALLADINO v. MAYOR, ETC., OF THE CITY OF NEW YORK.

(*Supreme Court, General Term, First Department. May 9, 1890.*)

1. MUNICIPAL CORPORATIONS—CONTRACTS—GRADING STREETS.

Where, after the passage of an ordinance directing the grading and flagging of a New York city street, and before the letting of the contract, the proposal for which specified the work to be done and the material to be furnished by the successful bidder, but did not require him to furnish any material for filling, a large quantity of earth in the street, which was capable of being used to fill the lower portion of it up to the prescribed grade, was taken away by trespassers without the knowledge of the city, the contractor has no right to compensation therefor as against the city.

2. SAME—EXTRA COMPENSATION.

Specifications for the work of regulating and grading a street, which were inserted in the contract letting the work, provided that, "if the amount of material excavated that is needed for filling shall not be sufficient to regulate the street, the contractor shall furnish and supply material of proper kind and quality sufficient for the purpose, but only the difference between the total quantity of excavation * * * will be considered as filling to be furnished, and as such to be paid for." No price was paid for such filling, nor was there any provision in the contract binding the city to pay therefor; but, on the contrary, it was expressly provided that the contractor would not ask or recover for the entire work any extra compensation for the several classes of work therein enumerated, "which shall be actually performed, at the price therefor herein agreed upon and paid," and in the proposals for estimates, which were made part of the contract, it was stated that work or materials not specified, "and for which a price is not paid, in the contract, will not be allowed for." *Held*, that these definite provisions and stipulations in the contract controlled the general language of the specifications as to the filling to be furnished and paid for, and precluded any recovery by the contractor for the value of earth obtained from other localities, and used by him in filling up the street to its required grade, and that, conceding the specification to be controlling in this respect, there could still be no recovery, in view of the fact that the cost of the work exceeded \$1,000, and of Laws N. Y. 1882, c. 410, § 64, (the consolidation act,) providing that, whenever "any work is necessary to be done to complete and perfect a particular job" involving an expenditure of more than \$1,000, it shall be done by contract let to the lowest bidder.

Appeal from circuit court, New York county.

Action by Joseph Palladino against the mayor, etc., of the city of New York. There was verdict and judgment for plaintiff. Defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

W. H. Clark, (*John J. Townsend*, of counsel,) for appellant. L. Loftin Kellogg, for respondent.

DANIELS, J. The action was brought to recover the amount claimed to be unpaid for regulating and grading Fort George avenue from Tenth to Eleventh avenues, and setting curb-stones and flagging sidewalks therein. The work was let by a contract executed by the commissioner of public works and James H. Sullivan on or about the 17th of August, 1886; and after it had been in part performed, the contract was assigned to the plaintiff, who completed the work. His claim consisted of two items. The first was for money retained by the city from the contract price, amounting to the sum of \$432.02, and the other was for the value or cost of the material used for filling on the avenue to bring it up to the grade adopted for the improvement. It was claimed on behalf of the defendant that it was entitled still to re-

tain the balance remaining unpaid upon the contract price of the work, because of proceedings taken to establish a lien against the contractor by other persons. But the evidence tended so directly to prove that this lien had been satisfied as to leave no substantial reason for doubting the right of the plaintiff to recover the amount of this balance; and accordingly the verdict of the jury in his favor for that sum, together with the interest upon it, should not be unnecessarily disturbed.

But the claim made by the plaintiff for filling furnished by him to raise the street to the grade prescribed stands upon different grounds; for, by the terms of the proposals for the contract, no material of this description was included, or required to be furnished. But the entire work, as proposals were invited for it, consisted of earth and rock to be excavated, curb-stones to be furnished and set, and flagging stones to be furnished and laid. The amount of this work and materials was included in the published proposals; but no material for filling was mentioned, nor required to be estimated, which should be obtained or supplied by the person whose proposals should be accepted for the performance of the work. The work was ordered by a resolution adopted by the aldermen on the 11th, and approved by the mayor on the 18th, of May, 1885; and this work was directed to be done under the action of the commissioner of public works; and sealed estimates for this work were invited by a notice published, as the charter required that to be done, in the early part of July, 1886. When the resolution was approved by the mayor, the earth included within the line of the avenue to be regulated and graded had not been disturbed or removed. But after that, and in the year 1885, a large part of the earth in the avenue, which was capable of being used to fill the lower portions of it up to the prescribed grade, had been taken and carried away. This was alleged to have been done through the act, default, and neglect of the defendant, its officers and agents; and the plaintiff, as the assignee of the contract afterwards entered into for the grading and improvement of the avenue, insisted that the city was responsible to him for the removal of this earth. But it appeared by the evidence that it was not so removed by any person acting in its employment or under its authority, or even with its knowledge, but the persons who removed it were trespassers, having no right whatever to take it, and themselves alone liable for the wrong in this manner committed. Upon these facts, therefore, no right of compensation for the earth removed within the lines of the avenue existed against the defendant.

It was further insisted on behalf of the plaintiff that he was entitled under the contract to recover the value of the earth obtained and used by himself from other localities in filling the avenue up to its requisite grade. This claim proceeded upon the ground that it was mentioned in the specifications, which were inserted in the contract, that the "street which is above the grade line is to be excavated, and such and so much of the material excavated as may be fit for the purpose, and as may be necessary, shall be filled in those parts of the street which are below the grade lines, in the manner hereinafter provided. The material excavated not so used for filling shall be removed from the street. If the amount of material excavated that is fit for filling shall not be sufficient to regulate the street, the contractor shall furnish and supply material of proper kind and quality sufficient for the purpose; but only the difference between the total quantity of filling to finish grade and line as shown in cross-section, and the total quantity of excavation to the finished grade and line as shown in cross-section, with slopes in each case as herein described, will be considered as filling to be furnished, and as such to be paid for." And the contract itself declared that, "for any work, the price of which is not specified in this contract, the provisions herein contained in relation to work not provided for in this contract shall apply." But no other provision appears to have been inserted in the contract relating to this sub-

ject, beyond that which was made a part of the specification; and, while the difference in the quantity of filling exceeding that supplied by the earth taken from the avenue itself is stated to be considered as filling to be furnished, and as such to be paid for, there is yet no provision in the contract binding the defendant to make such payment. But, on the contrary, it was agreed by the contractor that he would receive in full for his compensation for furnishing all the materials and labor for, and the faithful performance of, the whole of the work mentioned in the agreement, the following prices: "For excavating earth, per cubic yard, the sum of twenty-seven (27) cents; for excavating rock, per cubic yard, the sum of ninety-five (95) cents; for furnishing and setting new curb-stone, per linear foot, the sum of sixty-seven (67) cents; for furnishing and laying new flagging, per square foot, the sum of thirty-one (31) cents." And, by a preceding part of the agreement, it was also agreed by the contractor that he would, "at his or their own cost and expense, furnish and provide all the materials and labor for the purpose, and regulate and grade Fort George avenue from Tenth to Eleventh avenue, and set curb-stones and flag sidewalks therein;" and that he would "complete the entire work to the satisfaction of the commissioner of public works, and in substantial accordance with said specifications, and the plan therein mentioned, and that he will not ask, demand, sue for, or recover for the entire work any extra compensation beyond the amount payable for the several classes of work in this contract enumerated, which shall be actually performed, at the prices therefor herein agreed upon and fixed." It was further declared that "this contract is made with reference to the proposals for estimates for the above described work hereto annexed, which are to be taken as part and parcel of these presents;" and in and by the proposals it was stated that "no extra compensation beyond the amount payable for the several classes of work before enumerated, which shall be actually performed, at the prices therefor to be specified by the lowest bidder, shall be due or payable for the entire work;" and also that "work or materials not specified, and for which a price is not fixed, in the contract, will not be allowed for." The contract is not entirely harmonious and consistent in its stipulations and statements, but the intention to bind the contractor to furnish the materials and perform the labor for the prices contained in the contract appears to be predominant; for he was obliged to agree, as a part of the terms upon which he received the contract, that he would not ask for, demand, sue for, or recover, for the entire work, any extra compensation beyond the amount payable for the several classes of work in the contract enumerated, and that no extra compensation beyond the amount payable for the classes of work enumerated should be due or payable for the entire work, and that all the materials and labor required for the work should be supplied and performed by the contractor. These stipulations and provisions are clearly and definitely expressed, and so are those adjusting and prescribing the prices to be received in full compensation for all the materials and labor, and the faithful performance of the whole work, mentioned in the contract; and filling the avenue up to its prescribed grade was a necessary part of that work. These stipulations and provisions expressed in this definite manner overcome and control the general language employed in the specifications as to the filling to be furnished and paid for, and in the contract itself, for any work, the price of which was not specified; for they distinctly obligated the contractor to do all the work, and supply all the necessary material for it, for the compensation mentioned in the agreement, and without any claim for extras upon his part.

But if the contract, from this general language employed in the specifications, and relating to any work, the price of which was not specified in the contract, should be held to be controlling as to the intention of the agreement, the effect would still remain the same; for, by the law as it was in

force at the time when the agreement was made, and as it still remains, the commissioner of public works was required to advertise for proposals for the work, and to let the contract to the lowest bidder. This imperative regulation was prescribed by section 91, art. 16, c. 835, of the Laws of 1873; and it was afterwards, by section 64, made a part of chapter 410 of the Laws of 1882. By this enactment it was provided that, "whenever any work is necessary to be done to complete or perfect a particular job, or any supply is needful for any particular purpose, which work and job is to be undertaken or supply furnished for the corporation, and the several parts of the said work or supply shall together involve the expenditure of more than one thousand dollars, the same shall be by contract, under such regulations concerning it as shall be established by ordinance of the common council, excepting such works now in progress as are authorized by law or ordinance to be done otherwise than by contract, and unless otherwise ordered by a vote of three-fourths of the members elected to the common council; and all contracts shall be entered into by the appropriate heads of departments, and shall, except as herein otherwise provided, be founded on sealed bids or proposals, made in compliance with public notice, duly advertised in the City Record,—said notice to be published at least ten days;" and all such contracts, when given, shall be given to "the lowest bidder, the terms of whose contracts shall be settled by the counsel to the corporation as an act of preliminary specification to the bid or proposal."

It has been suggested in support of the right of the plaintiff to recover, as he did at the trial, for the filling obtained and used by him from other sources than the avenue, that this work may have been ordered to be done otherwise than by contract, by a vote of three-fourths of the members elected to the common council. But that fact cannot be assumed in his favor. It was not alleged in the complaint that such an order or resolution had been adopted; but, on the contrary, the proposals were invited, and the contract entered into, in apparent conformity to the requirements of the law, where no such resolution should be or had been adopted by the common council. And the case was tried and disposed of upon the theory that the plaintiff's right to compensation for the filling in this manner obtained and supplied depended upon the provisions of the contract, if it could not be maintained because of the removal of the earth from the line of the avenue after the passage of the resolution, and before the notice was published by the commissioner of public works; and it is upon that theory that the plaintiff is left to maintain his right to this recovery, if it can be maintained at all. It was proved upon the trial that by the Revised Ordinances of 1880, adopted after the enactment of the law of 1873, the proposals for estimates should contain, among others, a statement of "the quantity and quality of supplies, or the nature and extent, as near as possible, of the work required." But the proposals which were published in no manner included material to be supplied by the contractor for the filling of the avenue, beyond that which might be excavated in the performance of the work, and no estimate was made, and no contract proposed to be entered into, for supplying or paying for such filling; and, as the amount for which the plaintiff claimed, and the proof tended to establish he had furnished, exceeded the sum of \$1,000, the law required that it should be included in the advertised proposals for estimates before a contract could be authorized for supplying and paying for it. And that it was not expected that the contractor furnishing estimates, and afterwards receiving a contract, under the advertised proposals, would be compensated for such filling, was entirely evident from the proposals themselves, as they were published. And that such additional filling might become necessary must have been obvious to the contractor before he submitted his estimates, for the proof established the fact that the land included in the avenue exhibited the previous removal of the earth, amounting in quantity, according

to the statements of the plaintiff, to about 5,300 cubic yards; and it was with this knowledge, which had been, or readily could have been, acquired by the contractor, that the estimates were made, and the contract was taken. And it would be a violation of the mandatory provisions of the statute to permit a recovery by the plaintiff for the value of this filling, under the facts and circumstances in this way presented. If that could be done, then any other part of the work or material included in the improvement could likewise have been omitted, and the defendant rendered liable to pay for the labor and materials used in performing it; and thereby the restraints and directions of the statute would be as thoroughly disregarded as though it were, in the plainest language, repealed. If the courts may disregard it in one particular, they may in another, and as consistently defeat it altogether, by sanctioning a recovery for work done and material supplied in total violation of its provisions; and that the court has no authority to do, but its duty is to enforce and maintain the law without regard to the consequences which may be encountered by the contractor or his assignee, who were alike chargeable with knowledge or notice of the restraints imposed upon the officials of the city by these requirements of the statute. *Kernitz v. Long Island City*, 3 N. Y. Supp. 144; *Water Co. v. City of Syracuse*, 116 N. Y. 167, 22 N. E. Rep. 381.

It was, it is true, stated in the opinion in *Nelson v. Mayor*, 63 N. Y. 535, that such a recovery might be maintained; but the case ultimately was decided upon another ground. And in *McDonald v. Mayor, etc.*, 68 N. Y. 23, this decision was reviewed; and it was then considered and held that a recovery could not be secured for work or material supplied to the city in violation of the restraints of these provisions of the charter. And the same principle was sustained in *Brady v. Mayor, etc.*, 20 N. Y. 312, and *In re Merriam*, 34 N. Y. 596; and it was in no manner involved or questioned either in *Poillon v. City of Brooklyn*, 101 N. Y. 132, 135, 4 N. E. Rep. 191, or *Reilly v. Mayor, etc.*, 111 N. Y. 473, 18 N. E. Rep. 623. In the last case the contractor was permitted to recover for excavating rock notwithstanding a mistake concerning the quantity to be excavated in the performance of his work, which was unknown to the officials of the city, but was understood by himself. This case is an authority rather in favor of the defendant than of the plaintiff; for, if the city should be obliged to perform notwithstanding its mistake as to the amount or quantity of rock to be excavated, the contractor and his assignee should in this instance be equally bound by their agreement, if the proposals were made, and the contract entered into, by reason of a mistake as to the amount of earth which could be taken from the work, and made available for filling up the low parts of the avenue. The case of *Mulholland v. Mayor, etc.*, 118 N. Y. 631, 20 N. E. Rep. 856, applied only to deviations in the performance of the work, and has no application to this controversy. Neither has any of the other authorities which have been cited and relied upon for the purpose of sustaining this recovery. So far as it was permitted at the trial, it was in conflict with the law whose provisions are required to be enforced against the plaintiff. Neither he, nor the contractor who assigned the contract to him, was bound to accept the contract without a proposal and an agreement relating to the filling. But they voluntarily did this, with the ability directly at hand to estimate and ascertain the amount of additional material, which might become necessary to bring the avenue up to its prescribed grade, beyond that which could be obtained from the land included within its limits. It is highly probable that knowledge of this fact had been acquired, as it could be, by an observation of the locality over which the work was to be done. But, whether it had or not, the law provided for but one mode, in the absence of a vote of three-fourths of the members elected to the common council, and the city could only become obligated by a compliance with or observance of that mode; and that was neither complied with nor ob-

served in this instance. The duty to which the counsel to the corporation has been subjected, to settle the terms of the contract, can in no manner change the rights or obligations of these parties. The most he could do was to provide a contract to carry into effect the provisions of the law so far as it was applicable to this work. He had no power to disregard its injunctions and requirements, and the contract can in no manner be enlarged because of this direction. Neither can the plaintiff derive any advantage from any direction given to him by any officer of the corporation to obtain and use this filling, for no officer had power to bind the defendant by giving that direction. If it was given by any person, and the plaintiff acted under it, he must look to that person for his compensation, and not to the defendant. *Burns v. Mayor, etc.*, 5 Thomp. & C. 371. The judgment and order should be reversed, and a new trial directed, with costs to the defendant, to abide the event, unless, within 20 days after notice of this decision, the plaintiff shall stipulate to deduct the sum of \$4,200, and interest allowed thereon; and, if such stipulation shall be given, then the judgment as so reduced should be modified and affirmed, without costs of this appeal to either party. All concur.

PEOPLE *ex rel.* CAMPBELL v. HANNAN *et al.*, Police Commissioners.

(Supreme Court, General Term, Third Department. May 26, 1890.)

1. MUNICIPAL CORPORATIONS—DISCHARGE OF POLICEMAN—APPEARANCE BY COUNSEL.

The charter of the city of Troy provides that no member of the police force shall be removed "without having written charges preferred against him, and the same having been publicly heard and examined, after due notice thereof, and upon due proof." A rule of the board of police commissioners of the city provides that no officer shall be removed except upon substantiation of the written charges preferred against him, after a fair trial, in which full opportunity shall be given him for his own defense, as prescribed by law. Another rule provides that "no counsel are needed for the investigation of any charges, but may be allowed." Const. N. Y. art. 1, § 6, provides that in any trial, in any court whatever, the accused shall be allowed to appear and defend in person and with counsel. *Held*, that the police commissioners could not deprive a policeman of the right to appear and defend with counsel on his trial for official misconduct.

2. SAME—CERTIORARI TO REVIEW—OFFICER *DE FACTO*.

Where a policeman has held his office for four years, it cannot be objected, on *certiorari* to review the action of the police commissioners in dismissing him for misconduct in office, that, on account of non-compliance with the civil service law, he was an officer only *de facto*, and cannot be restored, though the proceedings against him were irregular.

3. SAME—MATTERS NOT TRIED BELOW.

On *certiorari* to review the action of police commissioners in removing a policeman, matters presented by the return to the writ, as to which relator was not tried, will be disregarded.

On *certiorari* to review the action of Edward Hannan, James Fleming, and others, constituting the board of police commissioners of the city of Troy, in dismissing the relator, John H. Campbell, from the police force.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Warren, Patterson & Gambell, (Orin Gambell, of counsel,) for relator. *R. A. Parmenter*, for respondents.

LANDON, J. On the 22d day of July, 1889, one of the board of police commissioners preferred a charge in writing against the relator of neglect of official duty, in that the relator did, on the night of the 7th of May, 1889, go to New York, with a warrant for the arrest of one Lace and another, Stebustro, for the crime of grand larceny preferred by Mary A. Garlo, and did return on the following night without having made any proper effort to apprehend said persons; and did state to the board that he would not have arrested them had he met them on the street in the city of New York; and also that the relator makes no personal effort, as chief detective, to suppress

crime, or bring criminals to justice. A copy of said charges was served upon the relator upon the afternoon of the same day, requiring him to answer the same, and appear for trial before the board on the next day, at 7:30 o'clock P. M. The relator appeared before the board at the time appointed, and requested that he might appear and defend, with counsel. This request was denied. He then denied the charges, and stated to the board that he did not go to New York to arrest the persons named in the warrant, but to bring them to Troy, they having already been arrested; but that when he arrived in New York he ascertained that they had been arraigned before the police magistrate, and that the complainant, Mary A. Garlo, had appeared before the magistrate, but could not identify them as the persons accused, and the magistrate thereupon discharged them; that the relator did not know them; and that he did say to the police board that, under the circumstances, he would not have arrested them if he had met them in the street. The relator then asked that his trial be postponed to enable him to procure the witnesses from the city of New York to prove the facts and circumstances of the discharge of the accused. This was refused, the board, or some one of its members, remarking that they would take his statement as true. The board return that they also accepted as proven that the relator, in his previous statement to the board, did add the words, "under the circumstances," to his statement that he would not have arrested the accused had he met them in the street. No other charge against the relator was inquired into upon the trial. The board thereupon found the charges to be true, and dismissed him from office.

The charter of the city provides that "no member of said police force shall be removed from his office without having written charges preferred against him, and the same having been publicly heard and examined by said board, after due notice thereof, and upon due proof." The statute does not, in express terms, provide that the accused shall be allowed to appear and defend with counsel, but the constitution provides that "in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel." Const. art. 1, § 6. The board of police commissioners was a court for the trial of the relator. *People v. Mayor, etc.*, 19 Hun, 449; *People v. Van Allen*, 55 N. Y. 31; *People v. Commissioners*, 72 N. Y. 445; *In re Murdock*, 7 Pick. 303, 12 Pick. 244; Dill. Mun. Corp. § 193. The statute could not deprive the relator of this right. The charter authorizes the board of police commissioners of the city of Troy to make rules in furtherance of the police government of the city, including the removal from office of members of the police force. Chapter 323, § 25, Laws 1880. Rules had been made, one of which provided that no officer should be removed "except upon the substantiation of written charges preferred against him to the board of police, after a fair trial, in which full opportunity shall be given him for his own defense, as prescribed by law." Another rule provides: "No counsel are needed on the investigation of any charges, but may be allowed." The rule first quoted implies that counsel will be allowed if desired; the second rule is advisory, with no injunction to accept the advice. Neither attempts to deprive the accused officer of this right, and it was error to deprive him of it. It is not clear that the accused had a fair trial. He gave an explanation of his conduct, which was accepted as true, and which, if true, would be a defense to the charge of neglect of duty, however it might be as to mistaken judgment, or inefficiency in performing it.

The defendants make return of several allegations of misconduct on the part of the relator, with respect to his official action. It is a sufficient answer to these to say that he has not been put upon trial with respect to any of them. The fact that such matters are returned suggests that possibly the relator was tried upon one charge, and dismissed because of others of which he had no notice. The determination of the board must be reversed.

It is urged, however, by the defendants, and they have made return of facts which they allege show, that the relator was not eligible to appointment in the first instance, because he had not passed an examination before the board of civil service commissioners for the city of Troy. It appears that the latter board was not organized until two days before the relator's appointment, and that it did not give the board of police commissioners notice that it was ready to proceed to the discharge of its duties until an hour and a half after the relator had been appointed. The defendants urge that, if the relator was only an officer *de facto*, no matter how he was excluded from office, he cannot be restored. The relator had been in office more than four years, and was charged and tried as an officer *de jure*, and was dismissed. As the proceedings and determination of the defendants were erroneous, and injuriously affected the relator, we think he is entitled to an adjudication reversing them. The question here is whether the proceedings and determination of the board of police commissioners were right. The question sought to be presented is whether they ought not to be sustained because of matters not presented upon the trial, and of which the board had no jurisdiction, and the relator no day in court. Regard being had to the fact that the defendants were required to make return to the writ, their return of other and further matters, as to which the relator was not tried, must be regarded as irrelevant, and as not presenting any issue for our determination. We relegate such questions to the proper action and forum. Proceedings and determination reversed, with \$50 costs and disbursements. All concur.

COXE *et al.* v. TOWN, Receiver of Taxes.

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

TAXATION—VOID ASSESSMENT—ACTION TO VACATE.

Under Laws N. Y. 1880, c. 68, § 8, making a deed executed by the tax receiver "presumptive evidence that the sale, and all proceedings prior thereto," were regular, and authorizing any one interested in assessed property to sue to restrain a sale, an action may be brought to set aside an assessment, and restrain a sale thereunder, though the assessment is void, as such sale would create a cloud on plaintiff's title.

Appeal from special term, Saratoga county.

Action by Mary J. Coxe and George F. Jones, as executors, etc., of Mary J. Jones, against Byron J. Town, receiver of taxes for the town and village of Saratoga Springs, to vacate an illegal assessment, and restrain a sale therefor. In 1888, and several years after the death of Mary J. Jones, the assessors set down among the names of the taxable inhabitants of the town of Saratoga Springs the name "Mary J. Jones, (heirs,)" and assessed against that name the real estate described in the complaint. Laws N. Y. 1880, c. 68, an act to authorize the sale of lands in the village of Saratoga Springs for unpaid taxes and special assessments, provides (section 8) that a sale by the tax receiver, and the execution after two years of a deed to the purchaser, is "presumptive evidence that the sale, and all proceedings prior thereto, were regular," and that "any person interested in property upon which a tax or assessment has been, or may be, assessed or levied, may bring an action to vacate and set aside such tax or assessment, or any sale made by virtue thereof, and to enjoin and restrain the sale of any real or personal property." From a judgment setting aside and vacating the tax, defendant appeals.

Argued before LEARNED, P. J., and MAYHAM, J.

John L. Henning, for appellant. Charles S. Lester, for respondents.

LEARNED, P. J. There is no question on the merits of this case. The only point is whether an action can be maintained to set aside this assessment. We have no doubt that the latter clause of section 8, c. 68, Laws 1880, gives

this right. *Seminary v. Cramer*, 10 Abb. N. C. 427. And, whatever may be the legal effect of an assessment like the present, it does, as a matter of fact, create a cloud on the plaintiff's title. She cannot sell with that freedom with which she could sell if it were not for the alleged assessment. Those who desire to purchase are afraid when they see what purports to be an assessment, even though they may be advised that it is void. If the section above cited is intended to make an exception to the rule which courts have adopted, it is a very excellent exception; and it would be well if the exception should become the general rule. Judgment affirmed, with costs.

BLAKE v. EVERMAN.

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

VENUE IN CIVIL CASES—CHANGE OF VENUE.

In an action by a wife for the alienation of her husband's affections, a motion by defendant to change the place of trial to the county where she claims to have gone through a marriage ceremony with plaintiff's husband, believing him to be unmarried, should be granted.

Appeal from special term, Warren county.

Action by Cornelia Blake against Fannie Everman, otherwise known as Fannie Blake. Defendant appeals from an order denying her motion to change the place of venue from Warren to Livingston county.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Andrew Hamilton, for appellant. D. S. Potter, for respondent.

LEARNED, P. J. This is an appeal from an order denying a motion to change the place of trial. The action is brought by the wife of one Jonas J. Blake for the alleged alienation of his affections by the defendant. The defendant had gone through the marriage ceremony with plaintiff's husband, and claims to have done so, believing him to be unmarried. The defendant resides in Livingston county, and that ceremony was performed there. The plaintiff resides in Warren county. The defendant, to obtain the change of place of trial, stipulates to admit plaintiff's marriage, and her receiving the affection of her husband, and support from him, etc. The alleged cause of action arose in Livingston county, because it is there that defendant is averred to have enticed the plaintiff's husband, and to have married him. Evidently, the questions to be litigated are whether defendant knew Blake to be a married man, and whether, with such knowledge, she enticed said Blake, and alienated his affections from plaintiff. The defendant admits that she had heard rumors that Blake was married, and that she wrote to him to inquire how this was. She avers that he told her he was divorced, on which she said that she could not marry him; that afterwards he told her his wife was dead, and thereupon she married him. It appears that a former action for the same cause was commenced in 1886, in which the complaint was dismissed. The place of trial was Livingston county. If the defendant is liable in this action, then it would follow that she had been guilty of a crime under section 301, Pen. Code. For such a crime she would be tried, if anywhere, in Livingston county. It would seem fair, unless there were strong reasons to the contrary, that she should be allowed to defend this action in the same county. In motions of this kind, it is well known that the parties seldom need all the witnesses whose names are given in the affidavits. We must act upon this knowledge, and upon our judgment in regard both to convenience of the witnesses who will be called, and also in regard to the other matters mentioned in rule 48, and "the ends of justice." Subdivision 3, § 987, Code Civil Proc. We are reluctant to interfere with the discretion exercised by the court below in cases of this kind; but in the present instance, on a careful examination of the papers, and a consideration of the number of

witnesses who will be called, we think that defendant's motion should be granted. Order reversed, with \$10 costs and printing disbursements, and motion granted, with \$10 costs; all to abide the event. All concur.

OWEN v. HOMEOPATHIC MUT. LIFE INS. CO. *et al.*

(*Supreme Court, General Term, Third Department. May 28, 1890.*)

1. RECEIVERS—"DEVOLUTION OF LIABILITY"—SUBSTITUTION.

There is no "devolution of liability" where a receiver is appointed on the voluntary dissolution of a corporation within Code Civil Proc. § 756, providing that, in case of a "devolution of liability," an action may be continued against the original party, unless the court directs the person on whom the liability is devolved to be substituted in the action, or joined with the original party, as the case requires.

2. SAME—LAGUES.

Where a receiver has been appointed on the dissolution of a corporation, against whom an action is pending, a motion to substitute him as party defendant, in its stead, comes too late after he has distributed the assets, under order of the court, among proved claims duly advertised for under the statute.

Appeal from special term, Saratoga county.

Action by Sarah Owen against the Homeopathic Mutual Life Insurance Company. It was held at special term that under Code Civil Proc. § 756, on the appointment of a receiver of a corporation against which an action was pending, there was a "devolution of liability." Edwin M. Kellogg, the receiver of defendant, appeals from an order substituting him party defendant in its stead. Section 756 is as follows: "In case of a transfer of interest, or devolution of liability, the action may be continued by or against the original party; unless the court directs the person to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action, or joined with the original party, as the case requires."

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

William H. Arnoux, for appellant. *William H. McCall*, for respondent.

LEARNED, P. J. It cannot be properly said that there is a "devolution of liability" when a receiver is appointed on the voluntary dissolution of a corporation. He does not become liable for the debts. His duty is to distribute the assets in the manner prescribed by law. Possibly there may be cases where, for the purpose of determining the existence or the amount of a debt, he could be made a party to an action previously pending against the corporation; though we do not see why, in most instances, those matters could not be determined in the proceeding under the statute in which the receiver was appointed. But, however that may be, in the present case the receiver had advertised for claims under the statute; he had even served the plaintiff and her attorney personally with notice to present their claim; the plaintiff had presented no claim; and the receiver, under the statute, had distributed the assets, reserving only enough to meet his expenses. After all this, the present motion was made. Under these circumstances, it would be unjust, by making him a party to this action, to throw on him the expense of litigation; especially when there are no assets from which to pay the claim, should the plaintiff be successful. The plaintiff urges that the question, how the debt is to be paid, if proved, is not before us; that that need not be determined until the plaintiff shall have succeeded in the action. But, clearly, the only hope of the plaintiff must be, under the circumstances, to compel the receiver to pay from his own funds. On what ground that could be urged we do not know. But at any rate, we ought not to expose the receiver, who has followed the directions of the statute, and has thus discharged his duty properly, to the expense of defending the action, and to the risk of some attempt to make him personally liable. The plaintiff had full notice of the time when claims were to be presented. If she had presented this claim, and any ques-

tion had arisen whether it could be passed upon otherwise than in a formal action, she might, at that time, have made this motion. Then the receiver was in possession of funds, and had not made his distribution. But, whatever might have been done at that time, the plaintiff is now too late. The order is reversed, with \$10 costs and printing disbursements.

WIGHTMAN v. BRUSH *et al.*

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

JAIL AND JAILER—ACTION FOR CRUEL TREATMENT.

A complaint in an action against the officers of a prison for inflicting cruel and unusual punishment on a convict is fatally defective when it fails to allege that the acts complained of were not in accordance with the regulations of the prison, or that they were not necessary for the proper punishment of plaintiff, or to secure submission and obedience on his part, or that the punishment was not administered in accordance with legal regulations upon the subject.

Appeal from circuit court, Westchester county.

Action by Andrew J. Wightman against Augustus A. Brush, warden, and James Connaughton, keeper, of Sing Sing prison, for the infliction of cruel, unusual, and unlawful punishment by defendants on the plaintiff while he was confined in such prison. The complaint alleged that the ill treatment and cruel punishment consisted in hand-cuffing plaintiff's hands, rendering them useless, then confining him in wet dungeons for a period of eight days; that said dungeons contained no place on which the plaintiff could rest, and when exhausted he was compelled to lie on the floor in the water; and that during said periods of confinement he received no food but four ounces of bread with water daily, and on being removed from the dungeons he was for a long time placed in solitary confinement. A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was sustained, and plaintiff appeals.

Argued before BARNARD, P. J., and PRATT, J.

George H. Bruce, for appellant. *Charles F. Tabor*, Atty. Gen., for respondents.

PRATT, J. The plaintiff alleges that while he was a convict in state-prison the defendants, the warden and principal keeper, abused and inflicted unnecessary and cruel punishment upon him, and claims damages therefor. However, the specific acts of cruelty are set out in the complaint, and the plaintiff is bound by such allegations; and the demurrer goes no further than to admit such specific acts. The acts described seem to be authorized by statute, if, in the opinion of the warden, it was deemed necessary in order to produce entire submission or obedience of the convict. Section 108 (7th Ed.) Rev. St. p. 2617. It is not necessary to decide that in no case can a convict have his action for damages for personal injuries inflicted upon him while in prison. It may well be that if an officer, outside the line of his duty, should commit a wanton and unprovoked assault upon a prisoner, such officer would be liable to an action for damages. That point we do not decide, as it is not necessary to a determination of this case. There is no allegation in the complaint that the acts done by the defendants were not in accordance with the regulations of the superintendent, or that they were not necessary for the proper punishment of the plaintiff, or to secure submission and obedience upon his part, or that the same were not administered in accordance with the legal regulations upon that subject. We think the demurrer was properly sustained, and the judgment must be affirmed, with costs.

KNOWLTON v. ATKINS.

*(Supreme Court, General Term, Second Department. April 12, 1890.)***ESTATES—CREATION—FEE-SIMPLE.**

A grantee executed a declaration of trust reciting that the trust was for the sale of the land for the benefit of the grantor's widow and two children; that when the youngest child became 21 years old the trust should terminate, and the estate be conveyed to the children subject to their mother's dower rights; and that, "in case of the death of both of said children before the age of maturity, then I am to convey all and every part of said property then remaining unsold, and to pay over all income and proceeds of sales in my hands," to the grantor's widow "for her sole and separate use and benefit, forever." *Held*, that the children took a fee-simple estate under the trust, subject to their mother's right of dower.

Appeal from judgment on report of referee.

Action by Frank B. Knowlton, as heir at law of two deceased nephews, children of Osman W. Atkins and of plaintiff's deceased sister, Cordelia Atkins, against Thomas J. Atkins—*First*, to compel a conveyance to him by defendant of such portions of certain real estate in East New York, Kings county, as the defendant held in trust for Cordelia Atkins and her children, as had not been sold and disposed of by the defendant pursuant to the power contained in a declaration of trust made by him as to the property; and, *secondly*, for an accounting as to the proceeds of such portions of the said property as had been sold and conveyed by him. The declaration of trust executed by defendant, and referred to in the opinion, recited that the lands had been conveyed to defendant "for the purpose of enabling the grantee to sell and dispose of said property for the benefit of the widow and children of said Osman W. Atkins in the case of his decease;" and defendant thereupon covenanted that he had taken and that he held the property "in trust only for the uses and purposes" which, in his declaration, defendant proceeded to recite. The first of these was to sell the property as in his judgment should be for the best interest of the widow and the two children, and to hold the proceeds of sale in trust for them; the second was to collect the rents, and apply them to the use of the widow, as to one-third, during her life, and to the use of the two children, as to the remainder, during their minorities; the third was to terminate the trust at the trustee's option, if the widow should give her written consent, and thereupon to convey the unsold real estate to the two children subject to the "life use" of Mrs. Atkins in one-third, with the provision for an estimate and payment of the present value of such life use; and the fourth was that, upon the attainment by the younger or survivor of the two children, of the age of 21 years, he should convey to the two children, "as joint tenants, in equal proportions, * * * all of said property then unsold, subject to the dower rights of said Cordelia." The third and fourth clauses also provided that the proceeds of sale of some or all of the real estate should be held and disposed of for the same purpose, and upon like conditions, as the corresponding real estate itself would have been held or disposed of. The power to terminate the trust under the fourth clause was never exercised, and was soon extinguished by the death of Mrs. Atkins. The sixth and seventh clauses also became unimportant. The fifth and remaining clause was in these words: "In case of the death of both of said children before the age of maturity, then I am to convey all and every part of said property then remaining unsold, and to pay over all income and proceeds of sales in my hands, (deducting charges and expenses,) to said Cordelia, for her sole use and benefit, forever." The referee held that the fifth clause was a grant of an estate to Mrs. Cordelia Atkins "for her sole and separate use and benefit," to ripen into possession upon "the death of both of said children before the age of maturity;" that the estate thus granted to her was descendible and devisable, and, on her death before her children, descended to them, and that, on the death of the children during infancy, it was

only the estate thus descended from their mother that they could transmit by inheritance; and that it would therefore go to their maternal uncle in preference to their paternal uncle, such uncles being their next of kin. A judgment was entered in accordance with the referees' opinion, and defendant appeals.

Howard St. C. Watt, (Wm. W. MacFarland, of counsel,) for appellant.
S. A. & D. J. Noyes, (James B. Ludlow, of counsel,) for respondent.

BARNARD, P. J. Osman W. Atkins, on the 7th day of September, 1871, conveyed a large landed estate to his brother, the defendant. The deed was absolute. The grantor had a wife and two very young children. The consideration expressed was \$3,000, and the wife of the grantor joined in the deed. In November following, and after the death of Osman W. Atkins, the defendant executed a declaration of trust in the land. In September, 1872, another declaration of trust was executed by defendant in respect to the same land. The declarations are substantially alike. The trust was expressed to be for the sale of the land for the best interest of widow and children of grantor, in the judgment of the trustee. One-third of the income was to go to the widow for life, and the remaining two-thirds to be equally divided between the two children of grantor. The trust was to terminate when the youngest child should be 21, and then the estate was to be conveyed to the children subject to the dower rights of grantor's wife, and the proceeds of land sold were to be paid over to the children after the widow's claim therein was paid. The declaration of trust contains this clause, out of which the controversy arises: "*Fifth.* In case of the death of both of said children before the age of maturity, then I am to convey all and every part of said property then remaining unsold, and to pay over all income and proceeds of sales in my hands, deducting charges and expenses, to said Cordelia, for her sole use and benefit, forever." The widow died in 1878. The two children were both drowned in 1881, at the ages of 10 and 11 years, respectively. The widow took no remainder in the estate which existed if she died before the children, and they died during their minority. The scheme of the transaction was to create a title for the better management of the lands during the minority of the children. One-third of the proceeds was to go to the widow, and the two-thirds was to be applied to the necessities of the children. The trustees could, by the terms of the trust, terminate the same with the wife's assent, and convey the lands to the infants "subject to the life-use of said Cordelia in one-third thereof." The trustees could, by the terms of the trust, pay a gross sum to the widow, and then convey to the children and to their heirs forever, equally. By the terms of the deeds of trust, when the trust terminated by the limitation of the same the conveyance was to be made to the children, "subject to the dower rights of the said Cordelia." The provision that the mother shall take in case of the death of both children during minority was not intended to create an estate in her, unless she survived the children. This contingency never happened. If she had survived her children, the trust-deeds would have carried the estate to her, and so would the statutes of descents, without the deed. In other words, the wife and children would be left, as to the succession, as if no deeds existed. *Hennessy v. Patterson*, 85 N. Y. 91. The gift over was of land to one John Foley, if the testator's daughter die without child or children. Foley died before the daughter, and the daughter left no children at her death. The court of appeals held that Foley had a contingent remainder which vested in him at the death of the testator, and which descended to his heirs. The case is not an authority for the judgment appealed from. If the construction be held that no estate was created in the widow except her dower rights, there was no contingent or expectant estate to be considered, under the case of *Hennessy v. Patterson*. The dower right, of course, would not be such an estate, under the circumstances proven in the

case. The law formed a construction which caused the land to descend in the course of ancestral blood. *Quinn v. Hardenbrook*, 54 N. Y. 88; *Wood v. Mitcham*, 92 N. Y. 375.

We conclude, therefor, that the widow, at the time of her death, left no estate, expectant or contingent, which survived her. These views render unnecessary an examination into the evidence claimed to support a finding that one of the children survived the other. The judgment should therefore be reversed, and a new trial granted at special term; costs to abide event.

KIERNAS v. WOLFF *et al.*

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

DECEIT—EVIDENCE.

In an action for deceit in the sale of a horse, evidence of the condition of the animal after its death, 31 days after the sale, is irrelevant, unless followed up by proof that the horse was unsound at the time of the sale.

Appeal from Kings county court.

Action by Francis Kiernas against Armand Wolff and Jules Wolff, for deceit in the sale of a horse, originally brought in a justice's court, where the complaint was dismissed upon the ground that there was no fraud shown in the sale. The justice excluded testimony offered by plaintiff to show the condition of the horse at its death, 31 days after the sale. The county court reversed the judgment "for error in rejecting testimony." From the judgment entered on the order of reversal, defendants appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

W. B. Hurd, Jr., for appellant. *James F. Quigley*, for respondent.

PRATT, J. The plaintiff made out no case, either upon a warranty or for deceit. What he might have done if permitted to put in his testimony cannot be determined. The case is so badly reported that it is impossible to say whether or not any material evidence was rejected. No question is asked or offer of proof made as to any evidence that we are able to say was material. Sending for a surgeon after the horse was dead, or proving his age, had no tendency to prove fraud, unless it was followed up by proof that would show that the horse was unsound at the time of the purchase. The question put to the witness Finnegan, to-wit, "Did you examine the horse that day?" was only important if preliminary to some further inquiry, of which no indication is given by the printed case. The presumption that the original judgment was properly rendered cannot be lightly overthrown. Much takes place on every trial of which the reviewing court must necessarily be ignorant. The discussions of counsel, upon which courts largely depend, and the tacit concessions which take place in all trials, cannot be fully represented upon the record. To require every word spoken upon a trial by court, counsel, and witnesses to be reproduced in the appeal-book would be an intolerable burden. The only practicable rule is that the appealing party must assume the task of showing clearly that the judgment rendered was based upon error. The appeal-book must be so prepared as to bring out the points upon which error is predicated, and the appellate court must be able to see wherein error took place, or the judgment should be affirmed. The county court seems to have held that the respondent was bound to show affirmatively that no errors were committed. By that rule, very few judgments could stand. The judgment of the county court must be reversed, and the judgment of the justice of the peace affirmed, with costs. All concur.

In re LASAK'S WILL.

(Supreme Court, General Term, Second Department. May 12, 1890.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED.

Where a witness, in case the will propounded should be admitted to probate, would take as legatee, and in case probate should be denied would take as heir of testator, then his interest in the event is sufficiently apparent to exclude his testimony as to personal transactions with the testator, under Code Civil Proc. N. Y. § 829, providing that a party or person interested in an action shall not be examined as a witness in his own behalf or interest against the executor, administrator, or survivor of a deceased person, concerning a personal transaction or communication between the witness and the deceased person.

Appeal from surrogate's court, Westchester county.

Application for the probate of the last will and testament, with seven codicils, of Francis W. Lasak, deceased. Probate was allowed, and the contestant, Margaret S. Ives, appeals. For other litigation over the will, see 7 N. Y. Supp. 2; 8 N. Y. Supp. 740, 775.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Chas. F. MacLean, for appellant. *Hoadly, Lauterbach & Johnson* and *G. & F. M. Reynolds*, for respondents.

DYKMAN, J. This is an appeal by one of the contestants from a decree of the surrogate admitting to probate the last will and testament of Francis W. Lasak; and upon the argument the counsel for the appellant abandoned all objections to the decree except one, which we will now consider. Mrs. Margaret S. Ives, a granddaughter of the deceased, was one of the contestants of his will, and during the trial she called as a witness Mrs. Cordelia D. Chanvet, one of the daughters of the deceased; and she was permitted, over the objection of one of the counsel, to testify to personal transactions and communications between herself and her father. On a subsequent day, however, all testimony of the witness concerning personal transactions and communications with the deceased were stricken out, and the counsel for Mrs. Ives excepted to such ruling.

We think the exception presents no error. "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or person interested in the event * * * shall not be examined as a witness in his own behalf or interest, * * * against the executor, administrator, or survivor of a deceased person, * * * concerning a personal transaction or communication between the witness and the deceased person." Section 829, Code Civil Proc. Mrs. Chanvet sustained the double relation of party and person interested in the event of the litigation over her father's will. If the will was destroyed, she received her interest in her father's estate as heir; and, if it was sustained, she took the portion given her by the will, and she would receive more or less, according to the conclusion of the litigation. It is not needful to determine which result would be most beneficial to her, or best promote her interest. If the determination would be either advantageous or detrimental to her, then her interest in the event is sufficiently apparent to exclude her testimony. The language employed in the statute is exceedingly comprehensive, and its scope is co-extensive with the words and actions between two persons. The statute has come to be considered very beneficial, and the testimony which it inhibits is excluded by the courts with inflexible uniformity. In the case of *Wadsworth v. Heermans*, 85 N. Y. 639, Judge FINCH says in the opinion, in speaking of this statute: "The spirit and purpose of this provision of the Code is equality, to prevent undue advantage, and that purpose should be kept in view when border questions arise, and lines of distinction are to be drawn." The decree should be affirmed, with costs to be paid from the estate. All concur.

SKINNER v. SMITH *et al.*

(Supreme Court, General Term, Second Department. May 12, 1890.)

CORPORATIONS—STOCK—PAYMENT TO STOCKHOLDERS.

Defendants, owning patents for carpet looms, formed a corporation under the general manufacturing act, with a capital stock of \$40,000, which was issued to themselves, and transferred the title of the patents to the company at that valuation, which was merely nominal. The only business intended by defendants was the holding of the patents and the collection of royalties. Subsequently, it was determined to manufacture carpets, and, for that purpose, to increase the capital stock. Preliminary, and so as to retain the ownership of the patents, defendants had them retransferred to themselves individually, for the same nominal price at which they were transferred to the company. They then increased the capital to \$600,000, all of which was issued to themselves; \$250,000, including the \$40,000 already held by them, for cash at par, and the balance for an unlimited license to use the patent at a certain rate of royalty. No debts were then owed by the company. *Held*, that the retransfer of the patents to defendants individually was not a withdrawal of capital, within the prohibition of 3 Rev. St. N. Y. (8th Ed.) p. 1728, § 2, declaring it to be unlawful for the directors of a corporation to withdraw, or in any way pay to the stockholders, any part of the capital stock, without the consent of the legislature.

Appeal from special term, Dutchess county.

Action by Charles E. Skinner, as trustee of the Smith Moquette Loom Company, against Warren B. Smith, William F. Cochrane, and Eva S. Cochrane, and the Smith Moquette Loom Company. The court dismissed the complaint, and from the judgment thereupon entered plaintiff appeals. Code Civil Proc. N. Y. §§ 1781, 1782, under which the action is brought, are as follows:

“§ 1781. *Action against Directors, etc., of a Corporation, for Misconduct.* An action may be maintained against one or more trustees, directors, managers, or other officers of a corporation to procure a judgment for the following purposes, or so much thereof as the case requires: (1) Compelling the defendants to account for their official conduct in the management and disposition of the funds and property committed to their charge; (2) compelling them to pay to the corporation which they represent, or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost or wasted by a violation of their duties.

“§ 1782. *By Whom Action to be Brought.* An action may be brought, as prescribed in the last section, by the attorney general in behalf of the people of the state, or, except where the action is brought for the purpose specified in subdivision third or fourth of that section, by a creditor of the corporation, or by a trustee, director, manager, or other officer of the corporation, having a general superintendence of its concerns.”

Argued before DYKMAN and PRATT, JJ.

Geo. C. Furman, (*Theron G. Strong*, of counsel,) for appellant. *T. & S. H. Fitch*, (*Joseph H. Choate* and *Theodore Fitch*, of counsel,) for respondents.

DYKMAN, J. On the 16th day of January, 1877, letters patent of the United States were granted to Alexander Smith for an improvement in looms, and the invention thereby secured was very valuable. When he died he left two children, Warren B. Smith and Eva S. Smith, now the wife of William F. Cochrane. There were likewise letters patent for a similar invention granted by foreign governments, and at the death of Alexander Smith all the patents came to his two children, and belonged to them. Later, however, it appears that William F. Cochrane became the owner of one-quarter of the patent, and his wife retained a quarter also, while Warren B. Smith continued to own the one-half. Being thus the owners of all the patents, on the 13th day of December, 1878, those three persons organized the Smith Moquette Loom Company, under the general manufacturers' act of 1848, with a capital stock of \$40,000, and transferred the title of the patents to the corporation, at that

valuation, for the purpose of collecting and distributing the dividends to accrue from the royalties for the use of the patents; and, while the certificates of incorporation recited other objects for which the company was formed, yet no other business was transacted by the company down to the 21st day of September, 1880, when the corporation was reorganized in the manner to be hereinafter stated. At that time the demand for moquette carpets was large, and the future prospects of manufacturing were encouraging, and the defendants concluded that it would be advantageous to the company to engage in such manufacturing; and, as they were unwilling to part with the exclusive ownership of the patent and invention, they concluded to retransfer the same to themselves individually, at the same nominal figure at which they had transferred it to the company; and to enable the company to go into manufacturing, erect the necessary buildings, buy machinery, and to manufacture, that its capital stock should be increased to \$600,000, all of which should be issued to themselves; \$40,000 of that amount of money to be paid in by them for the retransfer of the patent in lieu of the 400 shares originally issued to themselves, which were to be surrendered; \$210,000 of that amount to be paid in cash by themselves; and the residue, of \$350,000, for an unlimited license to use the patents, upon payment of the same royalty paid by the Alexander Smith & Sons Carpet Company, namely, 20 cents per yard.

The proceedings under the act for authorizing the proposed increase of capital were completed. The resolution was passed by the board of trustees of the company on the 19th day of October, 1880, to transfer the patent and invention to the defendants individually, for the sum of \$40,000, in the following proportions: Two equal undivided fourth parts to Warren B. Smith, one equal undivided fourth part to William F. Cochrane, and one equal undivided fourth part to Eva S. Cochrane; reserving, however, the right and license to manufacture and sell carpets under its United States patents upon issuing to the assignees 3,500 shares of this capital stock, and paying as a royalty therefor at the same rate as that paid by the Alexander Smith & Sons Carpet Company under its existing license. On the same 19th day of October, 1880, assignments of the letters patent, and the invention secured thereby, were executed and delivered by the Smith Moquette Loom Company to Warren B. Smith, William F. Cochrane, and Eva S. Cochrane, respectively, in the proportions above named, each of which assignments was expressly made subject to two licenses held by said Smith Carpet Company and the Hartford Carpet Company, and reserving the license and right to manufacture and sell the patented improvements to the end of the term of the patent upon payment of a royalty therefor at the same rate as then paid by the Alexander Smith & Sons Carpet Company and the Hartford Carpet Company; it being understood that such royalties were to be paid to the assignees and owners of the patent. The entire amount of stock of the company, to-wit, 6,000 shares, was issued to the defendants on the 18th day of November, 1880, as follows: To Warren B. Smith, one certificate for 3,000 shares; to William F. Cochrane, one certificate for 1,500 shares; and to Eva S. Cochrane, another certificate for 1,500 shares,—the consideration therefor being in the aggregate \$40,000 to all the defendants for the retransfer of the patent, and in lieu of the original 400 shares, which were surrendered by them; \$210,000 in cash, subsequently paid by said defendants for such amount of stock at par; and \$350,000 for the right or license to the company to use an unlimited number of looms, under said patent, upon payment of a royalty of 20 cents per yard, license to manufacture under said patent being limited to only two other companies in the United States, one of which had the right to run about 100, and the other 62, looms. From the incorporation of the Moquette Loom Company until the issuance of the 6,000 shares of stock, after the issue thereof was authorized, and until the 1st day of March, 1881, no person other than the defendants had any interest in the corporation. There were no other stockholders, and they held

all the stock, and were the only trustees and officers. They alone had any interest in its business or property, or in its continuance or dissolution, and there were no creditors.

The original transfer of the invention and patent by the individual defendants to the company for \$40,000 was made by them without any regard to its actual value, which was many times greater than that sum, and solely as a convenient mode of holding and enjoying title to the same, and to the royalties to be derived therefrom, for their exclusive benefit as the sole owners. At the time of the retransfer of the patent and invention the value thereof had not materially changed, and the retransfer at the same price at which the same had been conveyed to the company was made by the defendants, without regard to its actual value, in good faith, in the belief that they had the legal right to cause the retransfer to be made by the company on the terms on which it was made, and without any design or intent to injure or defraud any person who might thereafter become the holder of any of the increased stock to be issued by the company; and no such person, or any person, was injured or defrauded thereby. The unlimited license to manufacture under the patent upon payment of a royalty of 20 cents per yard was necessary for the manufacturing business of the Smith Moquette Loom Company, and was not an inadequate consideration for the amount of 8,500 shares of its capital stock then issued therefor to the defendants, according to their belief and expectation at that time as to the manufacturing possibly to be done by said company; and the issue thereof for that consideration was made by them in good faith, and with no intent to defraud the company, or any future holder of stock therein. Although the capital stock of the company was authorized to be increased to \$600,000 by a certificate filed September 23, 1880, it was not actually increased until the 6,000 shares of capital stock were issued to the defendants on the 18th day of November, 1880. When the patent was sold to the defendants for \$40,000, and the assignments thereof were executed and delivered to them on the 19th day of October, 1880, the amount of its capital stock was only \$40,000. Subsequently the defendants surrendered the certificates issued to them on the 18th day of November, 1880, and received in exchange therefor certificates of various amounts; aggregating, however, the same amount of shares as such surrendered certificates. On the 31st day of March, 1881, the defendants assigned 1,000 shares of the stock so held by them to the plaintiff and Eugene Tymeson, each of whom received 500 shares, being 250 shares from Warren B. Smith, 125 shares from William F. Cochrane, and 125 shares from Eva S. Cochrane; the certificates for which aggregate amount of 1,000 shares were assigned by the defendants out of their stock, and the consideration for which was given to the Moquette Loom Company, consisting of an assignment of certain letters patent held by the plaintiff and Mr. Tymeson for improvements in looms. The plaintiff and Mr. Tymeson at and before the time they assigned the patents to the Moquette Loom Company, and took an assignment of such certificates of stock, had knowledge that the loom company did not own the Smith Moquette Loom patent, but had only a right or license to use the same upon payment of a royalty, and that the patent had been transferred to the original owners, Warren B. Smith, William F. Cochrane, and Eva S. Cochrane. The negotiations for the purchase of the Tymeson and Skinner patents were continued between the plaintiff and the defendant Smith, and the defendant informed the plaintiff, before the same were closed, that the Smith Moquette Loom patent had been reassigned to the original owners, himself and Mr. and Mrs. Cochrane, and that the capital stock had been increased to \$600,000, and that had all been issued to the defendants, who were to put in \$250,000 in cash, and that the company was to have a license to manufacture upon a royalty of 20 cents a yard. No misrepresentations were made to the plaintiff or Mr. Tymeson to induce them to assign their patents or accept any stock.

While the factory of the company was being built, the individual defendants sold 1,000 shares of the stock of the company held by them to W. J. Sloane, who took their stock from the defendants at par, paying them \$100,000 therefor, and the stock therefor was thereupon issued to John Sloane, 500 shares on the 16th day of September, 1881, and 500 shares on the 14th day of January, 1882, and John Sloane became a stockholder and trustee of the company; and before he purchased his stock he was informed of the fact that the company had assigned the loom patent to the individual defendants, and held only a license, and sought only to manufacture under said patents upon payment of a royalty of 20 cents per yard, and that the patent had been purchased for the sum of \$40,000 from the company by the individual defendants, and that they had also paid \$210,000 for that amount of stock, and that 350 shares of the stock had been issued to them for the right or license to the company to manufacture upon payment of said royalty; and Mr. Sloane was cognizant of, and approved of, all the prior and subsequent proceedings of the defendants in regard to the affairs of the company. The only other stockholder to whom the defendants assigned any of their stock was Frank T. Holder, who became a trustee of the company, and who learned of the facts immediately above stated, and approved of the proceedings of the defendants, and held his stock merely at their pleasure and as their property, and parted with no consideration therefor. Under the management of the defendants, the company proceeded to erect factory buildings, purchased looms and machinery and the necessary stock, and commenced the business of manufacturing moquette carpets, and continued the same until about the close of the year 1882, and all of the money required therefor was furnished by the individual defendants. In addition to the sum of \$250,000 in the treasury of the company arising from the \$40,000 realized upon the retransfer of a patent to the defendants, and the sum of \$210,000 in cash contributed by them for that amount of stock, a much larger sum was loaned by them to the company in order to meet its business necessities; which sum so loaned was \$378,750.20, and with interest thereon from November 1, 1882, to the 1st day of February, 1883, amounted to \$384,627.40, at which time the defendants made a demand in writing upon the company for the payment of the amount of the indebtedness.

The manufacturing business had been done at a loss, and at the beginning of the year 1883 there was stagnation in the demand for moquette carpets, the market was overstocked, and there was no prospect of continuing the manufacturing business of the company at a profit, and no business could be carried on without additional money, which the defendants were unwilling to advance, and there was no means of procuring the same, and at that time it appeared that the continuance of the manufacturing business could only result in an increase of the loss already incurred. At a meeting of the trustees held February 3, 1883, the resolutions offered by Mr. Sloane, and set forth in the complaint, were unanimously adopted, whereby it was determined to cease manufacturing; to lease to the Alexander Smith & Sons Carpet Company the real property and the machinery of the Moquette Loom Company for 15 months from February 1, 1883, at an annual rent of \$15,000, and payment of taxes and assessments accruing during said term; also to sell to the same company the merchandise, stock on hand, and pay over the net proceeds realized therefrom to the individual defendants, to apply on account of the company's indebtedness to them; also to give to the individual defendants who were such creditors a bond for the residue of the account secured by mortgage, both on the company's real estate, and also upon its machinery, tools, and fixtures, provided the assent of the majority of the stockholders owning at least two-thirds of the capital stock should first be filed in the Westchester county clerk's office; also authorizing the due execution and delivery of the proper papers required to carry the resolution into effect. The defendants

and Mr. Sloane voted for the resolutions in good faith, believing that there was no other way to save the moquette company and its stockholders from further loss, and that the acts and proceedings therein directed were for the best interest of the company and its stockholders, and such was the fact; and the defendants, in passing the resolutions, did not intend to injure or defraud the plaintiff as a stockholder of the company, and did not in fact injure or defraud him. The resolutions so adopted by the board of trustees were necessary, and were for the best interest of the company and the stockholders, and no better or other arrangement to save the company and its stockholders from further loss was practicable. Immediately prior to the meeting of the board of trustees on the 3d day of February, 1883, a meeting took place between the defendants, John Sloan, and the plaintiff, at which meeting the plaintiff was apprised of the necessity of closing the business of the company, but he made no suggestion in respect to a remedy for the difficulties in which the company was involved.

The resolutions of February 3, 1883, were carried into effect. The lease to the Smith Carpet Company was executed; the merchandise and stock on hand were sold to the same company at cost price, for the sum of \$207,605.85, which amount, less \$25,511.23, was the sum due to the carpet company from said loom company, was paid by the carpet company to the loom company, and by it applied to that extent in liquidation of the indebtedness of the loom company to the defendants. The bond and mortgage from the company to the defendants was executed and delivered; the assent of the majority of the stockholders owning at least two-thirds of the capital stock of the company having been first obtained, and filed in the Westchester county clerk's office. About 15 months later, proceedings were commenced to foreclose the bond and mortgage. The judgment of foreclosure and sale under the real-estate mortgage was entered in this court on or about June 2, 1884, and the factory property described therein was sold by the referee appointed by the court for that purpose at public auction, and on the 24th day of June, 1884, after due notice, to Warren B. Smith, for the sum of \$50,000, and a deed therefor was delivered to him by the referee, and the amount realized upon said sale was applied, pursuant to the terms of the judgment, in payment of the amount due the mortgagors as adjudicated by the court. The order confirming the report of said referee was entered about June 27, 1884, whereby it appeared that the deficiency upon the judgment was then \$143,660.62, with interest from June 24, 1884, for which judgment was then entered against the company. Thereafter due proceedings were had for the foreclosure of the chattel mortgage upon the machinery, tools, and fixtures, and the same was sold at public auction to Warren B. Smith for \$100,000, and the net amount so realized was applied to that extent in payment and liquidation of the amount of \$143,660.62, with interest, then due to the said defendants. Both of these mortgage sales were regularly and fairly conducted, and the amount bid for the property, and for which the same was sold, was an adequate and sufficient consideration for the property. The defendant Smith still holds the title to the real and personal property, and in purchasing the same he acted for himself and William F. Cochrane and Eva S. Cochrane, and all his acts and proceedings were in good faith, and without any fraudulent or improper motive. There are no creditors of the Smith Moquette Loom Company other than the individual defendants in this action.

The principal dispute respecting the facts related to the knowledge of the plaintiff of certain transactions of the loom company previous to the acquisition of his stock, but most of the facts recited were found by the trial judge, and they are well sustained by the evidence. With the facts thus before us, we are prepared for the examination of the case. It is the *primary* object of the action to procure the nullification of the reconveyance of the patents to the individual defendants by the loom company; and, *second*, to procure the

surrender of the 8,500 shares issued to the defendants for the unlimited license to manufacture carpets under the loom patent; and, *third*, to annul the proceedings of February 3, 1883, and to set aside the judgment and the proceedings in the foreclosure suit, and compel the defendants to account for the property received. The action is brought under section 1781 of the Code of Civil Procedure, which is sufficiently comprehensive to justify its commencement.

The plaintiff invokes the provision of the Revised Statutes in condemnation of the retransfer of the loom patents to the defendants upon the reorganization of the company in September, 1880. That statute¹ reads as follows, so far as it has any application to this action: "It shall not be lawful for the directors or managers of any incorporated company in this state to make dividends, excepting from the surplus profits arising from the business of such corporation; and it shall not be lawful for the directors of any such company to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of such company, or to reduce the said capital stock, without the consent of the legislature." This statute fell under the consideration of the court of appeals in the case of *Williams v. Telegraph Co.*, 93 N. Y. 187, and this was the construction it there received: "These provisions were intended to prevent the division, distribution, withdrawal, and reduction of the property of a corporation below the sum limited in its charter or articles of association for its capital, but not to prevent its increase above that sum. The purpose was to prevent the depletion of the property of the corporation, and thereby injuring its solvency. All the other provisions of the section show very clearly that such was the intention. Careful provision was made that the whole amount of capital stock should be paid in, and hence there was a prohibition against receiving a note or other evidence of debt in payment of any installment actually called in, and required to be paid; and, in case the directors violated any of the provisions of the section, they were made individually liable to the corporation, and to its creditors in the event of its dissolution, to the full amount of the capital stock of the company so divided, withdrawn, or reduced. All these provisions show that it was the purpose of the legislature, by means of them, to create a property capital for the corporation, and then to keep that intact, so as to secure the solvency of the corporation, and its responsibility to its creditors. The 'capital stock,' in this section, does not mean share stock, but it means the property of the corporation contributed by its stockholders, or otherwise obtained by it, to the extent required by its charter." This elucidation of the statute makes it plain that it can have no application to this case. It was designed to suppress fraud, and protect creditors, and persons who might become creditors or stockholders in reliance upon false appearances. Making dividends without surplus profits, or dividing, withdrawing, or paying to stockholders any part of the capital of the company, or reducing its capital stock are all acts of maladministration, and fall under the condemnation of the statute; but neither of these acts have been committed by these defendants.

Turning back, for a moment, to the formation of the loom company, we find it organized by three persons, with the sole and only object of placing the ownership of the patents in a corporation as a convenient agency for the issuance of licenses and the collection of royalties, and where the title would be perpetuated, and free from the uncertainties of life, bankruptcy, and other contingencies. The three incorporators owned the patent before its assignment to the company, and in equity they owned it afterwards, for they owned all the stock issued for the patent by the company. There were no creditors, and there could be none, for the company embarked in no business requiring credit. It engaged in nothing but the collection of royalties. The patent

¹ 8 Rev. St. N. Y. (8th Ed.) p. 1728, § 2.

was its only property and its only wealth, and the company had more of the attributes of a partnership than of a corporation. In reality and in substance, it was a special partnership, as all trading corporations are, and members of such corporations are never merged in the company. *Bank v. Deveau*, 5 Cranch, 61. The incorporators owned the patent before they put it into the company, and they owned it afterwards. They owned the company, and all it represented; and they could dissolve it, and resume their private ownership of all its property, or they could reorganize it in any manner and on any basis. There was no purpose of deception or fraud, and there was no one to be deceived but themselves. Towards the public and the law, it maintained the attitude of a partnership; and there were none to molest it, and none to interfere with the absolute control and management of the company by the members and shareholders. Thus the company pursued the business for which it was originally organized, collecting the royalties, distributing them as dividends among the three individual defendants in this action, until the time of the reorganization of the company, when they concluded to commence the manufacture of carpets, and, for that purpose, to increase the capital stock of the company. Preliminarily, and for the purpose of retaining the ownership and control of the patents, they determined upon their retransfer to them individually, and that was done in the proportions in which they held them at first. Then they increased the capital stock of the company to \$600,000, all of which they issued to themselves in the manner already recited. Down to that time, no persons but the original incorporators had any interest in the company. They held the entire stock, and were the only trustees. They might have dissolved the corporation themselves, and taken back their patents, and then made up a new company, so long as these defendants alone were interested. Instead of adopting that method for the withdrawal of the patents, they substituted a promissory note of \$40,000 in the place of the patent, leaving the other \$560,000 to be raised by the issuance of new stock for cash and property at its full value. All the demands of the law were thus satisfied, and the rights of future creditors and stockholders were fully protected. The trustees were the corporation, and they were the shareholders, and the legal title to the patents was held by the company for their benefit alone; and the withdrawal of the patent, and the substitution of the note therefor, was not a violation of the statute. No principle of law or public policy is violated by an agreement between parties about to form a trading corporation, by which the capital stock is to be represented by property which they contribute, if the transaction is free from fraud. As, therefore, these original contributors and trustees capitalized a patent at \$40,000, they might withdraw the same, and substitute their promissory note for that sum as so much cash. There was none to object. The actors included the directors and shareholders, and there were no creditors. The circumstances surrounding the case are peculiar, in that the individual defendants in this action, in all their transactions in the formation of the company and in its reorganization, were really dealing with themselves and with their own property; and our conclusion is that the return to the defendants of the patents, and the payment to the company of \$40,000, representing all the stock issued before that time, was not a withdrawal of capital within the prohibition of the Revised Statutes.

The claim to invalidate the issuance of the 3,500 shares of stock issued to the defendants for the license to manufacture under the patent cannot be enforced by or for the benefit of the corporation. When that stock was delivered to the defendants, it became their property, free from any liability of the corporation itself. *Farnsworth v. Wood*, 91 N. Y. 308. But there is no basis here for a liability to any one in respect to those 3,500 shares, because there was no fraudulent purpose in its acquirement, and no intention to evade the statute. Neither can this action be maintained for the purpose of setting

aside or invalidating the resolutions of February 8d for closing the business of the company. The finding of the trial judge completely established the good faith of the defendants, and the absolute necessity of the resolutions and transactions, in order to save the company from further loss. The enterprise for which the corporation had been reorganized had failed, and its business from the beginning had been conducted at a loss. It had contracted a very large debt, and it seemed to be impossible to continue the business without further means, and the defendants had made the advances beyond the power of the company to secure them. In all trading corporations it is entirely competent for a majority of the stockholders to dissolve the company, and bring its business to a close. "Commercial corporations are ordinarily formed solely for the benefit of their shareholders. It is therefore no more than reasonable that the corporators should be authorized to give up their speculation, and wind up the company's business, if it should turn out to be unprofitable or otherwise undesirable. The law is settled accordingly, and it may be stated as a rule that it is an implied condition in the charter of every corporation formed solely for the pecuniary profit of its shareholders, such as an ordinary trading or manufacturing corporation, that its business may be wound up whenever the majority deem this to be expedient under these circumstances. The majority may, without the consent of the minority, sell the whole of the company's property, close up the business, distribute the assets, and surrender the charter to the state. *Mor. Priv. Corp. § 211; Treadwell v. Manufacturing Co.*, 7 Gray, 393. There is no obligation to the state or to the public imposed upon a private trading corporation to carry on the business for which it was formed. It may at any time put an end to its transactions, and voluntarily wind up its affairs. Its franchise of acting in a corporate capacity is merely permissive, and not obligatory; hence, in such case, a forfeiture for non-user of franchise cannot be based upon neglect of duty upon the part of the company. *Mor. Priv. Corp. § 651.* The theory and arguments of the plaintiff are based upon technical rules of law, applicable in particular cases, for the protection of creditors, and the prevention of frauds upon stockholders; but they cannot be applied to this case. The plaintiff has received everything he was entitled to receive, and so has the company; and the corporation cannot recover from the shareholders what the trustees and officers have agreed they should receive, in the absence of fraud. Why should there be any interference with these defendants? They have done what they would with their own, and they have done no more, and all they did was in the management of their own property and business, and neither the public nor the legislature have any interest in either. We can discover no principle of law or equity that justifies the demand of the plaintiff in this action. An adjudication that would direct the retransfer of the patent to the company, and invalidate the issue of the 3,500 shares of the stock, and the unlimited license to manufacture carpets under the patents, would be equivalent to an order for the transfer of the private property of one person to another. The judgment should therefore be affirmed, with costs; but we find no basis for the support of an additional allowance, and the appeal from that order must be sustained, and the order reversed.

PEOPLE *ex rel.* MORRISON v. BOARD OF SUP'RS HAMILTON COUNTY.
(*Supreme Court, General Term, Third Department. May 26, 1890.*)

1. COUNTIES—SUPERVISORS—DESIGNATION OF OFFICIAL PAPER.

Under Laws N. Y. 1886, c. 515, providing that the boards of supervisors in the several counties shall designate newspapers "to publish the laws," a designation of papers "to do the public printing" is sufficient.

2. SAME—MANDAMUS TO ENFORCE CLAIM.

It is the duty of a board of supervisors to allow a claim against the county, where the amount is undisputed, and its refusal to do so is not a mere error of law, but a breach of duty, which the courts will remedy by *mandamus*.

2. ACCORD AND SATISFACTION—PART PAYMENT.

Acceptance of a check for part of a claim against a county, where there is no dispute as to the facts, and no agreement that it shall be in full, will not preclude a recovery for the residue. Distinguishing *People v. Supervisors*, 38 Hun, 806.

Appeal from special term, Fulton county.

Application by Joel B. Morrison for a peremptory writ of *mandamus* requiring the board of supervisors of Hamilton county to audit and pay a balance of relator's bill for printing. The application was denied, and relator appeals. Laws N. Y. 1886, c. 515, amending Laws 1845, c. 280, § 3, is as follows:

"Sec. 3. It shall be the duty of each board of supervisors in the several counties of this state, at their annual meeting, or at any special meeting called for the purpose, to appoint the printers for publishing the laws in their respective counties. The appointment shall be made in the following manner: The members of the board of supervisors representing, respectively, each of the two principal political parties into which the people of the county are divided, or a majority of the members of the board of supervisors representing, respectively, each of such political parties, shall designate, in writing, a paper fairly representing the political party to which they respectively belong, to publish the laws, and such designation shall be signed by the members making it, and filed with the clerk of the board of supervisors, and the two papers so designated shall publish the laws. In case the members of the board of supervisors representing either of the two principal political parties into which the people of the county are divided, or a majority of such members, cannot agree upon a paper, then, in that case, they shall make report to that effect to the clerk of the board of supervisors; and such board shall, by resolution, designate a paper fairly representing such political party, to publish the laws. If there shall be but one paper published in the county, then, in that case, the laws shall be published in that paper."

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Clarence W. Smith, for appellant. John M. Carroll, for respondent.

LEARNED, P. J. A board of supervisors has a twofold position. It is a tribunal for passing upon claims against the county, and it is also the representative of the county against which the claims are presented; and because it is such representative the court may properly compel the board to pay claims, when there is no question of fact to be decided, and where such payment is a plain matter of duty, and not of discretion. There is no dispute about the facts in this case. The board designated two papers, one of which is the relator's, to do the public printing, and established the price to be paid. The comptroller sent to the relator's paper the redemption list (so called) of lands sold, to be published as required by law. The relator published the list, as was his duty. He rendered a bill to the board for printing, which included an item of \$420 for publishing this list. The board allowed the bill, except that for the publishing this list they allowed only \$60. The total amount allowed was \$686.50, for which the clerk gave him a check, which was paid. He now seeks by *mandamus* to compel the payment of the balance, \$360.

The first point made by the defendants is that under chapter 515, Laws 1886, the relator's paper was not properly designated. No such allegation is made in the opposing affidavits; and it will be seen by that law that, in a certain case, the board may designate the papers by resolution. We ought not to assume, with no proof on the subject, that this case did not exist. In the case of *People v. Supervisors of Hamilton County*, 78 N. Y. 604, the question was whether under chapter 662, Laws 1870, the supervisors had power to determine whether there should be one or more newspapers designated. The court held that the board had this power, and that, as they had

designated one only, the comptroller was not authorized to publish in another, also. But in this case two papers were designated; no question was made as to the manner of designation; the relator has acted thereon; and the defendants do not now set up any facts showing that a designation by resolution was not proper. It is true that the language of the resolution is "to do the public printing," while the language of the act last cited is "to publish the laws." But it is plain that the publication of the Session Laws was intended. Such publication was included in the relator's bill, and was paid by the defendants, and in their opposing affidavits they make no claim that the resolution did not include the publication of the Session Laws. It was their duty to make a designation, and they made no other than this. The words "public printing" are broad enough to include the publication of the Session Laws.

The next point of the defendants is that, in auditing and allowing the relator's bill at \$60, they acted judicially, and their determination is conclusive. It must be conceded that, where a question of fact is to be determined by the board,—such as the amount of work done for which a claim is made, or the value of such work, and the like,—there the board has a right to decide, and *mandamus* will not lie. But, on the other hand, where no question of fact exists; where the amount of services rendered is undisputed; and where the rate of compensation is established by law or by undisputed contract, so that, on the facts, a clear, positive, unquestionable duty exists that the board should pay the claim,—then the board cannot evade this duty by saying that the board is a *quasi* judicial tribunal. It may not always be easy to draw the line, but such we understand to be the settled distinction. The latest case in which this matter was discussed is *People v. Barnes*, 114 N. Y. 317, 20 N. E. Rep. 609, and 21 N. E. Rep. 739, which case was heard a second time on a motion for a reargument. While the court held that, in that case, *mandamus* would not lie, the decision was on the ground that there was a disputed state of facts. And it was admitted that if the claims were made by statute, or by some settled rule of law, legal charges, the case would have come within the cases of *People v. Supervisors Delaware County*, 45 N. Y. 196, and *People v. Town Auditors*, 82 N. Y. 80. The same doctrine is found in *People v. Supervisors Cortland County*, 58 Barb. 139. But the defendants insist that where, on undisputed facts, it is the duty of the board to allow a claim at an amount determined by statute or contract, yet that, if they refuse to do this, such refusal is an error of law, which must be reviewed only by *certiorari*. Here, however, they overlook what was pointed out above, viz., that the board of supervisors is not solely a judicial tribunal; but it is also the person, or the representative of the person, which owes the debt. If the board were merely a judicial tribunal, the court would not by *mandamus* control its action. But it is the official body charged with the duty of causing the debts of the county to be paid. And when there is no question as to the facts on which the debt arises, and as to the amount of the debt, then the board may be properly commanded to pay. To refuse to pay is not a mere error of law; it is a breach of duty.

A further point of the defendants is that the relator has lost his rights by accepting the check, which included part of his claim. We think not. Most of that check was for the rest of his bill. He could not divide the check, and was not bound to lose what was paid him. There was no compromise of a disputed claim. There was only a payment of a part of what was legally due. In *People v. Board Supervisors Queens County*, 83 Hun. 305, there was a dispute as to the facts, and the amount allowed and accepted was stated to be in full. Such is not the case here. See, on this point, *People v. Supervisors Cortland County*, *ut supra*. If, as we have shown, the board had no judicial discretion to exercise, a part payment does not satisfy the claim.

It was further urged by the defendants that the words "redemption list" in the relator's bill did not necessarily mean the notice to redeem lands sold for taxes issued by the comptroller. If the board had desired further evidence, when the bill was presented they might have so stated. But it does not appear that any doubt existed as to what the bill meant. In the affidavits used on this motion the matter is explained fully, and the defendants' affidavits make no denial. It is evident that the matter was perfectly understood. Order reversed, and peremptory *mandamus* granted, with \$50 costs and disbursements. All concur.

MACDONALD v. TROJAN BUTTON-FASTENER Co. *et al.*

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

1. PARTNERSHIP—DISSOLUTION—RIGHTS OF PARTNERS INTER SE.

A transfer, after notice of dissolution, by two members of a firm, of all the firm property, to a corporation organized by them for the purpose of continuing the business under a new arrangement, cannot affect the rights of a remaining partner who does not consent thereto; and he is thereafter entitled to the exclusive control of all the firm property for the purpose of winding up the partnership business. Affirming 9 N. Y. Supp. 888.

2. SAME—APPOINTMENT OF RECEIVER.

In such a case, a receiver of the firm's property will not be appointed unless the remaining partner neglects to perform, or improperly performs, his duty of closing up the business as expeditiously as may be, with due regard to the interests of all concerned.

Appeal from special term, Rensselaer county.

John A. Macdonald, Albert W. Ham, and Arthur M. Wight were engaged in business as partners under the firm name of the "Trojan Button-Fastener Company." Notice of dissolution was given, and, before the partnership business was closed up, Ham and Wight, in conjunction with one Patterson and others, united in forming a corporation styled "Trojan Button-Fastener Co., Incorporated," for continuing the business, and said Ham and Wight transferred all the property of the firm to the corporation. This action was brought by said Macdonald for an injunction against Ham, Wight, the corporation, Patterson, and others; and judgment was rendered giving plaintiff exclusive control of the firm property, and enjoining defendants from interfering in any way therewith. Defendants then moved to dissolve the injunction, and for the appointment of a receiver of the firm property, and now appeal from the orders denying their motions. For report of decision at special term, see 9 N. Y. Supp. 383.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

N. C. Moak and R. A. Parmenter, for appellants. Nelson Davenport, for respondent.

LEARNED, P. J. There are two appeals before us in this case. The first is from the injunction order granted by Mr. Justice FURSMAN; the second, from the refusal to appoint a receiver in the motion made before Mr. Justice EDWARDS. Upon a consideration of all the facts before us, we think that the injunction order was properly granted, and should be affirmed, with costs.

In regard to the refusal to appoint a receiver, the court required the plaintiff to give security to the amount of \$20,000. The court probably considered that the plaintiff, being one of the partners, should, under the circumstances, be allowed to close up the partnership business on giving proper security. The defendants, however, insist that they could not, with any convenience, control the action of the plaintiff in such closing up of the business, if he should not act properly; that if a receiver were appointed, his action would be under control of the court. We might, perhaps, appoint the plaintiff receiver, and thus obviate the defendants' objection to the present situation. But there might be this difficulty, viz., that, on any sale of the partnership property made

by the plaintiff in his capacity of receiver, he would be unable to be a purchaser in his private capacity. He would, therefore, be unable to protect himself against loss on such a sale. Having this in consideration, we think it will be best not to appoint the plaintiff receiver, and not at the present time to appoint any receiver. The partnership is ended, and it remains now the duty of the plaintiff, in whose control the property is, to close up the business as expeditiously as may be, with due regard to the interests of all concerned.

In case the plaintiff shall neglect to perform this duty, or shall perform it improperly, it will be the privilege of the defendants to move again, on showing such facts, for the appointment of a receiver. Each of the orders appealed from is affirmed, with \$10 costs and printing disbursements, but with the privilege to defendants, on showing plaintiff's neglect of duty in closing up the partnership, to renew the motion for the appointment of a receiver, and with privilege, also, to the plaintiff to make the same motion. All concur.

KITTEREDGE *et al.* v. VAN TASSELL.

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.

A husband who makes an assignment for the benefit of creditors may prefer a debt legally due to his wife.

Appeal from special term, Dutchess county.

Action by Charles M. Kitteredge and Jennie Davis, as assignees of James M. Davis, against J. Wesley Van Tassell, sheriff of Dutchess county. There was judgment for defendant, and plaintiff appeals.

Argued before DYKMAN and PRATT, JJ.

Freeman & Green, for appellant. *H. H. Hustis*, for respondents.

DYKMAN, J. This is an action against the sheriff for the seizure of a stock of goods. The plaintiffs are the general assignees of James M. Davis, and were in possession of the property in question when the sheriff seized the same under a warrant of attachment issued against the property of the plaintiffs' assignor. The cause was tried before a judge without a jury, and he found all the facts against the defendant, and rendered a judgment in favor of the plaintiffs. The conclusions of law reached by the trial judge follow legitimately from the facts found, which were amply justified by the evidence introduced upon the trial. The principal assault upon the assignment was directed to the preference of the debt of the wife of the assignor, but the proof showed her claim to be such an obligation as the husband might legally incur, and, being such, it might be the subject of preference in his assignment for the benefit of creditors. We coincide with the decision of the trial judge, and find no error in the record. The judgment should be affirmed, with costs.

HURLEHY v. MARTINE *et al.*

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

FALSE IMPRISONMENT—CERTIFICATE OF INSANITY—LIABILITY OF PHYSICIANS.

Where the certificates provided for by Laws N. Y. 1874, c. 446, § 1, forbidding the confinement of any person in any asylum except on the sworn certificate of two physicians setting forth the insanity, are false, fraudulent, and malicious, the physicians making them are liable to an action for false imprisonment.

Appeal from circuit court, Warren county.

Action by Julia A. Hurlehy against Godfrey R. Martine and James Ferguson. The complaint alleged that proceedings were instituted to have plaintiff declared a lunatic, and placed under restraint as such; that defendants assumed, as physicians, to hold an inquest as to plaintiff's sanity, and made a certificate that she was insane; that plaintiff was in fact sane; that the cer-

tificate made by defendants was false, and known by them to be false when they made it, and that defendants were actuated by malice; and that by means of this false and illegal certificate plaintiff was confined in an asylum for over two years, whereby she was deprived of her liberty, and greatly damaged, etc. A nonsuit was ordered, and from the judgment entered plaintiff appeals. Laws N. Y. 1874, c. 446, § 1, provides that no person shall be committed to or confined in any asylum, public or private, or in any institution, home, or retreat for the care and treatment of the insane, except upon the certificate of two physicians, under oath, setting forth the insanity of such person.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

W. F. Hickey, for appellant. *L. M. Brown*, for respondent.

LEARNED, P. J. There is much in the complaint which seems to have no proper connection with the alleged cause of action, and there are allegations which are quite peculiar; as that defendants, as practicing physicians, pretended to hold an inquest as to plaintiff's lunacy, and that not a witness was sworn, or any testimony taken, on the inquisition. We do not understand how such an inquest can be held; but we suppose that the complaint means that the defendants signed the certificates provided for in section 1, tit. 1, c. 446, Laws 1874; and the complaint alleges in an obscure manner that they did this falsely and maliciously, and that the "inquisition was false and fraudulent." It further alleges, in substance, that on these certificates the plaintiff was confined in the Hudson River Hospital about October 27, 1882, and there remained two years and five months. The answer, denying the allegations generally, pleads also the statute of limitations. On the trial it was admitted that the certificates were granted October 28, 1882, and the action commenced October 13, 1888, and that plaintiff was committed to the asylum, and remained there about two years and five months, and was discharged April 1, 1885. The court held that the plea of the statute of limitations was good, that the gist of the action was false imprisonment, and that, as to the statute of limitations, the action came under section 384, Code Civil Proc., and granted a nonsuit; that is, the court held that the two-years limitation applied. The only question is whether this holding was correct.

The question, then, is whether the maliciously making of false certificates authorized by the act aforesaid, under which, with the approval of the judge, a person is confined in an asylum, renders the persons making the certificates liable to an action for false imprisonment in case such certificates are false, fraudulent, and malicious. It must be observed, in the outset, that the question whether any cause of action is alleged in the complaint is not before us. There was no demurrer. The case comes up as on a trial of fact, and the only matter decided was that the action was one for false imprisonment, and was therefore barred by the statute. We must assume, therefore, that enough was alleged in the complaint, or could have been proved on the trial, to sustain a recovery, had it not been for the statute of limitations. Now, if we look at the statute of 1874 above cited, we shall see that all the physicians have to do is to give a certificate setting forth the insanity. The statute does not say that these certificates authorize or direct the confinement of the person. Section 1, tit. 1, only forbids the confinement without such certificates. These certificates are not directed to the person in charge of any insane asylum. They do not purport to specify where or by whom the person is to be confined. Section 5 authorizes the county superintendent of the poor to send a lunatic to a state lunatic asylum. Section 6 speaks of the neglect of a committee or guardian to confine a lunatic, and authorizes an application to a judge, in certain cases, for a warrant. But nowhere are these certificates mentioned in section 1 made the authority under which the keeper of an asylum is to confine a lunatic. Of course, the defendants in this case did not themselves imprison the plaintiff, but the plaintiff does not aver that she has

suffered any actual damages, except by the false imprisonment. It is not alleged that the certificates were a libel on her, and have thus done her injury; and, indeed, if they were libelous, the same limitation would apply as to an action for false imprisonment. Code Civil Proc. § 384. But the gist of the action, that is, the injury suffered, was the false imprisonment. The certificates did the plaintiff no harm except either as libels, or as causing her unlawful imprisonment. The case is in some degree analogous to an action against an attorney who has instituted proceedings of some kind which have resulted in the imprisonment (alleged to be unlawful) of the plaintiff; and, although the certificates of the physicians do not direct the superintendent of an insane asylum to imprison the lunatic, still, if the lunatic is thereby wronged, and if the physicians are liable, it would seem that the lunatic was wronged only by the imprisonment, and that it would only be for such imprisonment that the physicians could be liable. If the alleged lunatic had never been confined, what damages could have been recovered? It might be urged that the action was to recover damages for a personal injury from negligence. *Id.* § 383. Even if that view were correct, (and we need not say that a similar case might not come under that section,) still the action would be barred by the limitation there prescribed. The judgment should be affirmed, with costs.

KISSAM v. JONES.

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

1. LIVERY STABLE KEEPERS—VICIOUS HORSE—INJURY TO CUSTOMER.

A keeper of a livery stable, who hires a horse without giving notice of its known propensity to turn around in the road, is liable for personal injuries resulting to the customer for the failure to give him such information, and is not exonerated by the fact that the customer was informed by employees at the stable that the horse was "a little skeery;" nor that he wanted to look out; but that, if he kept a "taut" rein, there would be no danger.

2. SAME—EVIDENCE—RELEVANT.

In an action to recover for injuries caused by a vicious horse hired from defendant, after uncontradicted testimony that the horse was vicious, and had caused the injury by the very habit defendant knew he had, testimony as to the character or disposition of the horse is immaterial.

Appeal from circuit court, Suffolk county.

Action by John W. Kissam against Robert O. Jones. There was a verdict for defendant, and, from the judgment entered thereon in his favor, plaintiff appeals.

Argued before DYKMAN and PRATT, JJ.

Edward H. Kissam, for appellant. *Thomas J. Ritch, Jr.*, for respondent.

DYKMAN, J. This action is for the recovery of damages for the injury sustained by the plaintiff in a fall from a carriage caused by a vicious horse which the plaintiff hired from the defendant. The cause was tried at the circuit before a jury, and the defendant obtained a verdict. The plaintiff has appealed from the judgment; and, although a motion was made for a new trial on the minutes of the court, and denied, yet the plaintiff has taken no appeal from the order denying such motion. On this appeal, therefore, we are confined to questions of law solely. We cannot review the case, upon the facts, to determine whether the verdict was against the evidence, but we can review the testimony to ascertain whether there was any evidence to support the verdict; and, if we find none, we can reverse the judgment, for then the verdict was erroneous as matter of law. Such an examination of the testimony discloses the fact that the evidence is not contradictory, and stands substantially uncontradicted.

The plaintiff applied to the defendant to hire a horse and wagon to drive around the town, and the defendant agreed to furnish the same. In the afternoon of the same day the plaintiff went to the stable of the defendant, and saw there a colored man and a boy, and found the horse harnessed to a buggy, and tied. An examination of the horse excited some suspicion in his mind, and he inquired if he was all right, and he was told that the horse was just a little "skeery;" and, to an inquiry if there was any harm, he received an answer, "Oh, no! only a little skeery." The answer disarmed his suspicion, and he understood only that the horse might shy. He also informed the people at the stable that he was to take out a lady, and wanted a good horse on that account; and, while he was hesitating whether he should take the horse, the colored man assured him that he was all right, "only a little skeery." The suspicions of the plaintiff were thus disarmed. He did not think there would be any trouble, and took the horse; and, after taking in the lady, he drove about a mile and a half, when the horse commenced to shy, but not very seriously. After he went a little further, the horse started up, turned around, and ran down the hill on a run, until the plaintiff checked him. Then he started to go back, and the horse turned around and upset the wagon, and the plaintiff received very serious injuries from the fall. In the effort to control the horse, one of the lines broke, and then all control of the horse was lost, and he became unmanageable. In his examination in his own behalf upon the trial, the defendant stated that he remembered the plaintiff coming to him, and asking him if he had a horse that he could hire to go out riding, and he said to him: "Yes, I have got a horse. If you think you can drive him, you can have him." He also said that he knew the horse would shy, and that, when he saw anything in the road, he would shy and turn around; that he had told his employees not to let the horse out without telling them the kind of a horse he was. He does not state or claim that he gave the plaintiff any notice of any vicious propensity of the horse,—that he would turn around in the road, or that he had any vice whatever. One of the defendant's employees, Joseph Smith, testified that the defendant had told him, whenever the horse went out, to tell people about him, and that he told the plaintiff that he wanted to look out for him; that he would go all right; to keep a taut rein on him. So that the testimony is substantially uncontradicted. The defendant hired this horse to the plaintiff, and gave him no notice of any vicious propensity, when he knew that the horse had the habit of turning round in the road, than which nothing can be more dangerous. If a horse turns suddenly around before a four-wheeled vehicle, it is almost certain to be upset, and injury is almost certain to result therefrom. When the defendant hired this horse to the plaintiff, the law cast upon him the duty and obligation to give the plaintiff a horse that was manageable and safe. The law is that the defendant warranted the horse, wagon, and harness to be fit for the use contemplated; and such warranty is always implied where the quality or fitness of the article for the use specified is not visible, and the defect is not discernible by an ordinary observer. The keeper of a livery stable, engaged in the business of letting carriages and horses on hire, is bound to furnish a customer with a carriage and harness reasonably strong, safe, and secure for the purposes of the journey. Edw. Ballm. § 373. It was the duty of the defendant, also, to inform the plaintiff fully of the vicious propensities of the horse; and he is legally liable for the damages which resulted to the plaintiff in consequence of his failure to impart to him such information. It is easy to see that the suspicions of the plaintiff were allayed, instead of excited, by what the defendant told him, and by what the servants of the defendant told him at the stable. He could only infer from the language used to him that the horse was a little flighty, or might shy, but that, if he used proper care and caution in the use of the animal, and held upon him a taut rein, there was no danger. The information should have extended further, and the plaintiff should have been fully informed of the par-

tionably dangerous habit of the horse, before it can be claimed that he assumed any risk. There is therefore no evidence to sustain the verdict, and it should be set aside.

There is also a fatal exception in the case which will require a new trial. One of the witnesses for the defendant, who had stated that he had frequently driven the horse, was asked this question: "*Question.* State to the jury what are the principal characteristics of that horse." This was objected to as immaterial. Objection overruled, and the plaintiff excepted. After the uncontradicted testimony that the horse was vicious, and had caused the accident by the very habit which the defendant knew he had, the evidence respecting the character or disposition of the horse was improperly admitted. It was entirely immaterial what the general disposition or character of the horse was. In obedience to his well-known vicious propensity, he had turned round suddenly in the road, upset the wagon, and injured the plaintiff, and that gave the plaintiff a cause of action, and imposed liability upon the defendant for the result; and evidence of the character of the horse was entirely immaterial, and well calculated to divert the attention of the jury from the proper consideration of the real question at issue. *Buckley v. Leonard*, 4 Denio, 500. In that case, where the owner of a dog which had bitten other persons had notice of the fact, and afterwards suffered him to be at large, when he bit the plaintiff, it was held that it was no answer to the action for the injury to the plaintiff that the dog was generally inoffensive; and JEWETT, J., in giving the opinion in that case, said: "The evidence given by the defendant of the mild character and deportment of the dog, I think, was improperly admitted. It was immaterial. If the evidence proved that the dog bit the plaintiff; that the defendant was the owner, and knew or had notice that the dog had been accustomed to bite others,—he was responsible for the injury, however high the character of the dog for mildness stood among the neighbors. Such evidence was well calculated to divert the jury from a proper consideration of the real point in issue. * * * The evidence of the injury to the plaintiff, of the dog having previously bitten others, and that the defendant had notice of it, stands uncontradicted; and these facts were abundantly sufficient to require the jury to find for the plaintiff." The same principle applies to this case.

So our conclusion is: *First*, that the verdict is entirely unsupported by the evidence; and, *second*, that a fatal error was committed in the admission of the testimony respecting the characteristics of the horse. As the testimony stood at the close of the case, the evidence required a verdict for the plaintiff; and the trial judge would have been entirely justified in directing the jury to find for the plaintiff, leaving the question of damages alone for the consideration of the jury. The judgment should therefore be reversed, and a new trial granted, with costs to abide the event.

NORLING v. ALLEE.

(City Court of Brooklyn, General Term. June 3, 1890.)

1. NEGLIGENCE—DANGEROUS PREMISES—STORMS.

An owner of real estate, who keeps the same in a reasonably safe condition, is not liable to a passer-by on the street who is injured by the falling of a fence during a storm of sufficient violence to unroof houses, and do like damage.

2. TRUSTS—NEGLECT OF TRUSTEES—LIABILITY OF ESTATE.

A trust-estate cannot be mulcted for personal injuries sustained through the negligence of the trustees in relation thereto.

Appeal from trial term.

Action by John Norling against William H. Allee, as trustee, etc., under the will of Joseph B. Allee. There was a verdict and judgment for plaintiff, and defendant appeals.

Argued before CLEMENT, C. J., and OSBORNE, J.

William Sage, for appellant. *T. E. Hodgskin*, for respondent.

CLEMENT, C. J. The plaintiff was injured on the evening of January 9, 1889, while walking on the sidewalk of Flatbush avenue, near Third, in this city. A fence in front of the premises owned by defendant as trustee fell or was blown upon plaintiff by the wind, whereby he sustained bodily injuries. A verdict at the trial term was rendered in his favor for the sum of \$500. The plaintiff was the only witness in his behalf, who testified as to the condition of the fence prior to the evening in question. He said that he observed the fence very often before the accident, and that sometimes, when there was a strong wind, he saw it "like shaking," but that he did not think that it would tumble down; that, before he was injured, he heard a sound like an explosion,—something like a shock. The heavens were a light red, and the wind made a loud, roaring noise, and that he was "a little afraid" himself. It also appears from his testimony that the fence was not blown over, but that the wind carried it for at least six feet before it fell. The fence was six or seven feet high, and the sidewalk twelve feet wide; and plaintiff said that he was on the edge of the sidewalk when he was struck down by the flying fence. The testimony of the witnesses for the defendant conclusively shows that a cyclone prevailed in the vicinity. It appears that the front of a paint-shop on the premises in question was blown out into the street, and that the shop was so wrecked that it had to be taken down. A new fence in the vicinity was also thrown down, and many windows of neighboring buildings were blown in. One witness says that two sheets of corrugated iron, eight feet long by two feet wide, were blown off the roof of his house,—one into the street, and the other a block away. Mr. Demott testified that the roof of the annex of school-house No. 15 was torn off, and that four other buildings very near the fence in question were also unroofed.

We have stated only a portion of the facts proven by the witnesses for the defendant as to the violence of the storm; and, after carefully considering the case, we are of opinion that the complaint should have been dismissed on the ground that there was no evidence of negligence of the defendant. The testimony clearly establishes that the fence was blown from its position, a fact which tends strongly to prove that it was strong, and resisted the violence of the wind; for, if the fence was weak, it would have simply fallen. The storm was of such violence that the result should be treated as the act of God. *Sheldon v. Sherman*, 42 N. Y. 484. The owner was not called upon to construct a fence which could withstand a storm which unroofed houses, and did like damage. He was only bound to keep his property in a reasonably safe condition.

We think that on another ground the judgment cannot be sustained. The defendant was sued in his representative capacity, and was one of three trustees. 10 N. Y. S. no. 2—7

tees, and was the only one served with summons in the action. We are of opinion that the defendant, as trustee, was not liable for negligence, and that the remedy of the plaintiff was against him personally. The authorities are numerous that an executor or trustee cannot make the estate liable by an express contract unless directly authorized by the trust. *New v. Nicoll*, 78 N. Y. 127; *Austin v. Munro*, 47 N. Y. 860; *Ferrin v. Myrick*, 41 N. Y. 815; *Stanton v. King*, 8 Hun, 4. If an executor or trustee cannot make an estate liable by an express contract, it would seem to follow that the estate could not be mulcted for his careless act. The authorities are very meager on the question, but the principle is recognized in the case of *Camp v. Barney*, 4 Hun, 373, 376. See, also, *People v. Townsend*, 3 Hill, 479. In the case before us, if the judgment is sustained, the trust property is taken when but one of the three trustees has had his day in court, whereas, if the law is that the three trustees are liable in their individual capacity, an action would lie against one or all as joint tort-feasors. The judgment and order denying new trial must be reversed, and a new trial granted; costs to abide the event.

BLOHM v. BAMBER.

(City Court of Brooklyn, General Term. May 26, 1890.)

1. APPEAL—REVIEW—MATTERS NOT APPARENT ON THE RECORD.

Where the case on appeal contains no order denying a motion for a new trial, the general term cannot review the questions whether the verdict was against the weight of evidence, and whether it was excessive.

2. LIBEL AND SLANDER—EVIDENCE—OFFER TO APOLOGIZE.

In an action for slander, testimony that defendant offered to apologize to plaintiff is admissible in mitigation of damages.

3. SAME—INSTRUCTIONS—NOMINAL VERDICT.

A request, in an action for slander, that a verdict for nominal damages is a vindication is rightly refused. Following *Sanderson v. Caldwell*, 45 N. Y. 398.

Appeal from trial term.

Action by Charles A. Blohm against Isaac Bamber. There was a verdict for plaintiff, and from the judgment entered thereon defendant appeals.

Argued before CLEMENT, C. J., and OSBORNE, J.

George V. Brower, for appellant. *Hurd & Grim*, for respondent.

CLEMENT, C. J. This action was brought to recover damages for slander, and at the trial term a verdict was rendered for plaintiff for the sum of \$1,750. No appeal was taken from an order denying a motion for a new trial on the minutes, and no such order appears in the case. There is only a statement in the record that the court denied the motion. It follows, therefore, that we can review only questions of law, (Code, §§ 999, 1846;) and it also follows that the questions whether the verdict was against the weight of evidence, and whether it was excessive, are not before us for consideration.

It is claimed that it was error not to allow the defendant to prove that he had offered to make an apology to plaintiff. Such testimony was only competent in mitigation, and any fact which might tend to mitigate damages should have been pleaded. When the plaintiff rested, and again at the close of the case, the defendant moved to dismiss, which motions were denied, and we think properly.

The request to charge that a verdict for nominal damages was a vindication is in conflict with the law as decided by the court of appeals. *Sanderson v. Caldwell*, 45 N. Y. 398, 406. The judgment appealed from must be affirmed, with costs.

McCoy v. EMPIRE WAREHOUSE Co., Limited.*(City Court of Brooklyn, General Term. May 26, 1890.)***MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANTS.**

The neglect of employes in a warehouse to perform the duty assigned to them of covering the hatches in the different floors at the end of each day does not render their employer liable to an employe for injuries caused thereby.

Appeal from trial term.

Action by Bridget McCoy, as administratrix of Peter McCoy, against the Empire Warehouse Company, Limited, to recover damages for the death of her intestate while in defendant's employ. From a judgment entered upon a nonsuit plaintiff appeals.

Argued before CLEMENT, C. J., and VAN WYCK, J.

P. Keady, for appellant. *Butler, Stillman & Hubbard*, for respondent.

VAN WYCK, J. In the warehouse of defendant there were hatches or openings in each floor directly over each other, for the purposes of raising and lowering merchandise. The contention of plaintiff is that Peter McCoy fell from the upper floor through these hatches, and thus was killed. Plaintiff insists that the fact that the doors or covers had not been placed over the hatches the night before was such negligence as rendered the defendant liable for the death of Peter McCoy. The evidence overwhelmingly establishes that it was the duty of Peter McCoy, James O'Neil, and Antony Flaherty, three employes of defendant, to cover the hatches in question at the end of each day, which duty they failed to perform, though they were employed for that purpose, and were directed to do so. It is manifest that their neglect in that respect does not devolve upon defendant, their employer, liability to them, or either of them, for injuries caused thereby. The nonsuit was properly granted, and the judgment herein must be affirmed, with costs.

BECKER et al. v. FUELS.*(City Court of Brooklyn, General Term. May 26, 1890.)***APPEAL—REVIEW—HARMLESS ERROR.**

In an action for the contract price of bronze-gilt mouldings, the court charged that, if plaintiffs agreed to furnish such mouldings, and did furnish them, they were entitled to recover; but if, as claimed by defendant, the contract called for silver-gilt mouldings, then defendant was entitled to a verdict. *Held*, that this submission of the conflicting contentions was more favorable to defendant than if his counter-claim for a supposed breach of warranty had been submitted; for the charge made a breach of warranty a defense to the whole claim, while the counter-claim went only to a part of the claim.

Appeal from trial term.

Action by Lambert Becker and others against Joseph H. Fuels. There was a judgment for plaintiffs, and defendant appeals.

Argued before CLEMENT, C. J., and VAN WYCK, J.

Thornton, Earle & Klende, for appellant. *John R. Kuhn*, for respondents.

VAN WYCK, J. The court charged the jury that, if the contract between the parties was that plaintiffs should furnish bronze-gilt mouldings which would not tarnish or turn black, and if they furnished such mouldings, then the plaintiffs were entitled to recover \$121.71; on the other hand, if the contract was that plaintiffs should furnish silver-gilt mouldings which would not tarnish or turn black, that then defendant was entitled to a verdict. To this submission to the jury of these two contentions there was no exception, and there was testimony tending to sustain both. The jury on this conflict decided in favor of the first contention, viz., that the contract was to furnish bronze-gilt mouldings which would not tarnish or turn black, and that such

mouldings were furnished. After a careful examination of all the testimony in the case, we see no reason to disturb their decision. The submission of these two conflicting contentions to the jury was more favorable to the defendant than if the counter-claim on a supposed breach of warranty had been submitted; for the former made a breach of warranty a defense to the whole claim, whereas the latter made a breach of warranty a defense to a part of the claim. There is no other exception in the case upon which error can be predicated. Judgment and order denying motion for a new trial must be affirmed, with costs.

RUPPEL v. DONOHUE.

(City Court of New York, General Term. May 26, 1890.)

SALE—ACTION FOR PRICE.

In an action for goods sold, the answer alleged that they were delivered under an agreement that they were to be applied to the payment of a debt owing by plaintiff's husband to defendant. *Held*, that the exclusion of evidence tending to prove the agreement, and the refusal to let the jury determine whether the goods were delivered under it, called for the reversal of a judgment in plaintiff's favor.

Appeal from trial term.

Action by Margaret Ruppel against Michael Donohue. Between the 8th day of September, 1888, and April 22, 1889, the plaintiff, who was the owner of a butcher shop at No. 590 Tenth avenue, New York, sold and delivered to the defendant certain fats. Prior to the 8th day of September, 1888, the butcher shop of the plaintiff was owned and conducted by her husband, George Ruppel, from whom plaintiff purchased it. Immediately after purchasing the place, the plaintiff told the collector of the defendant that she had bought the place, and a book was made out in her name. Previous to that time, all fats delivered by George Ruppel to defendant had been entered in a book made out in his name. On the 15th day of July, 1889, plaintiff called at defendant's place of business to have her book balanced, and to receive payments for fats delivered by her; but, instead of paying her, defendant handed back to her her book marked, "Paid per beef bill," together with a bill against George Ruppel on which was a credit of \$93.32. Defendant alleges in his answer that George Ruppel, the husband, was indebted to him in the sum of \$166.10; that the plaintiff promised and agreed to and with defendant that, if he would forbear bringing any action against said Ruppel upon his indebtedness, she would pay it by delivering to defendant fats from time to time; and that, in pursuance of that agreement, she delivered the fats in question. Plaintiff served a reply denying the making of any such agreement, and pleading the statute of frauds, upon the theory that the agreement asserted by the defendant was in the nature of a promise to answer for the debt of another. The trial judge refused to send the case to the jury to determine whether the fats were delivered under an agreement of sale, or under an agreement by which the fats were delivered in part satisfaction of the husband's debt, and directed a verdict for the plaintiff, from which the defendant appeals.

Argued before MCADAM, C. J., and FITZSIMONS, J.

Guggenheimer & Untermeyer, for appellant. *D. Frank Lloyd*, for respondent.

PER CURIAM. We think the question should have gone to the jury to determine whether the fats delivered to the defendant were sold to him in the ordinary way, or whether they were delivered in performance of an agreement that it was to go in payment of the debt owing by the husband to the defendant. It was a mode of paying his debt which, if assented to,—and the proof shows it was,—is open to no legal objection. For this reason, and for error

in excluding evidence tending to prove this agreement, the judgment must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

KOEHLER v. SCHEIDER.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

1. EVIDENCE—FORMER TRIAL—DECEASED WITNESS.

The words "former trial," as used in Code Civil Proc. N. Y. § 880, providing that, where a party has died since the trial of an action, decedent's testimony taken or read "at the former trial" may be given in evidence at a new trial, do not mean the last trial only, but take in any former trial where evidence was given by a party since deceased.

2. LANDLORD AND TENANT—NOTICE TO QUIT—"ON OR BEFORE."

A notice by a landlord to his tenant to move "on or before" the date when the lease expires is not a continuing offer to accept a surrender of the existing lease whenever the tenant elects to make it, but simply means that the landlord will insist on his legal right to have the tenant move out before the last day of the term.

Appeal from city court, general term.

Action by Bertha Koehler, as executrix of Hermann Koehler, against Joseph Scheider, to recover rent for the months of March and April, 1886, under a yearly letting from May 15, 1885. The defense was a general denial and a constructive eviction. There was a verdict for defendant. The judgment entered thereon was affirmed at general term of the city court, and plaintiff again appeals. For report of a former appeal, see 4 N. Y. Supp. 611. Code Civil Proc. N. Y. § 880, provides that "where a party has died since the trial of an action, or the hearing upon the merits of a special proceeding, the testimony of the decedent, or of any person who is rendered incompetent by the provision of the last section, taken or read in evidence at the former trial or hearing, may be given or read in evidence at a new trial or hearing by either party, subject to any other legal objection to the competency of the witness, or to any legal objection to his testimony, or any question put to him."

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.

E. J. Myers, (C. P. Daly, of counsel,) for appellant. *Maurice Rapp*, (George H. Yeaman, of counsel,) for respondent.

LARREMORE, C. J. There have already been so many trials of this case that it is to be regretted that the judgment must be again reversed. I think there was sufficient to go to the jury on the question of constructive eviction. I am also of opinion that it was not error to allow the testimony of plaintiff's testator, given on the first trial of this action, to be read in evidence on the present trial. The contention of appellant seems to be that section 880 of the Code would allow only such testimony as was taken upon the trial immediately preceding this one; but I think the language of the section sufficiently broad to take in any former trial where evidence was given by a party since deceased, which it is subsequently desired to use. There is nothing to show that such was not the intention of the legislature; and the opposite party always has the compensating privilege, granted by section 829, of being himself examined orally as to any matters referred to in the testimony so read.

But the trial judge fell into one very grave error in his charge. It appears that on or about the 1st day of February, 1888, the landlord, being plaintiff's said testator, sent the following note to defendant, dated that day:

"DEAR SIR: I hereby beg to inform you that I desire you to vacate the premises on First avenue which you now rent from me on or before April 30th, 1886."

The trial judge told the jury that they might read this letter in connection with the following one of March 1, 1886, from the defendant:

"*Mr. H. Koehler*—DEAR SIR: "We hereby surrender you the keys of prem-

ises occupied by us, and give you full possession. The premises being untenable is the cause of our removal."

The instruction to the jury was, in effect, that the aforesaid letter from the landlord was a continuing offer from the time of its transmission to accept a surrender of the existing lease whenever the defendant chose to make it; that the letter from the defendant might be construed to operate as such surrender; and that the lease, therefore, came to an end on March 1st. We think this was a misconstruction of the landlord's words. Some such communication from him was necessary at some time before the termination of the original lease; because otherwise, said lease being a verbal one for one year, a new demise for a second year would arise by operation of law, if defendant elected to remain. In the exercise of common sense, as well as good legal judgment, this is the only interpretation that could be put upon the landlord's letter. Upon a former trial of this action one of the judges of the court below has construed this letter as follows: "Where a landlord gives his tenant a notice to move on or before April 30th, that means he is not to move after April 30th; that he is to move on the termination of the tenancy, the liberty to move sooner being a liberty the tenant has. A landlord may give a tenant notice to move on or before the 1st of May, his lease being up to the first of May; but that does not mean that, if a tenant should move out the next day, he should pay no rent. It means that the landlord will insist upon his legal right to have him move out before the last day of the term. 'On or before' is common language of the law, meaning that, if you remain one day after, you remain at your peril; you are a trespasser,—a wrong-doer. A landlord can take nothing away from a tenant's rights, and waives nothing by serving a notice of that kind." This view is eminently sound, and it was grave error to submit any different one to the jury. They were allowed to find a verdict either on the ground of eviction, or of alleged surrender of the lease brought about by this correspondence. Of course, we cannot say upon which ground their finding was based; and the judgment must be reversed, and a new trial ordered, with costs to abide the event.

BOOKSTAYER, J., (concurring.) As was said by us when this case was before us on a former appeal, (4 N. Y. Supp. 611,) "what would justify a tenant in vacating the premises" hired by him for a constructive eviction "depends so much on the terms of the lease," and various conditions in that opinion set forth, that any discussion of it at that time would be premature. As the testimony on the new trial may change the aspect of the case, I still deem it premature to discuss that question at this time, or to express any opinion on that evidence presented to us now. The question is a very close one, and can be satisfactorily decided when all the facts are before the court, to be determined after a trial free from error in other respects.

The plaintiff having died before the last trial of this action, and the defendant having become incompetent, under section 829 of the Code, to testify to any personal transaction between himself and the deceased, he availed himself of the right given by section 830 of the Code to read his evidence given on both of the former trials of this action, subject to legal objection, etc., as provided in section 830. The plaintiff objected to the reading of the testimony given on the first trial, contending that the section confined the defendant to reading the evidence given by him on the last preceding trial, and did not permit the reading of that given on the first trial. I agree with the learned chief judge that no error was committed in allowing both to be read. The appellant's contention is based upon the language used in the section which permits the party rendered incompetent to read his evidence "taken or read at the former trial;" insisting that it means the last trial only, if there be more than one. This construction, if correct, would confine the reading of such testimony to the first trial only, following the death of the other party; for

the language permitting such reading is, "at a new trial or hearing," and not any new trial, if more than one should be required, which would defeat the object of the section in case there were two trials following the death of a party. I think the intention of the section was to give competency to any testimony of the witness given in the case between the same parties before the incompetency attached to him. The then plaintiff, against whose executrix it is now offered, had the same opportunity, and certainly as great an interest, as his executrix can have to resort to every test to probe the witness and his evidence. The same reasons which render it proper to allow the testimony given on the last trial preceding the plaintiff's death operate to allow the reading of the testimony given on the first trial, as far as the same is pertinent to the contest. I therefore think the section was intended to permit the reading of any testimony given under such circumstances, whether on the last or any preceding trial of the action.

The question read from the former examination of the witness, in which he was asked to state what the deceased had agreed to furnish, and what he had agreed to do, is, I think, fatal. It clearly called for the conclusion of the witness merely, and not for what took place or was said between the parties. The learned judge who presided at that trial first excluded the question on plaintiff's objection that it merely called for a conclusion, and when, shortly afterwards, it was repeated, allowed it; and the answer shows that he gave his conclusions only, and not what was said or done. It was sufficient for the plaintiff to object, as he did, on the grounds before stated by him, and it was not necessary to repeat those grounds. The court's attention had been specifically called to them. *Dilleber v. Insurance Co.*, 69 N. Y. 256, 260. The testimony given at the former trial is allowed to be read, subject to any legal objection to the testimony, or to any question put to the witness.

I agree with the learned chief judge, for the reasons assigned by him, that it was error to charge as was done in regard to the letters of February 1, 1886, and March 1, 1886. For these reasons the judgment must be reversed, and a new trial ordered, with costs to abide the event.

CLAFFY v. O'BRIEN *et al.*

(Common Pleas of New York City and County, General Term. June 2, 1890.)

PLEADING—ANSWER—ADMISSIONS.

In an action for the value of specific merchandise sold and delivered, an answer which denies each and every allegation of the complaint, but admits that at the time alleged plaintiff furnished "certain" goods, but not of the value alleged, does not admit the purchase of the goods referred to in the complaint. Affirming 7 N. Y. Supp. 499.

Appeal from city court, general term.

Action by John Claffy against John O'Brien and others to recover \$582.06 for goods sold and delivered. A judgment entered on a verdict in favor of plaintiff was affirmed by the general term of the city court, and plaintiff again appeals.

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.

L. Laflin Kellogg, for appellant. *E. T. Lovatt*, for respondents.

BOOKSTAVEN, J. The complaint, after averring the copartnership of the defendants, contains the usual allegations in an action for goods sold and delivered. The answer, after admitting the copartnership of the defendants, is in substance a general denial, coupled with an admission that, between the dates mentioned in the complaint, certain goods were furnished the defendants, but not to the value of \$582.06. The appellant contends that this was an admission that the goods in controversy were sold and delivered to the defendants; but in view of the fact that the plaintiff had, between the dates

mentioned in the complaint, sold certain goods to the defendants, which had been used by them on work done by them near Derby, Conn., while the goods sued for in this action were delivered in this city, and used here by John Flanagan upon a wholly different work, we think the admission means no more than that the plaintiff furnished certain goods to the defendants, but not the goods in controversy. As pointed out by the court below, the plaintiff did not construe the pleading into an admission of indebtedness for the goods referred to in the complaint; for he did not move for judgment on it, nor did he ask the trial judge to direct the jury that it contained an admission of liability for the debt. On the trial it was therefore necessary for the plaintiff to prove that the goods had been purchased by the defendants, or by their duly-authorized agent, and delivered to them or such agent; or, if no agency was proved, that the defendants, with a full knowledge of the facts, subsequently ratified the acts of one who was not their agent. The plaintiff did not claim that either of the defendants made the purchases in person, but endeavored to show that they were made by John Flanagan, who, he claimed, was defendants' superintendent, and duly-authorized agent to make the purchases. This the defendants denied; hence the question of agency became the vital one in the case, and under the general denial the defendants had the right to offer any competent evidence to disprove the agency. *Hier v. Grant*, 47 N. Y. 278; *Schaus v. Gas-Light Co.*, 36 N. Y. Super. Ct. 262. The evidence introduced by defendants tending to show that Flanagan was not at the time their superintendent, but a subcontractor under them, and that he bought the goods on his own account, was admissible under the pleadings. No other objection was taken to it, and therefore no error was committed in allowing it.

Appellant also contends that, this evidence having been admitted, it was error to exclude the contract between defendants and the city of New York, under which they claimed they had made a subcontract with Flanagan, and which plaintiff denied. That contract contains these covenants: "And the said party of the second part [meaning defendants] hereby further agrees to give his personal attention constantly to the faithful performance of the work, and not to assign or sublet the work, or any part thereof, without the previous written consent of the aqueduct commissioners indorsed on this agreement, but will keep the same under his personal control;" and plaintiff insists that it was important to have these facts before the jury upon the probability of the defendants, in the face of such covenants as these, hazarding their rights in a large and valuable contract by violating these covenants. But the clause of the contract containing these covenants was read on the cross-examination of one of the defendants, and was in evidence, and he was examined in regard thereto. The defendants failed to prove any written consent, as required by the terms of the covenants. The plaintiff, therefore, had these facts before the court and jury, and was entitled to present any considerations or arguments that might be deduced from these facts as to the probability of defendants' contention, with the same force and effect as if the contract itself had been offered in evidence, and we do not see how he was injured by its exclusion.

At the close of the case, the plaintiff made no request for a direction in his favor, and it went to the jury without objections. The trial judge clearly and concisely charged the jury upon the only questions involved in the case, and on the conflicting evidence they found in favor of the defendants, which conclusion we are not at liberty to disturb. The judgment and order appealed from should therefore be affirmed, with costs.

WHALEN v. STANDARD GAS-LIGHT CO.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

APPEAL—RULINGS ON EVIDENCE—ERRORS CURED.

In an action by a servant against his master for injuries alleged to have been caused by defective appliances, the error in admitting in evidence a statement of defendant's foreman is not cured by instructing the jury to disregard it.

Appeal from trial term.

Action by Patrick Whalen against the Standard Gas-Light Company of the city of New York to recover damages for a personal injury. There was a verdict for plaintiff for \$5,000. From the judgment rendered thereon defendant appeals.

Argued before DALY and BOOKSTAYER, JJ.

J. W. Hawes, for appellant. *Wm. C. Reddy*, for respondent.

DALY, J. The plaintiff, a laborer in the defendant's employment, was injured while loading gas-mains upon a truck, and it is claimed that defendant furnished unsafe appliances for the work; the truck, and the means for load-it, being, as alleged, unsuitable and improper. On the trial, a fellow-workman of the plaintiff was permitted to testify to a declaration made by defendant's foreman after the accident that the truck was not a fit truck to load pipe on. The exception to the admission of this evidence requires the reversal of the judgment. Admissions and declarations of an agent after the fact, not part of the *res gesta*, are not admissible. An attempt was made to cure the error by a subsequent direction to the jury to disregard the evidence. This is unavailing. *Erben v. Lorillard*, 19 N. Y. 299; *Church v. Howard*, 79 N. Y. 415. The judgment should be reversed, and a new trial ordered, with costs to abide event.

MORSEMANN v. MANHATTAN RY. CO.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

1. NEGLIGENCE—WHAT CONSTITUTES—ELEVATED RAILWAY.

The falling from an elevated railway structure of a crow-bar which was in use by an employe repairing the track, whereby a person in the street below was injured, raises a presumption of negligence, which is not overcome by proof that the crow-bar was dropped through the employe's efforts to save himself from falling.

2. SAME—INSTRUCTIONS—PROVINCE OF JURY.

In an action against an elevated railroad company for injuries to a person in the street below by the falling of an iron bar from defendant's track while undergoing repairs, a charge that the "ordinary care with which the railroad is chargeable requires it * * * to use reasonable and ordinary care in selecting such appliances as are in practical use and of easy application. * * * You must say whether the railroad company has used ordinary and reasonable care in performing this work upon its tracks. * * * Has it neglected the precautions which reasonable and prudent people would have taken to prevent an accident similar to the one upon which you have to pass?"—is not objectionable as inviting the jury to make affirmative suggestions as to possible safeguards which might have been supplied.

3. DAMAGES—PERSONAL INJURIES—PHYSICIANS' BILLS.

In an action for personal injuries, the amount of physicians' bills which plaintiff has paid on account of the injuries is admissible without proof of the value of the physicians' services.

Appeal from trial term.

An action by David Morsemann against the Manhattan Railway Company for personal injuries caused by the alleged negligence of defendant. There was a verdict for plaintiff for \$500. From the judgment entered thereon defendant appeals.

Argued before LARREMORE, O. J., and BOOKSTAYER, J.

Davies & Rapallo, (*Howard Townsend* and *Alexander S. Lyman*, of counsel,) for appellant. *William O. Campbell*, for respondent.

LARREMORE, C. J. The plaintiff, while driving under defendant's elevated railway structure in Third avenue on the 14th day of November, 1888, was injured by a crow-bar falling from such structure, which was in use by an employe making repairs to the track. The facts of the injury and its cause are undisputed, and no contributory negligence is alleged. The trial judge correctly held that a *prima facie* case of negligence was made out, (see *Maher v. Railway Co.*, 6 N. Y. Supp. 309,) and properly ruled that the fact that the crow-bar was dropped through the employe's effort to save himself from falling did not overcome the presumption of negligence. This latter question is necessarily bound up and a part of the general inquiry whether suitable precautions were taken for the safe conduct of the work in its entirety.

The learned counsel for appellant contend that the judge erred in his charge in the too great latitude it gave the jury to determine whether proper precautions had been taken. They argue that the jury were invited to make affirmative suggestions as to possible safeguards which might have been supplied. But, while the instructions were general in their terms, they were sufficiently limited by the context. The judge said: "Now, this ordinary care with which the railroad is chargeable requires it to be careful, not only in the running of its trains, but also in employing competent servants to do work upon its railroad, and to use reasonable and ordinary care in selecting such appliances as are in practical use and of easy application. * * * You must say whether the railroad company has used ordinary and reasonable care in performing this work upon its tracks. * * * Has it neglected the precautions which reasonable and prudent people would have taken to prevent an accident similar to the one upon which you have to pass?" If the charge was at all amenable to the criticism suggested by *Cumming v. Railroad Co.*, 104 N. Y. 669, 10 N. E. Rep. 855, all error was cured in the same manner that it was in that case. It appeared from the cross-examination of one of defendant's witnesses that, if the workman had adopted the very simple expedient of laying boards, which were handy for their use, between the tracks, while this work was going on, the accident would not have happened. As to this and other suggested precautions, it was not the province of the judge to ask the jury to say whether this or that omission in itself constituted negligence, but to instruct them, as he did, to determine from all the evidence, and under the circumstances disclosed, whether defendant had been negligent. *Buck v. Railway Co.*, 6 N. Y. Supp. 524.

Nor do we think it was error to admit evidence of the amount of the physicians' bills which plaintiff had paid, without proof of the value of the services. This is part of the expense to which he has been put by reason of the accident. In *Gumb v. Railway Co.*, 114 N. Y. 411, 21 N. E. Rep. 993, the plaintiff gave evidence of a physician's charge, but without giving evidence of payment or of value, and it was held error. The present case is different because plaintiff has paid the doctors' bills. If a bill has not been paid, perhaps it would be well to insist on some proof of value to repel the suspicion of a collusive charge of a speculative fee. When the bill has actually been paid there is little ground for such suspicion, and plaintiff would always be open to cross-examination as to a fictitious payment. No error appearing, the judgment should be affirmed; with costs.

WHITFIELD v. BROADWAY & S. A. R. Co.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

APPEAL—APPEALABLE ORDERS—NEW YORK CITY COURT.

An order of the general term of the city court of New York affirming a judgment of that court is not an "actual determination" in the action, within the meaning of Code Civil Proc. N. Y. § 8191, providing that an appeal may be taken to the court of common pleas for the city and county of New York, from an "actual determination" made by the marine court (now city court) of New York, at a general term

thereof, where a final judgment has been rendered upon an appeal taken to the general term. In such a case the appeal lies from the judgment entered in accordance with the directions of the order, and not from the order itself.

Appeal from city court, general term.

Action by Lizzie Whitfield against the Broadway & Seventh Avenue Railroad Company for personal injuries sustained by reason of defendant's negligence. A judgment entered upon a verdict against defendant was affirmed by the general term of the city court. Defendant again appeals. Code Civil Proc. N. Y. § 3191, provides that "an appeal may be taken to the court of common pleas for the city and county of New York from an actual determination made by the marine court of the city of New York, at a general term thereof, in either of the following cases: (1) Where a final judgment has been rendered upon an appeal taken to the general term."

Argued before LARREMORE, C. J., and DALY and BISCHOFF, JJ.

Root & Clarke, (Joseph Kunzman, of counsel,) for appellant. Louis F. Doyle, for respondent.

BISCHOFF, J. The appeal herein is from an order of the general term of the city court of New York, affirming a judgment of that court, and not from the judgment of affirmance. Such an order is not appealable. *Mehl v. Von derwulbeke*, 46 N. Y. 539; *Ferris v. Aspinwall*, 10 Abb. Pr. (N. S.) 137; *Bank v. Vail*, 15 N. Y. 593. Section 3191 of the Code of Civil Procedure, which regulates appeals from the general term of the city court to this court, and upon the provisions of which the jurisdiction of this court to review the proceedings of the city court depends, does not change the general practice. The actual determination referred to in that section comprehends either a judgment or final order; and an order is not final where it is but the preliminary step towards perfecting the determination of the court upon a pending controversy. "In the sense of the Code, an order is deemed final which closes the subject to which it relates, or it is not final when it is a preparation to other actions." *Clarke v. Goodridge*, 44 How. Pr. 234. An "actual determination" in an action is the judgment rendered therein, and not an order for judgment; and this applies as well to the judgment entered upon the order of a general term as it does to a judgment in the first instance. Subdivision one of section 3191, above referred to, specifically permits an appeal to this court from a final judgment upon an appeal to the general term of the city court; and the general provisions of that section, allowing an appeal from an order affecting a substantial right, or involving some part of the merits, are not controlling upon the specific provisions for an appeal from a final judgment. An order for such a judgment is of an interlocutory nature, and an appeal from the judgment also brings up the order for review. The case is in all respects similar to an order for judgment upon a demurrer. In such a case it is not the order which determines the action, but the judgment entered in accordance with the directions of the order; and the appeal lies from the judgment, and not the order. *Elwell v. Johnson*, 74 N. Y. 80. The omission to appeal from the judgment of affirmance upon the order of the general term of the city court leaves this court without authority to review its proceedings, and this appeal must therefore be dismissed, with costs.

BUCK v. MANHATTAN RY. CO.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

1. CARRIERS—INJURIES TO PASSENGERS—DEGREE OF CARE.

In an action against an elevated railroad company for injuries to plaintiff, who, while trying to leave a car platform, was forced between the car and the station platform by persons endeavoring to board the train, it is not erroneous for the court to refuse plaintiff's request for a charge that it was defendant's duty, as a common carrier, to use the utmost care which a very cautious person would exercise to pre-

vent injury to its passengers while on its vehicles, and to grant his other request for a charge that defendant was bound to use reasonable care to prevent injuries from the careless or wrongful act of any person whom it permits to come on its premises. Explaining 6 N. Y. Supp. 524.

2. SAME—INSTRUCTIONS—BURDEN OF PROOF.

A charge that "the mere fact that the plaintiff sustained an injury while a passenger on defendant's road does not entitle him to a verdict. He must show that the accident was caused by a lack of due care on the part of the defendant,"—is proper, as merely stating the rule that the burden of proving negligence is on plaintiff.

3. SAME—PASSENGERS ENTERING AND LEAVING CAR.

A request to charge, in an action against an elevated railroad company for injuries to a passenger who, while leaving the car, was thrown down by other passengers entering, that, if defendant opened the gate to the platform of the car without giving any warning to let plaintiff alight first, it was an invitation to passengers on the station platform to enter the car, and to plaintiff to leave, and that if the platform was so narrow that two persons could not pass abreast, and that the passengers entering the car collided with plaintiff while leaving it in consequence of an invitation given by opening the gate, then defendant is liable for any injury to plaintiff caused by the collision without his fault, is objectionable as involving the conclusion that opening the gate of the car platform was an invitation to passengers to enter the car, rather than to plaintiff to alight, and also as making defendant liable for the negligence of one passenger to another, without negligence on its part.

4. SAME—PRECAUTIONS ON OTHER OCCASIONS.

Where the evidence showed that only plaintiff and one other passenger alighted at the station where the accident occurred, and that only three passengers attempted to get aboard, evidence that on other occasions, on different trains, at other stations, plaintiff had heard the guards warn persons not to enter the train until the outgoing passengers had alighted, was properly excluded, in the absence of proof that the situation was identical with the circumstances in the case at bar.

Appeal from trial term.

Action by Carlos C. Buck against the Manhattan Railway Company. There was a verdict for defendant. Plaintiff appeals. For former reports, see 2 N. Y. Supp. 718; 6 N. Y. Supp. 524.

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.

Charles Meyers, (*John W. Weed* and *Richard M. Henry*, of counsel,) for appellant. *Davies & Rapallo*, (*Howard Townsend* and *Alexander S. Lyman*, of counsel,) for respondent.

BOOKSTAVEN, J. The action was brought to recover damages for personal injuries occasioned by the alleged negligence of defendant. No testimony was offered on its behalf. The plaintiff offered evidence tending to show that on the evening of January 29, 1888, he was a passenger on defendant's Third-Avenue line, going south. As the train approached the Sixty-Seventh street station, he arose to leave, and went to the rear end of the second car, and stayed there until the train stopped, when the guard opened the gate, and the plaintiff started to leave the car platform. As he approached the edge of that platform, and his right foot was raised in the act of stepping from it to the station, two or three persons on the station platform rushed on board the car, and violently pushed the plaintiff, thus throwing him around so that he lost his balance, and his foot went between the car and the station platform, inflicting a severe injury to the smaller bone of his right leg, near the ankle. At the time of this occurrence the guard stood with his left hand on the bell-rope, and his right managing the gates of the car. There was no extra guard on the station platform, and in fact no one there on behalf of the company except the "ticket chopper."

The chief question arising upon this appeal is the degree of care required of a common carrier in order to prevent injury to its passengers while in transit, or getting on or off its cars or other vehicles, from the careless or wrongful acts of other passengers. On this question the plaintiff submitted two requests to charge: "(1) The defendant being a common carrier, it was its duty to use the utmost care which a very cautious person would exercise to prevent injury to its passengers while on its vehicles. (2) The defendant

was bound to exercise reasonable care, not only on the part of its servants, but also like care in preventing injury from the careless or wrongful act of any other person whom it permits to come on its premises, if such careless or wrongful act on the part of others could have been foreseen." If these two requests are not actually antagonistic, the second is a modification, or at least an explanation, of the first, and limits the utmost care to reasonable care, as applied to the careless or wrongful acts of other passengers. The first request is an extreme statement of the rule of law applied in cases of injuries to passengers while they are being carried over a railroad, where the injury occurs from a defect in the road-bed or machinery, or in the construction of the cars, or where it results from a defect in any of the appliances such as would be likely to occasion great danger and loss of life to those traveling on the road. But plaintiff's injuries did not arise from any of these causes. The real ground of negligence charged is the failure to prevent other passengers from being reckless and careless in boarding the train. The collision of one person with another through carelessness is not peculiar to railway travel. It may happen upon the public streets or highways, in drawing-rooms or public halls, as well as upon railways; and in this latter class of cases, we think, a different rule of law applies, and the second request is a fair and just statement of that rule, under *Palmer v. Pennsylvania Co.*, 111 N. Y. 488, 18 N. E. Rep. 859; *Kelly v. Railroad Co.*, 112 N. Y. 443, 20 N. E. Rep. 383; *Laffin v. Railroad Co.*, 106 N. Y. 139, 12 N. E. Rep. 599; *Morris v. Railroad Co.*, 106 N. Y. 678, 13 N. E. Rep. 455. When this case was before this court on a former appeal, the learned judge who wrote the opinion on that appeal intimated that the rule requiring a common carrier of passengers to use the utmost care and skill which human prudence and foresight suggested, was applicable to a case like this, while the passenger was upon the car or its platform; but the appeal turned upon another point, and his remarks on this subject were collateral to the discussion of that other question, so far as they approved the first request. See 6 N. Y. Supp. 524. The court, therefore, was justified in refusing to charge the first request, and in charging the second.

The defendant's fourth, fifth, and sixth requests, which the court charged, relate to the measure of responsibility of a common carrier of passengers when one passenger is injured by the fault of another, and we think is fully sustained by *Putnam v. Railroad Co.*, 55 N. Y. 108; *Railroad Co. v. Hinds*, 58 Pa. St. 512; *Morris v. Railroad Co.*, 106 N. Y. 678, 13 N. E. Rep. 455; and the decisions above cited.

The defendant also requested the court to charge: "(1) The mere fact that the plaintiff sustained an injury while a passenger on defendant's road does not entitle him to a verdict. He must show that the accident was caused by a lack of due care on the part of the defendant." To this plaintiff excepted. The charge was proper. It merely stated the familiar rule of law that the burden of showing negligence is upon the plaintiff. *Holbrook v. Railroad Co.*, 12 N. Y. 242. Defendant's second and third requests relate to the degree of care required of a common carrier, and fall within the rule first considered.

Plaintiff also requested the court to charge: "(4) If you find that the defendant, by its agent, the guard, threw open the gate to the platform of the car without giving any word of warning to let the plaintiff alight first, then the opening of the gate was an invitation to passengers on the platform to enter the car, and the plaintiff to leave. If you find that the platform of the car was so narrow that two persons could not pass abreast, and that the passengers entering the car collided with the plaintiff while leaving it in consequence of an invitation given by throwing open the gate, then the defendant is liable to the plaintiff for any damage resulting from the collision thus brought about, provided the collision was not due to the fault of the plaintiff." The court refused to charge the first of these requests, but left it to the

jury to say whether or not the opening of the gate was an invitation to the plaintiff to leave the car. Both requests involve the conclusion of fact that the opening of the gate was an invitation to passengers to embark, rather than one to plaintiff to alight. The opening of the gate is clearly as necessary to let passengers off, as to let others on, the train. It is just as easy to reach one conclusion as the other. Where opposite inferences may with equal propriety be drawn from the same state of facts, it is the exclusive province of the jury to draw them. *Hart v. Bridge Co.*, 80 N. Y. 622. Besides, the request, if charged, would have made the defendant liable as a matter of law, without fault on the part of its servants, for the negligence of one passenger towards another.

The court did not err in excluding evidence of what the plaintiff had heard the guard say on other occasions, nor that he had seen extra guards at other stations. The inquiry in this case was whether the defendant was guilty of negligence towards the plaintiff in regard to this particular casualty, whereby he received his injuries; and, as a part of that inquiry, the conduct of the guard, his faults of omission or commission, were proper subjects of investigation, and this matter was fully gone into. The fact that on other occasions, on different trains, at other stations, the plaintiff had heard other guards say, "Passengers off first, please," or similar remarks, or that he had warned persons on the station platform, eager to enter the train, not to do so until the outgoing passengers had alighted, was immaterial, at least unless the situation in all essential details was identical, or nearly similar, with the circumstances involved in the case before the jury. This was not shown, nor was there any offer made to show it. We think it well settled in this state that when evidence of conduct, usage, or manner of operation is offered for the purpose of throwing light on a particular transaction, the circumstances must be shown to be identical, or so nearly similar as to require the same course of conduct in both cases. *Fillo v. Jones*, 2 Abb. Dec. 121; *Hill v. Railroad Co.*, 63 N. Y. 101. The number of passengers alighting from or entering trains not only differs very greatly at different stations, but also at the same station at different hours, and is an important element for the jury to consider in determining whether a guard should be placed at a particular station at a particular time or not. So, too, the disposition of the passengers to get on or off the train, as made apparent by their conduct to an ordinary observer, is an element to be considered by the jury in each particular case. As far as shown by the testimony, only two passengers, including the plaintiff, alighted at the station where the accident occurred, and only three attempted to get aboard. Besides these, there were only the "ticket chopper" on the platform, so that it was comparatively empty. There is absolutely no evidence showing that the three persons who attempted to board the car evinced any unruly or boisterous conduct before colliding with the plaintiff, and the evidence offered was properly excluded. The judgment should therefore be affirmed, with costs.

PERLS v. METROPOLITAN LIFE INS. CO.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

DISCOVERY—WHEN ALLOWED.

In an action for breach of a contract to pay plaintiff a commission on renewal premiums on policies procured by him as defendant's agent, an order granting a discovery and inspection of defendant's books, to enable plaintiff to prove the amount of his damages, will be vacated where the moving papers show that plaintiff kept books of his agency, and before the order was made was offered a statement of the desired facts as to every policy procured by him, in which he would furnish to defendant the name of the assured, and it further appears that, if the desired evidence ever becomes material, it will be available by a *subpoena duces tecum*.

Appeal from special term.

Action by Emanuel Perl's against the Metropolitan Life Insurance Company. Defendant appeals from an order granting a discovery, and inspection of its books. For report of a former appeal, see 8 N. Y. Supp. 532.

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.

Arnoux, Retch & Woodford, (Haley Fiske, of counsel,) for appellant. L. A. Fuller, for respondent.

BOOKSTAVEN, J. The action in which the order was made is in form an action at law for damages for an alleged breach of contract, but in reality is to recover commissions to which plaintiff claims he is entitled as a former agent of the defendant. The contract alleged in the complaint is denied in the answer, and another contract is set up, which, it is alleged, provided that commissions should only be paid plaintiff so long as he should not work or procure applications for any other life insurance company. The answer then alleges that he had worked for, and procured applications for, other life insurance companies, (naming them,) and that in consequence thereof all his rights under the contract were by its conditions terminated. It also alleges full payment to the plaintiff of commissions, and all services, up to such termination, and then sets up the statute of limitations. The trial of the action will necessarily, if plaintiff establishes the contract alleged in the complaint, involve the examination of a long account, and for this reason a reference was ordered several months ago on plaintiff's motion; but, instead of proceeding with the trial, he has applied to the court for a discovery. We think the application should have been denied. Before the plaintiff can recover any damages in this action, he must establish a breach of the contract on which he relies, and also that his action was commenced within the time limited by law. The discovery sought is not for the purpose of establishing either of these facts, but only to enable him to prove the amount of his damages, and therefore cannot, in strictness, be said to relate to "the merits of the action." If the books of the defendant become necessary to prove the amount of damages, he can compel their production by a *subpoena duces tecum*.

Judge Rumsey, in his recent work on Practice, (volume 1, pp. 683, 684,) says: "Wherever the object of the discovery can be obtained by the examination of a party, or by a *subpoena duces tecum*, the petition will not be granted." And again, at page 685: It must be shown "that the evidence or information sought cannot be obtained from any other source, and that a *subpoena duces tecum* * * * will not answer the purpose;" citing authorities to sustain the proposition. The decisions of this court on this subject, cited by the respondent, are not in conflict with this proposition. The case of *Union Paper Collar Co. v. Metropolitan Collar Co.*, 3 Daly, 171, was decided by Judge BRADY in 1869, and the same judge, delivering the opinion of the supreme court in *Harbison v. Von Volkenburgh*, 5 Hun, 464, said: "It is not a matter of right to inspect books and papers, and the privilege is not given except in extreme cases, where the refusal may involve the loss of a claim or defense; in other words, unless it is * * * indispensably necessary, and therefore essential to accomplish the administration of justice." No such necessity exists in this case. As before stated, the plaintiff's cause of action rests on his alleged contract, and its breach. The contract he claims to have in his possession, and it is not contended that the books will show the breach of it. Indeed, the chief grounds on which plaintiff seeks the discovery is the time and expense which will be involved in the examination of the books of defendant on the trial, and the supposed difficulty of getting the books by a *subpoena duces tecum*. The latter difficulty is more fancied than real, as the court has ample power to compel their production; and the first should not prevail in this case, for it appears from the papers that the plaintiff kept books of his agency while he was defendant's agent, and the latter, before the order in question was made, offered to give

the former a full statement of the facts desired by him with respect to every policy which was procured by him as agent under the contract in suit, in which he would furnish to the defendant the name of the insured, provided that upon investigation it should be found that he did procure such policy. This we think, under the circumstances of this case, is all that the plaintiff could in fairness and justice require.

The good faith of the application is also seriously questioned by the defendant, and it is charged that the discovery is sought for ulterior purposes. These charges are not satisfactorily met by the plaintiff, although he had an opportunity to do so; and, under the circumstances, we think the books should only be examined under the supervision of the referee. The order should therefore be reversed, with costs.

SANDERS v. NEW YORK EL. R. Co. et al.

(Common Pleas of New York City and County, General Term. June 3, 1890.)

1. ABATEMENT AND REVIVAL—WHAT ACTIONS MAY BE REVIVED.

An action for an injunction, in which incidentally damages for the maintenance of a railroad are demanded, is not an action for trespass, and on the death of plaintiff may be revived in the name of his devisee and executor. Affirming 7 N. Y. Supp. 641.

2. TRIAL—FINDINGS—SURPLUSAGE.

In an action for damages to abutting property caused by the operation of an elevated railway, the finding of fact referring to smoke, steam, gas, and cinders, of which there was ample proof, stated that grease, oil, and water, of which there was no evidence, were allowed to drop from passing trains, and fall in front of plaintiff's premises. No motion was made to amend the finding, and the judgment was apparently just on its merits. Held, that the statement would be treated as surplusage by the general term. Distinguishing *Pappenheim v. Railway Co.*, 7 N. Y. Supp. 679.

Appeal from equity term.

Action by Elizabeth B. Sanders, as devisee and executrix under the will of Charles W. Sanders, deceased, to restrain the New York Elevated Railroad Company and the Manhattan Railway Company from further operation of their elevated railway in front of plaintiff's premises, 41 Third avenue, New York city, and to recover damages already sustained by reason thereof. From the judgment entered in favor of plaintiff the defendants appeal. For former report, see 7 N. Y. Supp. 641.

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.

Davies & Rapallo, (Brainard Tolles and Alexander S. Lyman, of counsel,) for appellants. *Peckham & Tyler*, (Henry G. Atwater, of counsel,) for respondent.

LARREMORE, C. J. Our former decision in this action, affirming the order of revivor, (7 N. Y. Supp. 641,) expressly disposes of the first point raised upon this appeal. We think, also, that necessary inferences to be drawn from such decision must overrule appellants' second point. They contend that they should have been granted a jury trial as to the claim for past damages for loss of rentals before the testator's death. Our decision was that this action, which was pending at the time of Mr. Sanders' death, was and is an action in equity for an injunction, in which the question of damages is merely incidental and alternative. It was revived in its entirety as an equitable action, and must be preserved in its integrity as an equitable action.

There remains the point that the learned trial judge included in one of his findings of fact a statement that grease, oil, and water were allowed to drop from passing trains, and fall on Third avenue in front of said premises. There is no evidence to support such conclusion, and we cannot look upon it as anything but an inadvertence. It does not constitute an independent finding, but is included in the one referring to smoke, steam, gas, and cinders,

as to all of which there is a great deal of proof. This is not an instance of basing a judgment upon insufficient evidence, or no evidence at all. Here, in addition to the evidence upon the issues which have been tried, appears what purports to be a finding upon an issue which had not been tried. It is obvious that the judgment was intended to rest upon the findings on the issues actually discussed at the trial. The trial judge might have entertained a motion to amend his findings in this respect, if the matter had been called to his attention. It is evident, upon inspection of the whole case, that this apparent error could not have had any influence on the result. We will not presume, for the sake of reversing a judgment apparently just on the merits, that the judge, in order to enhance the damages, took into consideration elements not proved before him, and not even mentioned or referred to during the hearing. We think, under the circumstances, the obnoxious clause may be disregarded as surplusage, and treated as if actually expunged. We do not regard the case of *Pappenheim v. Railway Co.*, 7 N. Y. Supp. 679, as controlling. There the inadvertent finding was utterly irreconcilable with, and antagonistic to, the judgment, and was moreover made as a separate and distinct finding. That decision was put upon the ground that, where two findings of fact are inconsistent, the appellant is entitled, in support of his exceptions, to have that taken as true which is the more favorable to himself. The case at bar is distinguishable from the case cited.

The judgment appealed from should be affirmed, with costs.

EAGLE TUBE CO. v. EDWARD BARR CO.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

DAMAGES—PROXIMATE—BREACH OF CONTRACT.

Plaintiff contracted with defendant to weld heads into 540 tubes, which, as plaintiff knew, had been ordered by a boiler company of defendant for use in making boilers. Plaintiff delivered the tubes to the company with the heads "sweated" in, and they were on that account rejected, and the company was compelled to plug up the holes in which the tubes were to be placed, and procure other tubes, and insert them in the boilers at such times as they were not in use, and also to pay for extra carting. *Held*, that these expenses were the natural consequence of plaintiff's breach of contract, and that it was not necessary for defendant to have actually paid the claim of the company therefor in order to recover it against plaintiff.

Appeal from city court, general term.

Action by Eagle Tube Company against Edward Barr Company. Plaintiff appeals from a judgment of the city court, general term, affirming a judgment in favor of defendant on a counter-claim.

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.

Smith & White, for appellant. Billings & Cardoso, for respondent.

BOOKSTAVEN, J. The action was brought to recover the contract price of goods sold and delivered to the defendant amounting to \$106.25. The defendant admitted the indebtedness, and set up a counter-claim for \$600 damages arising, not out of the contract sued on, but on a former contract between the parties, whereby the plaintiffs undertook to weld heads into about 540 pieces of iron pipe which had been ordered by the Vertical Tube Boiler Company of the defendant, and which the plaintiff delivered to that company with their heads sweated in, and not welded in, and which were on that account rejected by the Vertical Tube Company. Defendant's answer set up the agreement to weld in the heads, its breach, and a claim for the special damages sustained by it by reason thereof. To this plaintiff replied, admitting that it contracted to weld the heads into the pipe, but alleged that its contract only required them to stand a pressure of 300 pounds, and that they not only stood this, but much more. On this trial, evidence was given tending to support the issues so raised, and the jury found a verdict for the de-

fendant for the amount of its counter-claim less the amount of plaintiff's claim in this action. The general term of the city court reviewed the questions of fact, and affirmed the judgment. Therefore, we can only examine the questions of law in the case as presented to us.

There is but one question raised by the various exceptions to the introduction of evidence and to the charge; and that is, what is the true rule of damages to be applied to such a case? Appellant contends that the defendant, if entitled to any damages, could at most recover only the value of the pipe if welded according to the contract; that is to say, the original cost, the expenses of transportation, and the amount the defendant paid the plaintiff for the welding. In all ordinary cases of breach of an executed contract, the defendant could not recover even that much unless the goods were totally spoiled for any purpose, as it is claimed these were. But in this case the answer alleged the plaintiff was "fully informed as to the purpose for which the pipes were to be used," and charged it with knowledge of the necessary loss and damage which would occur in case the agreement was not carried out; and the court at plaintiff's request charged the jury that, "if the plaintiff was not informed for whom and for what purpose the pipes were needed, it was not responsible for any special damage suffered by the defendant resulting from the defective pipes, if they were defective, thus sharply bringing home to the jury the question of plaintiff's knowledge of the use to which the pipes were to be put; and on the evidence the jury found that the plaintiff had such knowledge. To us it appears that the evidence on this question on the part of the defendant was very slight, and that on the part of the plaintiff was much stronger; but both the jury and the general term of the city court have determined otherwise, and we are concluded thereby, as there was some evidence to support the finding. Where the parties to a contract of sale have such knowledge of special circumstances affecting the question of damages as that it may be fairly inferred they contemplated a particular rule for estimating them, and entered into a contract on that basis, that rule will be adopted. *Booth v. Rolling-Mill Co.*, 60 N. Y. 487. The Vertical Tube Boiler Company was under contract to deliver certain boilers at a certain time. The tubes or pipes in question were ordered of the defendant to be used in making these boilers, and it contracted with plaintiff to weld in a head on the pipes furnished by it, with knowledge, as the jury has found, of the circumstances. This it failed to do, and in consequence of such failure the Vertical Tube Boiler Company had to deliver the boilers without them in order to prevent a breach of contract on its part, and to do this was put to the expense of plugging up the holes in which the tubes were to be inserted, and were compelled to procure other tubes, and insert them in the boilers after they had been placed, and at such times as they could when the boilers were not in use. Besides, they had to pay for extra carting, etc. These items constituted the claim made by that company against the defendant, and which the latter set up in its answer as a counter-claim against the plaintiff. We think these extra expenses were the natural consequence of plaintiff's breach of contract, and were properly allowed. It was not necessary for the defendant to have actually paid in money the claim of the Vertical Tube Boiler Company in order to set up and recover it against the plaintiff, if it was just. It is enough that it is liable to pay it. 1 Sedg. Dam. (7th Ed.) 197. But defendant has practically paid it, as the Vertical Tube Boiler Company has claimed the amount allowed by the jury against defendant, and refused to pay a bill due the defendant, of a larger amount, in consequence. Plaintiff claims that, inasmuch as only about one-fourth of the tubes were tested, the counter-claim should not have been allowed, because the proof failed to show all would not stand the required pressure; but the contract as claimed by the defendant, and found by the jury, was that the tubes should not only stand the pressure, but that the heads should be welded in; and the chief contention on this

branch of the case was not so much about the pressure as about the welding in of the heads, and we think the testimony sufficient to warrant the jury in finding that they had not been welded but "sweated" in, as it is known in the trade, and that all had been subjected to the same process, and were liable to the same infirmity as regards pressure. The judgment should therefore be affirmed, with costs.

BUDDIN v. FORTUNATO.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

1. NEGLIGENCE—DANGEROUS EMPLOYMENT—BLASTING IN STREET.

One who contracts to do blasting in a street is not relieved from responsibility to any person injured thereby, though he has sublet the contract to a third person, through whose negligence the injury occurred.

2. LANDLORD AND TENANT—RIGHTS OF TENANT—INJURY TO PREMISES.

In an action for damages to property by negligent blasting, it is not error to allow for repairs to premises of which plaintiff is only lessee, it not appearing that the landlord was bound by any covenant to keep the property in repair, and the repairs being necessary to make the building tenantable after the injury.

3. BAILMENT—RIGHTS OF BAILEE—INJURY TO PROPERTY.

Plaintiff in such action cannot recover for injuries to chattels which had been left with him by the owner to be repaired.

Appeal from eleventh district court.

Action by Theodore Buddin against Malcho Fortunato. There was judgment for plaintiff, and defendant appeals.

Argued before LARREMORE, C. J., and BOOKSTAYER, J.

C. H. Preyer, for appellant. John G. Ritter, (D. Edgar Anthony, of counsel,) for respondent.

BOOKSTAYER, J. The action was brought to recover damages to plaintiff's property caused by alleged negligence in blasting. On the trial it was proved that the defendant had entered into a contract with the city of New York to do certain work which involved the necessity of blasting in Ninety-First street, in the vicinity of plaintiff's premises. By the terms of this contract, he was precluded from subletting any part of it except by a consent in writing on the part of the city indorsed on the contract. No actual negligence or want of skill on the part of the defendant was proved, and his counsel moved to dismiss the complaint on this ground, which was denied, and defendant excepted. He also endeavored to show in his defense that he had sublet the contract to one Nicholas Fortunato; that the latter was doing the work, and he was in no manner interested in it except as to the result; that he had no control over the manner, mode, or means used to obtain the result, nor over the workmen employed, and consequently he was not liable to the plaintiff for any negligence on the part of Nicholas or his servants. Evidence tending to prove these facts was excluded, and defendant excepted.

It is well settled, as appellant contends, that as a rule, in actions for damages caused by alleged negligence, either actual negligence must be shown, or facts and circumstances proved from which the inference of negligence can be fairly and reasonably drawn; and it is equally well settled that one person cannot be held for the damage caused by the negligence of another unless the relation of master and servant, or principal and agent, exists between the person sought to be held, and the person whose negligent act is complained of. But both of these rules have their exceptions, and an action brought to recover damages caused by blasting is one of these. In *Hay v. Cohoes Co.*, 2 N. Y. 159, the court expressly held that in such an action the defendant was liable for such injuries although no negligence or want of skill was alleged or proved; and in *Tremain v. Same*, Id. 163, in the same kind of action, it was held that evidence tending to show the work was done in the most careful manner was inadmissible, there being no claim to recover exemplary dam-

ages. See, also, *St. Peter v. Denison*, 58 N. Y. 416. In the case under consideration, the defendant contracted with the city to do all requisite blasting. This was, from its nature, dangerous. When the undertaking is one intrinsically dangerous to others, the person undertaking it is not relieved from responsibility to any person injured thereby although he has entered into a contract with some person to perform it, and the injury has occurred through the negligence of the latter. *Moak's Underh. Torts*, 277, and cases cited; *Hexamer v. Webb*, 101 N. Y. 387, 4 N. E. Rep. 755. The theory on which the case was tried by the court below was entirely correct, and it committed no error either in refusing to dismiss the complaint, or in excluding evidence offered by defendant.

In awarding judgment the court allowed certain items for damage to the premises, of which the plaintiff was only lessee, and also for injuries to a phaeton which did not belong to him at the time. The appellant contends it was error to allow either of these items. As to the damage to the premises, the lease is not before us, and it does not appear that the landlord was bound by any covenant to keep the building in repair; and, in the absence of such proof, none will be inferred. *Witty v. Matthews*, 52 N. Y. 512; *Howard v. Doolittle*, 8 Duer, 464. Besides, it appears from the evidence that it was necessary for the plaintiff to make some of the repairs he did in order to protect his property, and all of them to make the building tenable after the injury. Therefore, we think these items were properly allowed. Nor can the defendant be made to pay twice for such damages, as what he is compelled to pay for that purpose in this action could not be again recovered by the landlord in any action he may bring for injury to the freehold.

As to the phaeton, the plaintiff was not the owner of it at the time. It had been left with him to be painted. At most, he was a bailee for hire, and bound to use the ordinary care only. *Fos v. Bruden*, 3 Daly, 187. He was not liable to the owner for the injury occasioned by the wrongful act of another. It was therefore error to allow damage to it; and the judgment must be reversed for this reason, and a new trial ordered, with costs to the appellant to abide the event, unless the plaintiff, within 10 days, stipulates to reduce the judgment by \$37, the amount allowed for such damage, in which event the judgment will be affirmed, without costs of this appeal to either party against the other.

EGAN v. BERKSHIRE APARTMENT ASS'N.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

NEGLIGENCE—DANGEROUS PREMISES—ELEVATORS.

Plaintiff's intestate went to defendant's apartment house to visit a servant of one of the tenants, and entered an elevator used for carrying freight and servants. In one side of the elevator was a slide, movable up and down, for the purpose of taking on baggage. While the elevator was ascending, intestate, either through faintness or loss of consciousness, sank to the floor, and fell through the slide, which was open. *Held*, that the accident was a misadventure for which defendant could not be held liable.

Exceptions from trial term.

Action by Dominick J. Egan, as administrator of Winifred Egan, against the Berkshire Apartment Association. The trial judge dismissed the complaint, and directed the exceptions heard in the first instance at general term.

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.

Goff & Pollock, for plaintiff. *Albert Stickney and Samuel H. Ordway*, for defendant.

LARREMORE, C. J. This action is to recover \$5,000 damages, under the statute, for alleged negligence resulting in the death of plaintiff's intestate. The facts testified to by plaintiff's witnesses, and which must be taken

as established for the purposes of this appeal, are as follows: Plaintiff's intestate went to the Berkshire apartment house to pay a friendly visit to a domestic servant in the employ of one of the tenants. She entered an elevator which was used for the carrying of baggage and freight, as well as of conveying servants employed in the house, to the upper stories. The sides of this elevator were of wire, and in one side was a slide, which was movable up and down, for the purpose of taking on baggage. When said intestate stepped into the elevator, and when the accident happened, this slide was up. There also extended from the ground floor to a height of several feet, but not quite up to the second floor, a wire screen or cage, of the same mesh, and in all respects similar to, the wire forming the elevator sides, the object of which was to protect persons from falling into the elevator shaft. Just under the ceiling of the first floor, and above where the wire cage stopped, and between it and the staircase, there was an open space by the side of the elevator shaft. Plaintiff's principal witness gives this description of the accident: "I don't remember that I heard anybody else cry or shout, or make any noise, besides myself. I must have been pretty excited. I suppose the thing that first excited me was seeing her fall. All that I saw at the time the thing occurred,—I saw her fall. I saw her fall inside under the slide. That is all I could see. She didn't fall exactly down. She fell more backward,—towards the back of the elevator; and then I saw her fall outside, at the side, underneath the slide that raised up and down." A mysterious feature of the casualty is that, although the elevator fits quite closely in its shaft, there being only a space of a very few inches between the side of the shaft and the side of the elevator, the deceased did not fall on the staircase outside, but was found lying dead at the bottom of the shaft. The only possible explanation of the intestate's being able to get out of the elevator at all is that when she fell the open slide of the elevator was abreast of the opening in the shaft just under the second floor. Plaintiff's witness aforesaid caught at her clothing in an effort to save her, and apparently held onto her dress after she had got into the open space outside. Presumably this was the cause, while the elevator kept moving up, of the intestate's being drawn back within the elevator shaft. The evidence is undisputed that her remains were found at the bottom of such shaft.

Such facts as are shown convince me that the deceased originally fell down inside the elevator through vertigo, fainting, or loss of consciousness. The reason attempted to be assigned on the trial for such fall is most improbable. The witness above referred to, Katie Egan, on this point, said: "As far as I saw, the fur of her cloak caught in the outside wire; and, as the elevator moved up, it drew her backward." It seems impossible that fur of any quality or kind, even if it did catch upon, or become entangled in, the wire netting, could adhere thereto with sufficient tenacity to draw a woman backward off her feet, especially if another person grasped her clothing on the other side, and helped her to pull back. A careful analysis of the evidence also shows that the witness virtually abandoned this theory as to the cause of the mishap. Upon her cross-examination, she admitted that she had previously testified at the coroner's inquest that "she [the deceased] stumbled some, and Tony said to her: 'Be careful. The slide is up,'"—and further that she had said at the inquest: "It was as if her dress was caught in the wire." One of the present counsel for appellant appeared at the inquest, and put the question to the witness: "When you say she stumbled, you mean she was pulled back by her dress?" to which she answered, "No." This testimony at the inquest was obviously very different, as to the probable cause of the accident, from that given by the witness on her direct examination in the present trial. Before the coroner, she not only neglected to say that the deceased was pulled back by her dress, but she directly refused to give that explanation, though it was suggested by a leading question. The witness further testified that the facts as related by her at the inquest, a month or two after the

accident, were as she remembered them then; that her recollection then was fully as good, and might be clearer, than at the time of the present trial; that she was no exception to the rule that persons remember events better when they are fresh than when they are two or three years old. The only fair construction of her evidence as a whole is that, whenever her testimony at the trial conflicted with that at the inquest, she intended that the latter should prevail, and she was to be considered as now testifying to the facts as she had formerly stated them. Accepting this view, the theory that the decedent was pulled out of the elevator, by the catching and adhering of the fur on her cloak to the wire cage is left without foundation. In fact, the only possible hypothesis the admitted facts will support is that, either through faintness or loss of consciousness, she stumbled, and sank to the floor of the elevator, while it was ascending. It is in evidence that she had been sick a few weeks before this time, and also that she did not utter a cry or any sound when she fell. Having fallen thus, in some inexplicable manner,—perhaps by the momentum from the fall,—she rolled out through the slide into the opening in the shaft, and, being dragged back through Miss Egan's mistaken zeal in holding fast to her dress, fell to the bottom. The only alleged act of negligence on the part of defendant was in leaving the slide open. Even if the elevator had been constructed without a slide, but with a permanent opening in the side, I should not have considered such form of construction, in itself, sufficient to make out a *prima facie* case of negligence. The accident was not only unexampled, it was one which, if it had not actually happened, would seem physically impossible. We think the trial judge correctly held that plaintiff's case disclosed no facts which would authorize a finding of negligence, and correctly ruled in dismissing the complaint at that stage.

The following language of ANDREWS, J., in *Lofthus v. Ferry Co.*, 84 N. Y. 455, forcibly states the legal principles which we conceive are applicable to the present case: "The rule does not impose upon the defendant the duty of so providing for the safety of passengers that they shall encounter no possible danger, and meet with no casualty, in the use of appliances provided by it. It was possible for the defendant so to have constructed the guard that such an accident as this could not have happened; and this, so far as appears, could not have been done without unreasonable expense or trouble. If the defendant ought to have foreseen that such an accident might happen, or if such an accident could reasonably have been anticipated, the omission to provide against it would be actionable negligence. But the facts rebut any inference of negligence on this ground. The company had the experience of years certifying to the sufficiency of the guard. That it was possible for a child, or even a man, to get through the opening, was apparent enough. But that this was likely to occur was negated by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty." Again in *Laffin v. Railroad Co.*, 106 N. Y. 136, 12 N. E. Rep. 599, Judge EARL remarks that "no structure is ever so made that it may not be made safer. But, as a general rule, when an appliance or machine or structure not obviously dangerous has been in daily use for years, and has uniformly proved adequate, safe, and convenient, its use may be continued without the imputation of culpable imprudence or carelessness."

We think the motion for a new trial should be denied for defendant, and we could not better sum up the reasons for our conclusion than by employing the final words of Judge EARL's opinion in the case last cited: "A careful consideration, therefore, of the whole case, as it appears in this record, has led up to the conclusion that the defendant is not legally responsible for the accident which befell the plaintiff. It was a misadventure, and no rule of law will permit her to charge the misfortune, in whole or in part, to the defendant."

McGRANE v. KENNEDY *et al.**(Common Pleas of New York City and County, General Term. June 2, 1890.)*

VENDOR AND VENDEE—DEFECTIVE TITLE.

In a controversy submitted on agreed facts the question was whether defendants should be compelled to specifically perform a contract to purchase of plaintiff certain premises on Thirty-Eighth street, in the city of New York, title to which plaintiff claimed under a devise by one N. to his widow of all his interest "in and to certain lots in Thirty-Seventh street, in the city of New York, which I acquired from Chatfield H. Smith." The agreed case contained an admission that, in proceedings for probate of N.'s will, Chatfield H. Smith testified that he conveyed to testator real property on Thirty-Eighth street, that he never sold him any other real property, and that, as far as he knew, there was no other person bearing his name in New York city. *Held*, that the admission did not include a concession of the truth of Smith's testimony, and was not of itself sufficient to warrant the assumption that N. was not seised of real property in Thirty-Seventh street, and that, in the absence of such estoppel, plaintiff's title was not sufficiently free from doubt to justify a direction that defendants accept it.

Case submitted on agreed statement.

Action by Sarah A. McGrane against James Kennedy and Patrick Kennedy, for specific performance of a contract to purchase premises No. 588 West Thirty-Eighth street, in the city of New York.

Argued before LARREMORE, C. J., and BISCHOFF, J.

John Hardy, for plaintiff. Page & Taft, for defendants.

BISCHOFF, J. A careful examination of the case agreed upon and submitted by the parties to this action shows that one James Nelson, at the date of his last will and testament, April 25, 1856, and at the time of his death, March 28, 1857, was the owner of certain real property, situate on West Thirty-Eighth street, in the city of New York, being the same premises described in the contract of sale forming a part of the case submitted; that the last will and testament of said James Nelson, upon due citation to the testator's heirs at law, was duly admitted to probate by the surrogate of the city and county of New York, on the 5th day of June, 1858, and contained the following devise to his widow, Mary Elizabeth Nelson, viz.: "Second. I give, devise, and bequeath to my wife, Mary Elizabeth Nelson, all the right, title, and interest I possess in and to certain lots in Thirty-seventh street, in the city of New York, which I acquired from Chatfield H. Smith, of the value of five thousand dollars (\$5,000.)" It is through this devise and several mesne conveyances that the plaintiff claims title to the premises agreed to be sold by her to the defendants. Defendants declined to perform the contract on their part, and refused to accept the plaintiff's deed, alleging, as the ground for such refusal, that the premises agreed to be sold were not the premises devised to Mary Elizabeth Nelson. From the plaintiff's brief accompanying the case submitted it appears that the facts extrinsic to the last will and testament of James Nelson, upon which the plaintiff relies in support of her title, are that, at the time of making his last will and testament, and at the time of his death, James Nelson was seised of the Thirty-Eighth street premises, which had been conveyed to him on the 19th day of February, 1856, by one Chatfield H. Smith, and that said Chatfield H. Smith had never conveyed any other real property in the city of New York to the testator; and upon these alleged extrinsic facts the plaintiff contends that it was the intention of the testator, by the aforesaid devise to Mary Elizabeth Nelson, to devise to her the Thirty-Eighth street premises, and that the words "Thirty-Seventh street," in the devise, must be deemed to be an immaterial error in the description of the said premises. If the case agreed upon and submitted contained an explicit admission of the alleged extrinsic facts relied upon by the plaintiff, no difficulty would arise in the way of a judicial determination of the question then presented; but, in the absence of such an admission, the court will be compelled to sustain the defendants' refusal to perform the contract on their part,

and to accept the deed tendered by the plaintiff. The admission that there does not appear of record any conveyance to the testator of premises on Thirty-Seventh street is in itself not sufficient to warrant the court in assuming that James Nelson, the testator, was not seised of any real property on Thirty-Seventh street, the title to which he may have held under an unrecorded instrument. It is true that there appears in the case agreed upon an admission that Chatfield H. Smith, in the proceedings relative to the probate of the last will and testament of James Nelson, testified that he conveyed to the testator certain real property on Thirty-Eighth street; that he never sold him any other real property; and that he was the only person in the city of New York named Chatfield H. Smith of whom he knew. But this admission does not include a concession of the truth of Smith's testimony. Neither can it be successfully claimed that the testimony of Mr. Smith, in proceedings to obtain the probate of the last will and testament of James Nelson, has any binding force or effect or is controlling upon the heirs at law of James Nelson in any action or proceedings which may be instituted by them to recover real property, the title to which they may claim through him. There is no provision of law or rule of evidence which would justify a contention that the testimony of a particular witness in an action or proceeding to which some of the parties to another action or proceeding were parties is conclusive upon them, in such last-mentioned action or proceeding brought for a different purpose, and against different parties. It is the adjudication by judgment or decree which operates as an estoppel of record upon all the parties to the action or proceeding wherein such an adjudication was made. The proceeding brought to obtain the probate of the last will and testament of James Nelson had for its sole object the establishment of the validity of the paper propounded. It is not the province of the surrogate in probate proceedings to determine the effect of a last will and testament with the aid of extrinsic facts, when the testamentary disposition of the testator's property is clear and explicit, and does not trespass upon any legal restraint; and it does not appear from the case submitted that the surrogate, by the decree establishing the validity of the said will, undertook to do further. Eliminating from the case the admission that Chatfield H. Smith in the probate proceedings testified as stated, no facts remain which could serve to indicate that it was the intention of James Nelson, the testator, to devise to his widow, Mary Elizabeth Nelson, any property other than that particularly described in the devise itself, to-wit, property on Thirty-Seventh street, in the city of New York. The statement of facts agreed upon by the parties to this action is therefore entirely barren of any admission of facts or circumstances from which it can be successfully contended that the heirs at law of James Nelson are concluded by estoppel of record, resulting either from their voluntary act or the judgment or decree in judicial proceedings to which they were properly made parties, from asserting their claim to property of the testator which was not in express terms bequeathed or devised to others. In the absence of such estoppel of the heirs at law of said James Nelson, the plaintiff's title to the Thirty-Eighth street premises, agreed to be sold by her to the defendants, cannot be said to be so free from doubt as to justify a direction by this court that the defendants specifically perform the contract on their part, upon tender of performance by the plaintiff. Owing to the absence from the case submitted of the extrinsic facts relied upon by the plaintiff in support of her title, as hereinbefore explained, the court is constrained to answer the question propounded by the parties hereto in the negative, and judgment must therefore be awarded to the defendants, and against the plaintiff, for the sum of \$555, and interest from the 17th day of October, 1889, that being the amount paid by them on account of the purchase money, and \$75 damages accruing to defendants from plaintiff's inability to perform the contract on her part, together with the costs and disbursements of this action.

GEOGHEGAN v. ATLAS STEAM-SHIP CO.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

1. STATUTES—PROOF AND CONSTRUCTION OF FOREIGN LAWS—DEPOSITIONS.

A commission to take the testimony of foreign lawyers to prove the existence and construction of a statute of their country is properly denied where the moving papers fail to show any ambiguity or uncertainty in the meaning of the statute, or that it has received any judicial interpretation, or that it cannot be proved under Code Civil Proc. N. Y. § 942, providing for the proving of foreign statutes by officially printed copies.

2. SAME—EXPERT TESTIMONY.

Expert testimony to prove the construction of a statute of a foreign country is not admissible where the language of the statute is plain, and there is no decision by the courts of such country upon the points in controversy.

Appeal from special term.

An action by Susan Geoghegan, as administratrix of John M. Geoghegan, against the Atlas Steam-Ship Company, for negligently causing the death of plaintiff's intestate. Plaintiff appeals from an order denying her motion for a commission.

Argued before LARREMORE, C. J., and BOOKSTAYER, J.

Roger M. Sherman, for appellant. Wheeler, Cortis & Godkin, for respondent.

BOOKSTAYER, J. The action in which the motion was made is brought to recover damages from the defendant for the alleged death of plaintiff's intestate, caused, as it is claimed, by the negligence of defendant in the harbor of Savanilla, republic of Colombia. The learned judge who heard the motion says in his opinion it was conceded on the argument by plaintiff's counsel that the sole object of the proposed commission was to secure proof of a certain statute law of the republic of Colombia, and its interpretation in the country. No other ground for the motion is suggested by the moving papers. They do not show that there is any ambiguity or uncertainty in the meaning of the law, or that it has received any judicial interpretation in that republic, or that it cannot be proved under section 942 of our Code. We think the latter fact, at least, must be made to appear, before the court would be authorized to grant the commission.

It has been held that the statute law of another state cannot be proved by parol. *Toulandou v. Lachenmeyer*, 6 Abb. Pr. (N. S.) 215; *Kenny v. Clarkson*, 1 Johns. 385. But, if the object of the commission had been stated in the papers to be to prove the construction and interpretation of this foreign statute, the opinion of the person sought to be examined would not be admissible to prove it. Where the evidence of a foreign law consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court to determine; and evidence of a lawyer of another state or country as to what, in the opinion of lawyers there, should be the construction of a statute of that state or country, is not admissible where the language of the statute is plain, and there is no decision by the courts of that state or country upon the points in controversy. *Bank v. Boardman*, 47 Hun, 142; *Kline v. Baker*, 99 Mass. 255; *Bank v. Wood*, 142 Mass. 564, 8 N. E. Rep. 753; *Hennessey v. Farrelly*, 13 Daly, 468; *Dupuy v. Wurtz*, 53 N. Y. 571. The motion was therefore properly denied, and the order appealed from should be affirmed, with costs.

LARREMORE, C. J., (*concurring*.) This is an appeal from an order denying an application made by plaintiff for a commission to take the testimony of two advocates in active legal practice in the republic of Colombia, as experts. It was conceded on the argument that the object of such examination was to prove a certain statute law alleged to have been in operation in

the United States of Colombia, (which government since has been merged into the present republic of Colombia,) and the interpretations of such statute made and accepted by the courts of such foreign country. Section 942 of the Code provides a simple manner of proving foreign statutes by officially printed copies. The learned counsel for appellant argues that the law does not restrict him to such form of proof, and further contends that he should not be so limited, because there is nothing to show that printed copies of the law in force when the accident occurred exist. Undoubtedly the learned judge did, in effect, presume that printed copies were obtainable; but we think it was not error for him to entertain such presumption, under the circumstances disclosed, in a matter addressed to his discretion. Section 888 is not mandatory, but the discretion granted by it is to be exercised with the greatest latitude, and always in the interests of substantial justice. Nevertheless the judge was not precluded from considering that, in the present state of civilization, most governments officially print their statutes, and of supposing such to be the fact here, as there was no allegation in the papers, or suggestion on the argument, to the contrary. On the basis that the proof could be made under section 942, we think it was a proper exercise of discretion not to put the parties to the trouble and expense of any other form of procedure. On the question of the alleged interpretation of the statute by the courts of Colombia, we think the rule well settled that the evidence of the proposed witnesses would be incompetent if obtained. *Bank v. Boardman*, 47 Hun, 142, and cases there cited. It would have been an unwise exercise of discretion to grant plaintiff a commission to take evidence which, on her own showing, would certainly have been inadmissible. The order should be affirmed, with costs.

SHACKELFORD v. MITCHILL *et al.*

(Common Pleas of New York City and County, General Term. June 3, 1890.)

LIFE INSURANCE—ASSIGNMENT OF POLICY.

In 1846 B. assigned an insurance policy on his life to M., under an agreement that the proceeds, when collected, were to be applied to the liquidation of any indebtedness from B. to M. that might arise out of transactions then commenced between them, and that the balance, if any, should be paid over to B.'s legal representatives. In 1851 the parties had a settlement, and M. accepted one-half the balance due him, and gave a written discharge of all his claims against B. Nothing was then said or done concerning the policy, and M. continued to carry it until his death, 21 years afterwards, and during that time, and for 10 years longer, B. in no way indicated that he had any interest in the policy, though M.'s executors had negotiated with him to take it up. Held that, in the absence of any evidence as to the agreement of the parties after the settlement of 1851, it must be presumed that the original agreement continued, and that B. retained an interest in the policy.

Appeal from equity term.

Action by William T. Shackelford against Ann Eliza Mitchill and others, executors, etc., of Samuel L. Mitchill, for an accounting as to the proceeds of a policy of insurance on the life of Adrian H. Van Bokkelen, plaintiff's assignor.

The following opinion was delivered at special term:

"DALY, J. On October 5, 1846, Adrian H. Van Bokkelen assigned to Samuel L. Mitchill a life policy for \$5,000, issued on that day by the Mutual Life Insurance Company of New York on the life of said Van Bokkelen, such assignment being to secure any indebtedness from Van Bokkelen to Mitchill that might arise in the course of dealings between them which began at that time, Van Bokkelen being a shipper of naval stores from Newburn, N. C., and Mitchill being his consignee in New York. Mitchill, by a writing of the same date, agreed with Van Bokkelen as follows: 'The proceeds of said policy, when collected, to be applied to the liquidation of any liabilities that may be due from him to me, and any balance remaining after such liabilities are discharged to be paid over to his legal representatives.' The transactions be-

tween the parties, then commenced, continued down to August 1, 1851, at which date an account was rendered by Mitchill to Van Bokkelen, showing a balance due from the latter of \$25,342.76. The account was then settled by Mitchill making an abatement of one-half, excepting two sums of \$124.50 and \$334.60, and accepting, in payment of the balance, \$12,909.10, and in full discharge of all demands, acceptances of third parties for the last-mentioned sum, maturing at various times up to twelve months, which were subsequently paid. This settlement is evidenced by writing. Nothing appears in it, nor in any other paper, concerning the disposition to be made of the policy of insurance which was then held by Mitchill, and which has been kept in force by his payment of the premiums thereon, \$124.50 per annum, which premiums were regularly charged in his account with Van Bokkelen. The \$124.50 upon which no abatement was allowed in the final account of August 1, 1851, was probably the annual premium for 1850, paid in the previous November, and charged in the prior account. After the settlement Mitchill kept the policy alive by regularly paying the annual premiums up to the day of his death, May 11, 1873, and his executors, the defendants, paid the premiums next falling due in October, 1873. After the latter date the policy became self-supporting, and the premiums were defrayed from the earnings until August 13, 1888, when Van Bokkelen died, and the amount of the policy, which, together with additions, was \$11,000, was paid by the company to Mitchill's executors on December 18, 1888. Nothing is shown to have been done by Van Bokkelen concerning the policy up to the death of Mitchill, nearly twenty-one years after the settlement of the accounts between them. After Mitchill's death, in the year 1877, his executor, Mr. Sturgis, wrote to Van Bokkelen, stating that the estate held a policy in his favor, assigned to Mr. Mitchill; that the original amount was \$5,000, and now with accumulations amounts to \$10,580; that it has become self-supporting; the yearly dividends not only paying the premiums, but, in addition, leaving something to be added to the policy every year, and under these circumstances it was thought he might desire to purchase the policy from the estate. No reply having been received, Mr. Sturgis wrote again in 1878, inclosing a copy of the first letter. In 1883 or 1884 Mr. Van Bokkelen came to the city of New York and saw Mr. Sturgis. The policy, which was kept with the Safe-Deposit Company, was shown him, and he was asked to purchase it, (according to Mr. Sturgis' testimony,) or to pay the premiums or his indebtedness on the policy, and take it and care for it himself, (according to the testimony of S. D. C. Van Bokkelen.) Van Bokkelen said he would see if he could take the policy up; that he would be very happy to take it up if he could arrange to get the money; and that he was not in a condition then to do anything about it. Nothing was said about its being held as security for premiums. Van Bokkelen did nothing further until April 25, 1888, when he made an assignment to the plaintiff of all his right, title, and interest in the policy. He died less than six months afterwards. Although there is no written evidence of the agreement upon which Mitchill held this policy after the closing of the transactions, to secure which it had been originally given, there is evidence in the testimony of S. D. C. Van Bokkelen of an admission or declaration of Mitchill on this subject just prior to the time of the settlement of August, 1851. This witness was the brother of the insured, and was an acceptor of some of the drafts given in settlement; his firm, R. H. Berdell & Co., being acceptors of the others. He went with his brother to see Mitchill, and inform him as to the responsibility of himself and his firm, as proposed acceptors, and he swears that Mitchill then said that if his brother died before the drafts matured the proceeds of the policy would be applied towards their payment, and that after those drafts were paid he (Mitchill) would have no other claim against the policy. The plaintiff, the assignee of Van Bokkelen, now sues for an accounting with respect to the proceeds of the policy, and the payment

of premiums by the deceased, Samuel L. Mitchill, or the defendants, his executors, claiming that there is due him from defendants the sum of \$3,146.71, as follows: Total amount of premiums paid from October, 1851, to October, 1873, inclusive, \$2,863.50; interest on each yearly premium of \$124.50 from date of payment to December 18, 1888, \$4,889.79,—making a total of \$7,853.29 to be deducted from the proceeds of the policy, \$11,000, leaving \$3,146.71.

"The defendants contend—*First*, that neither the plaintiff nor his assignor, Van Bokkelen, had any interest in the policy after the settlement of August, 1851; and, *second*, that if they had such interest, and the plaintiff is entitled to an accounting, there is nothing coming to him, because by the usage and course of dealings between his assignor and Mitchill the account for payment of premiums is to be stated in the manner in which the previous accounts between the parties were stated; that is to say, with annual rests, adding interest to the principal each year and computing interest on such total as principal. By this method the account would stand as follows: Premiums and interest compounded, \$17,239.57, from which the proceeds of the policy, \$11,000, are to be deducted, leaving a balance in favor of the defendants of \$6,239.57. There is room for question as to the terms and conditions upon which Samuel L. Mitchill held the policy and paid the premiums after the settlement of 1851. There is force in the defendants' suggestion that the policy may have been part consideration for the abatement of over \$12,000 of indebtedness then due him from Van Bokkelen. It does seem, as suggested by defendants' counsel, singular that Mitchill should continue for over twenty years to pay the premiums on the policy, as a mere accommodation to, and for the sole benefit of, Van Bokkelen; that during that time, and for ten years longer, Van Bokkelen should not by word or act indicate that he had any interest whatever in the policy. But, in the absence of evidence as to the agreement of the parties in this matter after the closing of the mercantile transactions between them, we must be guided by the presumption of law that the original agreement continued. By this agreement, made on October 15, 1846, any balance of the proceeds after the liabilities to Mitchill were satisfied was to be paid over to Van Bokkelen's legal representative. There was no change in this agreement up to the time of the settlement, as testified to by S. D. C. Van Bokkelen, and there is no proof that any change was made afterwards. While it is not in accordance with any known business principles or rules that Mr. Mitchill should carry this policy for so many years, apparently for the mere benefit of Van Bokkelen and as a matter of charity, there is no such improbability in it as to overcome the presumption of law to which I have referred, and I feel constrained to hold, therefore, that Van Bokkelen continued to have an interest in the policy, and that his assignor is entitled to an accounting with respect to it. Upon the accounting I do not doubt that interest should be computed on each payment of premium from the time of payment to the date of collection of the policy, and should not be compounded by allowing annual rests. It is true that in the mutual accounts of the parties from 1846 to the settlement in 1851 interest was calculated and added in each account to the principal, and that upon the totals and balances interest was again computed; but there is no evidence of an agreement that the usage or course of dealings so established should continue after the settlement of the account, and in respect of subsequent advances for the payment of premiums. No account of such advances was rendered to Van Bokkelen after the settlement. Before that time accounts were sent him semi-annually, or annually, but they were discontinued after August, 1851. An agreement to pay compound interest upon subsequent advances for premiums would be implied from the receipt and retention of accounts made out upon that basis; but there were no such accounts. If there were subsequent mutual accounts or dealings between the parties, even if no accounts were rendered, the pre-

sumption would be that the prior usage or course of dealings with respect to the computation of interest continued. But there is no presumption in this case because mutual accounts and dealings had ceased. There was simply an account on one side for premiums paid by Mitchill. The custom or usage in the prior mutual accounts is not to be presumed to continue in such an account as that. The reason for implying an agreement to pay compound interest in merchants' accounts and mutual dealings is that 'an extension of time for payment is implied, and the transaction is fair, as the balance may change, and the benefit of the usage be mutual.' Kelly, Usury, 49, quoted in *Young v. Hill*, 67 N. Y. 171. The reason for the rule does not exist in a case where there are no mutual dealings, as here, where there was merely an advance to pay premiums, and no implied extension for payment, and where the balance could not change, nor the benefit of the usage be mutual. The account for premiums paid was a new account of a different character from the prior dealings between the parties, and there could be no presumption that the usage in the prior accounts was to continue in the subsequent one. Plaintiff is entitled to judgment, with costs."

Defendants appeal.

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.

John E. Parsons, for appellants. *Davies, Short & Townsend*, (*Julien T. Davies* and *Edward Lyman Short*, of counsel,) for respondent.

LARREMORE, C. J. The judgment should be affirmed on the opinion of Judge DALY at equity term. I recognize, as he did, the force of the suggestion that the retention of the legal title to the life insurance policy may have been part consideration for the abatement of 50 per cent. of the former debt; but there is nothing in the case from which a court could find that it was. There was a settlement between the parties in 1851, in which plaintiff's assignor received "a full discharge of all demands against him to this date." The legal title to the policy still remained with defendant's testator, but, as it seems to me, and as Judge DALY held, such legal title was subject to the provision in the original assignment "the proceeds of said policy, when collected, to be applied to the liquidation of any liabilities that may be due from him to me, and any balance remaining after such liabilities are discharged to be paid over to his [Van Bokkelen's] legal representatives." If all liabilities were settled and discharged in 1851, even though half of the debt was merely forgiven, I cannot see how a court can make a new agreement for the parties, in the absence of any proof of a modification of the original contract between themselves. I think Judge DALY has correctly held on the subject of interest. The mutual business accounts between the parties were settled and closed in 1851. Therefore, as he has shown by argument and authority, the reason for the rule allowing compound interest ceased to exist. I am also of opinion that plaintiff was not allowed to trespass upon the fair limits of this controversy as drawn by the pleadings. Plaintiff relies upon the original assignment of 1846, and it was within the scope of his complaint to show that the indebtedness of the parties then existing and to accrue from subsequent mutual transactions had been liquidated and settled in 1851, so that the claims reserving the policy to the insured and his personal representatives became operative. Judgment affirmed, with costs.

MACLAURY v. HART et al.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

1. RELIGIOUS SOCIETIES—MEETING OF TRUSTEES—NOTICE.

The failure of a notice calling a special meeting of the trustees of a religious corporation to state the object of the meeting, renders the action taken at the meeting in the absence of at least two of the trustees, invalid and illegal.

2. SAME—RIGHTS OF TRUSTEES—EQUITY.

Laws N. Y. 1876, c. 176, § 3, as amended by Laws 1880, c. 167, authorizing any two or more religious societies incorporated under the laws of the state to consolidate into a single corporation, with the approval of the supreme court, to be obtained on an application for the purpose, and providing that on such application "all persons interested may be heard," does not debar a trustee and vestryman of a church from maintaining an action in equity to set aside an agreement illegally entered into by his co-trustees for the consolidation of their church with another, the remedy conferred by the statute being merely cumulative and insufficient to deprive plaintiff of his equitable right to have an illegal transaction set aside.

Appeal from special term.

Action by James Maclaury, as trustee of the rector, church-wardens, and vestrymen of the Protestant Episcopal Church of St. Stephen in the city of New York, against A. Bloomer Hart, rector, and James Blackhurst and other, church-wardens, etc., of said church, and the rector, church-wardens, etc., of the Holy Trinity Church of Harlem, to restrain the consolidation of the two churches. The proceedings for the consolidation were taken under Laws N. Y. 1876, c. 176, § 3, as amended by Laws 1880, c. 167, which reads as follows: "Any two or more of the corporations aforesaid [any church, congregation, or religious society incorporated under any of the laws of this state,] are hereby authorized to unite and consolidate themselves into a single corporation of the denomination to which at least one of such corporations shall belong, in the manner following: The said corporations may enter into an agreement, under their respective corporate seals, for the union and consolidation of the said corporations, setting forth the terms and conditions thereof, the name of the proposed new corporation, the church or denomination to which it shall belong, the names of the persons who shall be the church-wardens and vestrymen, or elders and deacons or trustees or other officers, as the case may be, until the first annual election of the proposed new corporation, and fixing the day of such election. But in the case of the Protestant Episcopal churches no such agreement shall be valid unless approved by the bishop and standing committee of the diocese in which such churches are situated; and in case of Presbyterian churches a union under this act shall not be valid unless approved by the presbytery with which such churches are connected. Each of the said corporations may make its separate petition to the supreme court in the judicial district in which such corporations are situated for an order for such union and consolidation, setting forth in such petition the reason for such union and consolidation, the agreement made as hereinbefore provided, and a statement of all its property, real and personal, all its debts and liabilities, and the amount and sources of its annual income. Upon such petition from each of such corporations so proposing to be united and consolidated, and upon the said agreement satisfactorily proved or certified, the supreme court may, in case it shall deem it proper, make an order for the union and consolidation of such corporations, determining all the terms and conditions and provisions thereof. All parties interested therein may be heard on such petition. When such order is made and entered according to the practice of the court, the said corporations shall be united and consolidated into one corporation by the name designated in the order, and it shall have all the rights and powers, and be subject to all the obligations, of religious corporations under the act to which this is supplementary, and the acts amendatory thereof and supplementary thereto." The following opinion was filed at special term:

"ALLEN, J. It is a principle of equity jurisprudence that one of several trustees may invoke the aid of a court of equity to set aside an agreement illegally entered into by his co-trustees, and to restrain the carrying it into effect, as well as to restrain the doing by them of any threatened illegal act. The resolution for consolidation of the churches of St. Stephen's and Holy Trinity Church, of Harlem, to set aside which and to prevent its being car-

ried into effect this action is brought, was passed at a special meeting of the vestry of the Church of St. Stephen's. The notices calling such meeting did not state the object thereof. At least two of the trustees were not present. This renders the action taken at the special meeting invalid and illegal. The rule that a notice calling a special or extraordinary meeting must state particularly the objects of the meeting is amply supported by the authorities. *Ang. & A. Corp.* § 489; *Boone, Corp.* § 64; 1 *Mor. Priv. Corp.* § 482; 1 *Wat. Corp.* 207, 209, and the cases cited in these text-books. The plaintiff is thus entitled to the relief he asks for, unless something can be found in the act of 1876, c. 176, as amended by the act of 1880, c. 167, which debars him from the right of the interposition of a court of equity which he possessed before the passage of that act.

"It is contended by the defendant's counsel that the provision of the act referred to requiring an approval of the consolidation agreement by the supreme court upon an application being made therefor, and providing that upon such application 'all persons interested may be heard' does so debar him. This statute does not give to the parties interested any new right not before known to the common law of equity, and provide a means for enforcing such new right. The equitable right to set aside invalid transactions, and to come into a court of equity for that purpose, under the rules and principles laid down by such courts, is of very old date. The jurisdiction of courts of equity in this respect cannot, under the constitution of this state, be divested by the legislature. The clause in this statute may give a cumulative remedy; but the plaintiff is not bound to wait until those he opposes see fit, by making an application, to give him an opportunity of availing himself of that cumulative remedy. The statute gives the plaintiff no right to initiate any proceedings under it; nor does it prescribe any mode for bringing parties in opposition before the court; nor is there any provision compelling the applicants to disclose to the court the fact that there is opposition, or that persons other than themselves are interested. A statute of this character does not afford ample, nor even sufficient, remedy to the plaintiff, and he should not be debarred of his equitable right and remitted to defending a proceeding which the defendants may or may not initiate, and of which they may or may not give him notice. There is sufficient in the history of the case to warrant a belief that the plaintiff's rights may be seriously impaired by such remission. Upon the views above expressed, the motion must be granted, without entering into the question of the good faith of the parties seeking the consolidation, about which voluminous affidavits have been submitted, and the injunction restraining the defendants from any act or proceeding for the consolidation of the said churches under the resolution passed at a special meeting of the vestry of St. Stephen's Church, February 6, 1890, continued until the final judgment and decree in this action."

Defendants appeal.

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.

Andrew J. Shipman, (*Wager Swayne*, of counsel,) for appellants Church St. Stephen. *Charles Blandy*, for appellants Holy Trinity Church. *David Bennett King*, for plaintiff, respondent. *Booraem, Hamilton & Beckett*, (*Daniel G. Rollins*, of counsel,) for defendant Blackhurst.

LARREMORE, C. J. The opinion filed by Judge ALLEN upon granting the injunction states reasons more than sufficient why the defendants should be restrained from further proceedings until after the trial and final judgment.

The order should be affirmed, with costs.

TURNER v. BEAVAN.

(Common Pleas of New York City and County, Special Term. October, 1899.)
SLANDER—PLEADING—BILL OF PARTICULARS.

In an action for slander, plaintiff will be required to furnish a bill of particulars giving the name of at least one person present on each of the occasions on which the alleged slander was uttered. Following *Dempewolf v. Hills*, 53 N. Y. Super. Ct. 105.

Action by Albert E. Turner against Jeffrey Beavan for slander. Defendant moves for a bill of particulars.

Henry B. Johnson, for plaintiff. *James C. Colgate*, for defendant.

DALY, J. I will follow the ruling in the case of *Dempewolf v. Hills*, 53 N. Y. Super. Ct. 105, and order the plaintiff to furnish a bill of particulars giving the name of at least one present at each of the occasions on which the alleged slander was uttered, so that defendant may know with certainty the occasion on which the complaint refers. No costs.

OTTOMANN v. FLETCHER.

(Superior Court of New York City, Special Term. November 2, 1899.)

1. PLEADING—MOTION TO MAKE MORE DEFINITE AND CERTAIN.

Where the complaint alleges a modification of the contract sued on, plaintiff will be required to make the complaint more definite and certain by giving the full terms of the alleged modification, and by stating whether the word "contract," as used after the averment as to the modification, refers to the original contract, or to the contract as modified.

2. STATUTE OF FRAUDS—PLEADING—MODIFICATION OF CONTRACT.

Where a complaint alleges that the contract sued on was in writing, as required by the statute of frauds, and that it has been modified, it need not allege that the modification was in writing.

At chambers. Action by Jacob Ottomann against George H. Fletcher. The complaint alleged that plaintiff and one Alberto H. Chaffee entered into a contract in writing whereby plaintiff agreed to make and deliver to Chaffee a lot of comic playing cards and advertising cards. The third, fourth, and fifth paragraphs of the complaint, referred to in the opinion, are as follows: "(3) That plaintiff has complied with all the terms of said contract as modified, as alleged hereinafter, and has made and delivered or duly tendered to said Chaffee thirty-seven thousand seven hundred packs of said cards, and performed all the conditions of said contract on his part, and that, thirty days after the delivery or the tender of said goods complete, he duly demanded performance and payment therefor on the part of said Chaffee, which he has refused, and still refuses, to plaintiff's damage three thousand one hundred and forty-seven dollars, no part of which has been paid. (4) That, when plaintiff manufactured said cards from the stock originally estimated by him to fill the contract, there were but thirty-seven thousand seven hundred packs produced; that the attention of said Chaffee, and the defendant herein, was called to said deficiency, and to a consequent deduction in the contract price to compensate therefor; that they made no objection to the receipt of said thirty-seven thousand seven hundred packs, and acquiesced in the same, and consented to accept said goods tendered, with said consequent deduction in price, in performance of said contract, and waived the delivery of the balance of said cards; that it was customary among lithographers, in making contracts for large quantities of lithographic work, to make allowances for variances in quantity, from the difficulty of accurately estimating the original stock to be manufactured, and said contract having been made with said custom in view. (5) And plaintiff further shows that, in consideration of the premises, and as a condition of plaintiff making said contract, and as an inducement for him to do so, this defend-

ant, on the day said contract was made, guarantied in writing the payments as aforesaid under said contract to be made by said Chaffee, which guaranty, as written under said contract in words and effect as follows: 'Payments by A. H. Chaffee as above guarantied. N. Y., April 30, 1888. GEO. H. FLETCHER.' Defendant now moves to make the complaint more definite and certain.

Goepel & Raegner, for plaintiff. *George H. Fletcher*, for defendant.

DUGRO, J. I think the complaint should be made more definite and certain by giving the substance and full terms of the alleged modification, and also by stating whether the words "said contract," in paragraph 5, refer to the original contract, or to the same as modified. The precise meaning and the application of the allegations of the complaint are apparent without specification of the time and place of the alleged modification, or any statement as to whether this modification was in writing; and therefore the defendant's motion, so far as it asks for information as to these particulars, should not be granted. See *Tilton v. Beecher*, 59 N. Y. 176. In *Betts v. Bache*, 23 How. Pr. 197, it is held that it is not necessary in a pleading to state a contract within the statute of frauds to be in writing.

As to the contention of plaintiff's counsel that the defendant is well aware of all the facts upon which the plaintiff's claim is founded by reason of another action, etc., it is sufficient to say that the defendant is entitled to be informed by the complaint of the facts constituting the plaintiff's cause of action. Section 481, Code Civil Proc. He may have reason to know the nature of the plaintiff's claim aside from the pleadings, but it is his right to rely only upon that which appears in the complaint itself. An order in accordance with the above will be granted, without costs.

TALLMADGE *et al.* v. LOUNSBURY.

(*Superior Court of New York City, Special Term. September 19, 1889.*)

ASSOCIATIONS—ACTIONS—VERIFICATION OF PLEADINGS.

Code Civil Proc. N. Y. § 525, provides that a pleading must be verified "by the affidavit of the party, * * * except as follows: (1) Where the party is a domestic corporation, the verification must be made by an officer thereof;" and, (3) "where all the material allegations of the pleading are within the personal knowledge of the agent or attorney, * * * the verification may be made by the agent or the attorney for the party." Held that, where a voluntary association is sued by its treasurer, (Code Civil Proc. N. Y. § 1919,) the answer cannot be verified by any other officer of the association, except as the agent or attorney of the treasurer.

Action by Daniel W. Tallmadge and George G. Martin against Phineas C. Lounsbury, as treasurer of the Republican League of the United States, a voluntary association. The answer was not verified by the treasurer, nor by any one for him, but by the secretary of said association, and on that ground plaintiffs returned it. Defendant then moved to compel plaintiffs to accept the answer. Plaintiffs relied on Code Civil Proc. N. Y. §§ 524-526, which are as follows:

"Sec. 524. *Form and Construction of Certain Allegations and Denials in Verified Pleading.* The allegations or denials in a verified pleading must, in form, be stated to be made by the party pleading. Unless they are therein stated to be made upon the information and belief of the party, they must be regarded, for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information to form a belief with respect to a matter must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information.

"Sec. 525. *Verification, How and by Whom Made.* [Amended by chapter 542 of 1879.] The verification must be made by the affidavit of the party, or, if there are two or more parties united in interest, and pleading together, by at least one of them, who is acquainted with the facts, except as follows: (1) Where a party is a domestic corporation, the verification must be made by an officer thereof. (2) Where the people of the state are, or a public officer in their behalf is, the party, the verification may be made by any person acquainted with the facts. (3) Where the party is a foreign corporation, or where the party is not within the county where the attorney resides; or, if the latter is not a resident of the state, the county where he has his office, and capable of making the affidavit; or if there are two or more parties united in interest, and pleading together, where neither of them, acquainted with the facts, is within that county, and capable of making the affidavit; or where the action or defense is founded upon a written instrument for the payment of money only, which is in the possession of the agent or the attorney; or where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney,—in either case the verification may be made by the agent or the attorney for the party.

"Sec. 526. *Form of Affidavit of Verification.* The affidavit of verification must be to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. Where it is made by a person other than the party, he must set forth, in the affidavit, the grounds of his belief as to all matters not stated upon his knowledge, and the reason why it is not made by the party."

Section 1919 provides that actions by or against unincorporated associations shall be in the name of the president or treasurer of the association.

Nichols & Bacon, (Alex. S. Bacon, of counsel,) for plaintiffs. *Blanchard, Gay & Phelps*, for defendant.

DUGRO, J. The cause shown by the plaintiff is sufficient. The stay is vacated.

PEOPLE v. MOLINS.

(Court of General Sessions, New York County. April, 1883.)

1. CONSTITUTIONAL LAW—DEPOSITIONS DE BENE ESSE.

Depositions in a criminal case, taken *de bene esse*, under a stipulation by counsel that they shall be read on the trial with the same force and effect as if the witnesses had testified, are not open to the objection that defendant is deprived of his constitutional right to be confronted by his accusers.

2. CRIMINAL LAW—ACCOMPLICES—WHO ARE.

A detective employed to procure testimony on which to predicate a prosecution, who enters into a bargain with defendant with a view to obtaining such evidence against defendant, is not an accomplice.

3. TRADE-MARK—COUNTERFEITING—JURISDICTION OF STATE COURT.

Act Cong. March 3, 1881, § 7, (21 St. at Large, 502,) relating to trade-marks used in commerce with foreign nations, which provides that any person who shall counterfeit "any trade-mark registered under this act" shall be liable to an action on the case, does not apply to any trade-mark that has not been registered, so as to oust the jurisdiction of a state court in a prosecution for counterfeiting a foreign trade-mark which is not registered under the act of 1881.

4. SAME—PROOF OF OWNERSHIP.

In order to convict of counterfeiting a trade-mark, the jury must be satisfied that it was the exclusive property of the person alleged in the indictment to be the owner, that the alleged trade-mark was capable of appropriation as such, and that, if ever valid, it has not been abandoned by acquiescence in its use by others.

5. SAME—INTENT TO DEFEAUD.

Evidence that defendant, in an indictment for counterfeiting a trade-mark by printing copies of the labels used by the owner of the trade-mark, also put on the labels the name of the printer of the original, and that he was found in possession of counterfeits of other labels, is admissible to show his knowledge of the fraudulent intent.

Prosecution of one José S. Molins for counterfeiting a trade-mark, consisting of a cigar manufacturer's label owned by one Juan A. Bances, and partly designed by him, and partly derived by assignment from Partagas & Co., cigarette manufacturers in Cuba. The indictment was in several counts, the fifth charging that defendant "unlawfully and knowingly did falsely make and forge a certain trade-mark, to-wit, a certain mark used by Juan A. Bances, to indicate himself as the maker and seller of certain cigarettes, the same being a printed wrapper with the name of him, the said Juan A. Bances, and also certain other letters and words, devices, emblems, figures, and other marks printed thereon, which said trade-mark had been theretofore lawfully adopted by the said Juan A. Bances, and was by him then usually affixed to such cigarettes so made and sold by him as aforesaid, to denote that the same were so made and sold." The sixth count charged that defendant unlawfully and knowingly had counterfeited labels in his possession.

The court denied a motion to quash, made on the ground that it did not have jurisdiction because the trade-mark in question was a foreign trade-mark, and was governed by Act Cong. March 3, 1881, § 7, (21 St. at Large, 502,) relating to trade-marks used in commerce with foreign nations, which provides that "any person who shall reproduce, counterfeit, copy, or colorably imitate any trade-mark registered under this act, and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, shall be liable to an action on the case for damages for the wrongful use of said trade-mark;" and held that the act applied only to trade-marks that had been registered, which was not the case with this trade-mark. The court refused defendant's request to charge "that the alleged trade-mark appearing by the evidence to be, if any, a foreign trade-mark, and the protection of foreign trade-marks and the punishment of their infringement being within the exclusive powers of the congress of the United States under section 8, art. 1, of the constitution, and having been exercised by Act Cong. March 3, 1881, the courts of this state have no jurisdiction to proceed for the punishment of infringement of such trade-marks; and section 364 of the Penal Code, under which this indictment is drawn, does not comprehend the case of such trade-marks."

The court also held that depositions taken *de bene esse*, under a stipulation between the district attorney and the attorney for defendant, which recited that the depositions should be read on the trial with the same force and effect as if they had been given in court on the trial by the witness, were not open to the objection that their admission would deprive defendant of his constitutional right to be confronted by his accusers; and that *Cancemi v. People*, 18 N. Y. 128, in which it was held that it was error to proceed to try a criminal case with 11 jurors, though defendant had agreed thereto, involved a different principle from a stipulation to take testimony.

The charge of the court was as follows: "*Gentlemen of the Jury*: Under the head of offenses against trade-marks contained in the Penal Code of this state, it is provided that 'a person who knowingly, in a case where provision for the punishment of the offense is not otherwise specially made by statute, (1) falsely makes or counterfeits a trade-mark; or (2) affixes to any article of merchandise a false or counterfeit trade-mark, knowing the same to be false or counterfeit, or the genuine trade-mark, or an imitation of the trade-mark, of another, without the latter's consent; or (3) sells or keeps or offers for sale an article of merchandise to which is affixed a false or counterfeit trade-mark, or the genuine trade-mark, or an imitation of the trade-mark, of another, without the latter's consent; or (4) has in his possession a counterfeit trade-mark, knowing it to be counterfeit, or a die, plate, brand, or other thing, for the purpose of falsely making or counterfeiting a trade-mark; or (5) makes or sells, or offers to sell or dispose of, or has in his possession with intent to sell or dispose of, an article of merchandise with such a trade-mark as to appear to

indicate the quantity, quality, or character of the article, but not indicating it truly,—is guilty of a misdemeanor.' Section 364. Now, I understand that this indictment embraces the provisions of this statute to which I have just now called your attention. This statute also defines a 'trade-mark,' and you and I are bound by the statutory definition. It is defined in this manner: 'A "trade-mark" is a mark used to indicate the maker, owner, or seller of an article of merchandise, and includes, among other things, any name of a person, or corporation, or any letter, word, device, emblem, figure, seal, stamp, diagram, brand, wrapper, tick-t, stopper, label, or other mark, lawfully adopted by him, and usually affixed to an article of merchandise, to indicate that the same was imported, manufactured, produced, sold, compounded, bottled, packed, or otherwise prepared by him; and also a signature or mark used, or commonly placed, by a painter, sculptor, or other artist, upon a painting, drawing, engraving, statue, or other work of art, to indicate that the same was designed or executed by him.' And then there is something referring to works of art. That is the statutory definition of a 'trade-mark.' Now, without referring in detail to the testimony of each witness, which you doubtless recollect, it will be sufficient for me to call your attention, generally, to what I understand to be the facts developed in this case; without, however, intending to influence your judgment on any question of fact, because, if I misstate a fact, or if my statements of the facts as I understand them do not agree with your recollection and understanding of fact, of course you are not bound by my statement or conclusion. You are the sole judges of all questions of fact, and it is for you to determine those questions, and not for the court. But, for the purpose of enabling you to apply the provisions of this statute to which I have just now called your attention, it may be, and will be, necessary for me to state what I understand to be the facts as detailed by the various witnesses which have been introduced in the case, and for that purpose only.

"It is claimed that it appears here that, for many years prior to the time mentioned in this indictment, a person by the name of Partagas, a resident of Havana, was engaged in the manufacturing of tobacco and cigars; that this tobacco had acquired a distinction as a superior article of that class, and had acquired in that way a value; and that this person was also engaged in the manufacture of cigars from the tobacco grown by him; and that, for the purpose of designating his tobacco, and his manufacture of tobacco into cigars, he adopted and used a label or trade mark, which had been in use for many years, and up to the time of his decease; that when he died his business and this property became invested in his son by operation of law, and also in this person, J. A. Bances; and that J. A. Bances subsequently acquired whatever interest Partagas' son had in this business, and in this property, and he, from that time down to the present time, has been engaged in carrying on and conducting the business that was originally carried on and conducted by Partagas; with this exception, as I understand from the evidence, (if I am wrong, of course you will correct me,) that Bances commenced to manufacture cigarettes from this Partagas tobacco, so called; and it is claimed here that, by operation of law, Bances became vested with the legal title, and the sole and exclusive right to the use of the label or trade-mark which has been adopted and used by Partagas. He (Bances) then, according to the claim made here on the part of the prosecution,—and I am not aware that there is any conflicting evidence in this case; however, it is for you to say whether there is, gentlemen,—invented a label or trade-mark which has been produced here, and introduced in evidence and proved, if you believe the testimony of the witnesses, for the purpose of covering these cigarettes manufactured by him, and designating them as his manufacture of cigarettes from this Partagas tobacco, and in that label or trade-mark, so called, he embraced this portion which is called the 'ellipse,'—that round portion which formed the label or trade-mark of Partagas. All this—the remaining portion of this label, with

the exception of this ellipse, which you have seen here—it is claimed here is the invention of J. A. Bances, and that no other person had any right to use, or any other firm to use, that label so invented and appropriated by him. Now, there does not appear to be any question in this case as to that fact, as I understand the evidence. However, as I said before, this is a question that you are to determine.

"Now, gentlemen, I have held for certain reasons, not necessary for me to explain further than by saying that under a decision which has been referred to by the defendant's counsel, that that portion, the ellipse, or the Partagas label, is not, so far as the evidence in this case shows, the subject of counterfeiting or forgery. But I do hold that the remaining portion of this label, signed by Juan A. Bances, is the subject of forgery or counterfeiting; that is, that it is an instrument the forgery or counterfeiting of which is punishable under the provisions of this statute to which I have already referred.

"The fifth count contained in this indictment charges as follows: Defendant, 'unlawfully and knowingly, did falsely make and forge a certain trade-mark, to-wit, a certain mark used by Juan A. Bances to indicate himself as the maker and seller of certain cigarettes, the same being a printed wrapper with the name of him, the said Juan A. Bances, and also certain other letters and words, devices, emblems, figures, and other marks printed thereon, which said trade-mark had been theretofore lawfully adopted by the said Juan A. Bances, and was by him then usually affixed to such cigarettes so made and sold by him as aforesaid, to denote that the same were so made and sold, against the form of the statute.' Now, did this defendant forge this trade-mark? There is evidence in this case which, it is claimed on the part of the prosecution, established the fact that this defendant was engaged, to a certain extent at least, in carrying on the business of lithographing and printing, with other business; that, on a certain day named, one Johnston applied to him for certain labels, which were to be a counterfeit of the genuine label of J. A. Bances then furnished to him by Johnston, and that this defendant agreed with Johnston, in consideration of his receiving from him a specified sum of money mentioned in the bill, which has been produced here, that he would furnish to him, by a certain time, a certain number of counterfeit labels,—counterfeit of the genuine labels, which he received for the purpose of counterfeiting; and that, in pursuance of that agreement, he did furnish and subsequently deliver, or cause to be delivered, to this man Johnston, a large number—the exact number of which appears on the bill in this case—of counterfeit labels. Now, the defendant himself substantially admits that he received the order; that he undertook to furnish the counterfeit label,—a counterfeit of the pattern label which was delivered to him for that purpose; and that he had furnished those; and that he had caused them to be delivered to Johnston, and received a compensation agreed upon between him and Johnston for that number of labels. Now, that is the evidence bearing upon the question of whether he counterfeited that label.

"The first question for you to determine in this case—the evidence is contradicted on that point—is whether that was a genuine label belonging to J. A. Bances, which was handed to him by this man Johnston, and subsequently whether this defendant falsely forged or counterfeited it. If that is so, gentlemen, this defendant would be guilty under the fifth count of this indictment. If you come to the conclusion, however, upon the evidence in this case, that that is not so; if you find those facts against the prosecution,—then the next question is under the sixth count,—whether this man had in his possession knowingly false, forged, and counterfeited labels of this description. The same evidence to which I have referred, as bearing upon the questions involved in the fifth count of the indictment, also bear upon the questions involved in the sixth count. Now, if this defendant received a genuine label, believing it to be genuine, and if he entered into an agree-

ment either to forge and counterfeit that label, or to cause or to procure it to be forged and counterfeited, and to deliver a counterfeit of that label, and had it in his possession, knowing it to be a false, forged, and counterfeited label, here, then, he comes within the provision of the sixth count of this indictment.

"In respect to what are the real facts in this case, there is no doubt that this man, according to his own testimony, was engaged in this business of furnishing a very large amount of spurious labels; and that would have a bearing upon the question whether he had those spurious labels in his possession knowing that they were spurious, with a fraudulent intent. It is just like the case of a man having a large quantity of counterfeit money in his pocket. If he was found with one counterfeit bill, endeavoring to pass it, that evidence would not be sufficient to warrant a jury in convicting him of knowing that that was a counterfeit bill; but if, when he is informed that it is a counterfeit, he goes into another place of business, and offers to pass the same bill there, and when he is arrested, and in his possession is found a large quantity of the same character, why, the law authorizes the jury to infer and conclude a guilty knowledge on his part; and it is so in this case. If this man was found with one or two labels,—a small quantity of these labels,—it probably would not be evidence to justify you in coming to the conclusion that he knew that they were false and forged and counterfeit labels. But when you take into consideration the fact that there was found in his possession a large number of those counterfeit labels, and that he was selling them in the way it was claimed by the prosecution, secretly, that he received an order to print them, and that he furnished a large quantity in pursuance of that order, why, of course, it must necessarily have a great bearing on the question of his guilty knowledge.

"Now, there is something which is claimed on the part of the prosecution to be very peculiar in this case. The defendant, it seems, for several years has been engaged in furnishing to various parties labels to be used for the purpose of representing a certain brand of cigars or cigarettes; that he has taken large orders and furnished large quantities of such labels; and yet, with one or two exceptions, he cannot tell you the names of any lithographers or other persons who were engaged, under his orders, in the manufacture of those labels. He seems to forget all, or nearly all, of those names. That may be, or may not be, a circumstance bearing upon the guilt of the defendant, under the two counts of the indictment I have referred to. Now, on the question of the forgery of the label, you have got the testimony of the expert,—the witness who produced those photographs,—and he has pointed out to you the difference between the genuine or the alleged genuine label and alleged forged label. You recollect his testimony. He tells you, based upon his knowledge and skill as an expert in matters which he has testified to, that one is a counterfeit of the other, and that evidence is entirely uncontradicted. Now, in addition to that testimony, you have the other fact, also,—which does not appear to be disputed, if I recollect the evidence aright,—that this genuine label was printed at or near the works or manufactory of J. A. Bances, in Havana, and, of course, any label that was printed here, except by his expressed authority, would be a counterfeit of that genuine label, which was printed in Havana. Again, gentlemen, another little item of evidence was referred to yesterday that may or may not have a bearing upon the question of guilty knowledge; that is, that the name of the original lithographer or printer in Havana also appears upon this alleged forged or counterfeit label; and the undisputed fact is that this alleged forged and counterfeit label was not printed or was not issued by the lithographer who printed and issued the original, and what is claimed to be the genuine, label here. This is a species of fraud, because it was a misrepresentation. It represents on the face of it that it was printed by a person in Havana,—the same person who

appears to have printed the original or supposed or alleged genuine label. That is a badge of fraud, if you find it to exist in this case.

"I have been asked to charge you, gentlemen, and charge you that, 'to render the defendant guilty of the misdemeanor charged, the jury must be satisfied beyond reasonable doubt that his act was done with intent to defraud, and, to show such intent, that the defendant knew the facts constituting the right of the party intended to be defrauded.' Well, gentlemen, if a person knowingly issues a paper which he knows not to be a genuine label, upon the face of which certain representations are made, a jury have a right to infer from that a fraudulent intent,—that, taken in connection with other facts.

"I have also been asked to charge you, and do charge you, that 'the jury, in order to convict, must be satisfied that the label set forth in that indictment was clearly and exclusively the property of Juan A. Bances.' I do so charge. You must be satisfied from the evidence in this case that the label, or that portion of the label which I called your attention to, was the exclusive property of Juan A. Bances.

"I have also been asked to charge you 'that the jury must be satisfied that the alleged trade-mark was capable of appropriation as a trade-mark, and that the use therein of the words descriptive of the articles upon which it was used is not sufficient.' I do charge that, gentlemen, as requested.

"I have also been requested to charge you, and do charge you, 'that the jury must be satisfied that the alleged trade-mark, if ever valid, has not been abandoned by acquiescence in its use by others for a long period,' and I do charge you that. A man may adopt the trade-mark, and it may be a genuine trade-mark, and he may abandon his right to the use of that trade-mark, provided you are satisfied he did actually abandon it, and that abandonment may be no doubt done by his acquiescing in the use of his trade-mark by other persons. Now, is there any evidence in this case whatever which satisfies you that Mr. Bances abandoned his right to the use of this trade-mark, or that he acquiesced in the fraudulent use of his trade-mark by other persons? That is a question for you to determine.

"I am also asked to charge you, and do charge you, 'that the assignee or purchaser of a trade-mark must indicate in his use of it that he is such assignee or purchaser, or he misleads the public.' Well, in ruling as I have, gentlemen, in reference to the ellipse, I have covered, as I understand it, this request to charge. It is not claimed here, nor is there any proof in this case, that that portion of the trade-mark or label which I have submitted to you, as being embraced in this indictment, was the subject of assignment by any person to Bances, or by Bances to any other person. I have already stated, as I understand the testimony, that that portion of the trade-mark or label is the invention and exclusive property, as it is claimed in evidence, of Mr. Bances himself.

"The seventh request to charge I refuse, because I covered it in my charge under the sixth clause. The ninth and tenth requests I have already refused to charge, except as I have already charged upon the subject-matter of these requests.

"Now, gentlemen, I have stated all that I think it is necessary for me to say to enable you to come to a proper conclusion as to the guilt or innocence of this party. He introduced some evidence tending to show that he has so far borne a good character. Well, you are to give that evidence just such weight as you think it justly and properly entitled to, and no more. This being a criminal proceeding, the law requires you to take that evidence into consideration, with all the other evidence in the case. * * * As to the testimony of Johnston, there was a request to charge which I declined. Johnston was not an 'accomplice,' within the meaning of that term. Johnston has testified that he was a detective, employed by the complainant, Ban-

ces, and that what he did in this case was done for the purpose of obtaining evidence on which to predicate this prosecution; and under a very recent decision in the supreme court (and I think the court of appeals afterwards confirmed it) in a lottery case, (*People v. Noelke*, 1 N. Y. Crim. R. 495,) the rule was laid down that where a person or an officer, for the purpose of obtaining information on which to predicate a criminal prosecution, makes such a bargain and arrangement as Johnston undoubtedly did in this case, that he is not an 'accomplice,' within the legal meaning of that term; and therefore his testimony, for the purpose of being relied upon by the jury, need not be corroborated; that is, if a person is an accomplice,—one engaged in perpetrating the crime charged, or aiding or assisting in its perpetration,—a jury would have no right to convict upon his uncorroborated testimony; but in this case I charge you that Johnston does not occupy that position of an accomplice, under this recent decision of the court of appeals. I do not wish you to understand from what I have said that you are not the sole judges of the credibility of the testimony of Johnston. You have the right to determine the question of whether his testimony is entitled to credence or not.

"Now, upon that question, is there anything in Johnston's manner, or what Johnston has said, or in any transaction with this defendant, that would lead you to believe that he has willfully and corruptly testified to what is false. In many respects he is corroborated by the defendant himself. In some respects he is contradicted by the defendant. It is claimed here that in some respects, that where there is a contradiction, it is not on any material matter. But he is corroborated by the defendant so far as the execution of the order for the goods or labels and the payment of the money is concerned. The defendant corroborates Johnston's testimony, and there is no serious conflict between his testimony and that of Johnston in that respect. The defendant's testimony is contradicted in some respects, and it is a matter for you to determine whether it is on any material matters; and if it becomes a question for you to determine his credibility in addition to his manner, and the nature of his evidence, you have the right, and it is your duty, to take into consideration that he is here charged with the commission of a criminal offense. It is for you to say whether that would furnish a sufficient motive or inducement for him to come here on the witness stand, and testify untruly in respect to any material fact that he has testified to, for the purpose of relieving himself from the position in which he is placed.

"Now, gentlemen, I repeat again that this is an important case, although it is the lowest grade of crime. If this man is guilty of this offense, he is guilty of an offense which is a very serious one in every large mercantile community, and it is one for which, if he is guilty of it, he ought to be punished, not only for the purpose of preventing him from the continuous violation of the law, but also for the means of preventing other parties from indulging in like criminal acts. That is the object of the criminal law, and the object of punishment for criminal offenses. Your verdict in this case, therefore, will be 'guilty' or 'not guilty' under the fifth and sixth counts of the indictment, or under either count. If you find him guilty under the fifth count, you will say so. If you find him guilty under the sixth count, you will say that you find him guilty under the sixth count. If you find that he not only forged and counterfeited the labels, but also had them in his possession, knowing them to be forged and counterfeited, you will find him guilty under both counts."

Ast. Dist. Atty. Davis, for the People. *Benjamin F. Foster, William B. Ellison, Charles C. Gill*, and *Walter L. McCorkle*, for defendant.

The jury found defendant guilty of having counterfeited labels in his possession, and was fined \$350, to stand committed until payment of the fine. No appeal was taken.

MCBRIDE v. TAPPEN.

*(Supreme Court, General Term, Third Department. May 26, 1890.)***SHERIFFS AND CONSTABLES—ACTIONS—SUBSTITUTION OF INDEMNITORS.**

Where a sheriff, in an action against him for an unlawful seizure of property, and also for an excessive levy, obtains an order substituting his indemnitors, the execution creditors, as defendants, and requiring them to give a further bond conditioned to pay any judgment plaintiff may obtain in the action, and the reversal of such order is opposed by the indemnitors, they can not be heard to claim that they are not liable for the excessive levy, because not covered by their original bond.

Appeal from special term, Rensselaer county.

Action by James McBride against Shepard Tappen, sheriff of Rensselaer county, for the levy and sale of plaintiff's property upon execution issued against him. Defendant moved for the substitution of his indemnitors, Peter and Abraham Van Vechten, as defendants. From an order granting the motion plaintiff appeals.

Argued before LEARNED, P. J., and LONDON and MAYHAM, JJ.

I. C. Ormsby, for appellant. *Orin Gambell*, for respondent.

LEARNED, P. J. It was held in *Hein v. Davidson*, 96 N. Y. 175, that where, under an attachment against one Rice, the sheriff had levied on property which the plaintiff Hein claimed to belong to him, the indemnitors of the sheriff might be substituted for the sheriff in the action brought against him, and he might be discharged. It was held that the act permitting this was constitutional. The effect of this decision seems to be that one who commits a trespass on property may be permitted by the legislature to escape all liability for his act on substituting some responsible defendant. We are, of course, bound by the decision, though we cannot agree with the reasoning.

The present case presents another question still. The plaintiff sues the defendant, not only for taking the plaintiff's property under an execution against other persons, but also for making a levy on the plaintiff's property which was grossly excessive, and for illegally and wrongfully selling plaintiff's property to an amount more than sufficient to satisfy said execution. The learned justice before whom the motion was made said that, if the substitution of the indemnitors rested in the discretion of the court, he should refuse it. But he thought that section 1421 was now mandatory. The plaintiff urges on this appeal that the right of substitution under this section can only apply to a case in which the indemnitors would be liable on their original bond, if the action should have proceeded against the sheriff, and a recovery should have been had against him. He further urges that, for abuse of the process, by excessive levy and the like, the indemnitors would not be liable, and therefore should not be substituted in such a case; and that it would be contrary to principle to hold the indemnitors liable for abuse of process by the sheriff in making an excessive levy and the like; and that hence, if they were substituted, the plaintiff could not recover against him for such abuse of process. It is not necessary to decide how this would be in case the indemnitors objected to the substitution. In the present case, the indemnitors are willing and desirous to be substituted; they did not appeal from the order; and they opposed the reversal of it. Furthermore, the order required them to give a further bond conditioned to pay any judgment the plaintiff may obtain in the action. It seems to us, therefore, that on this bond, and on the affirmative action of the indemnitors in favor of the substitution, it will not lie with them to say that they are not liable for every cause of action set up in the complaint. The order should be affirmed, with \$10 costs and printing disbursements.

BARRETT v. AMERICAN TELEPHONE & TELEGRAPH CO.*(Supreme Court, General Term, Second Department. May 12, 1890.)***WRITS—SERVICE OF PROCESS—CORPORATIONS.**

Service of a summons against a telephone and telegraph company on its general superintendent, an officer having general charge of one of its departments, is a service on a "managing agent," under Code Civil Proc. N. Y. § 431, providing that service of a summons upon a domestic corporation must be made by delivering a copy thereof within the state "to the president or other head of the corporation, * * * or a director or managing agent."

Appeal from special term, Kings county.

Action by Clarissa J. Barrett against the American Telephone & Telegraph Company. Defendant appeals from an order denying its motion to set aside service of the summons.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Melville Eggleston, for appellant. W. B. Yeomans, for respondent.

DYKMAN, J. The defendant in this action is a domestic corporation, and the action was commenced by the personal service of the summons on the general superintendent of the company. Thereupon a motion was made to set aside the same because it was not in accordance with the provisions of the Code of Civil Procedure, prescribing the manner of service upon a domestic corporation. That motion was denied, and the defendant has appealed from the order of denial.

The provision of the Code respecting the service of process, to which the defendant appeals, is this: "Personal service of the summons upon a defendant, being a domestic corporation, must be made by delivering a copy thereof, within the state, * * * to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent." Code Civil Proc. § 431. While this section should be reasonably construed, like all other laws, yet it should not receive a construction which would place unnecessary obstructions in the way of commencing actions against corporations. Those intangible bodies must always act through agents; and they must also, necessarily, be reached through officers or agents. Service of process must be made upon some person, and the object of the legislature was to provide for such service upon an officer or agent of the company who should be charged with some general duty, and have some general control of the affairs of the corporation,—one who should occupy a position of responsibility, and have an interest in the general management and prosperity of the company; the whole end and aim being to have the process placed in the hands of a responsible person, who would yield attention to the same, so that the company might suffer no default, and sustain no injury. It is not essential to the satisfaction of the statute that the person served should have the entire charge or control of the corporation or of its business. If he sustains sufficient character and rank to render it reasonably certain that the corporation will be apprised of the service, the requirement of the statute is answered. In this case the service was made personally upon the general superintendent of the company; an officer having the general charge of one of the departments of the corporation, the same as the treasurer has the general charge of his department, and the secretary has the general charge of another. The service so made was as certain to come to the knowledge of the corporation as if made upon the secretary or treasurer, and service on either of those officers would have been valid, beyond doubt. The powers of the person served in this case were broader and more general than those of the person served in the case of *Palmer v. Pennsylvania Co.*, 35 Hun, 370; and we held the service sufficient in that case, and our decision was sustained by the court of appeals. 99 N. Y. 679, *mem.* In the

case of *Rochester, etc., R. Co. v. New York, L. E. & W. R. Co.*, 48 Hun, 190, service of process upon a division superintendent was held sufficient. We deem the service in this case sufficient, upon principle and authority; and the order should be affirmed, with costs and disbursements. All concur.

STRANG v. PETERSON *et al.*

(Supreme Court, General Term, Second Department. May 12, 1890.)

DURESS—THREAT OF PROSECUTION AT LAW.

A mortgage procured from a mother in the belief that her son had been guilty of forgery, and would be prosecuted unless she secured the debt, is executed under duress. DYKMAN, J., dissenting.

Appeal from judgment on report of referee.

Action by Ami K. Strang against Catharine Peterson and Henry Peterson, her husband, and Isabella Whitney and Constant White as administrators of Seth Whitney, deceased, to foreclose a mortgage executed by defendants Peterson. The issues were referred, and the referee reported in favor of defendants, finding that the only consideration for the mortgage was to save the mortgagor's son from a prosecution for forgery in using plaintiff's name as indorser on certain notes, and ordered a dismissal of the complaint. From the judgment thereupon entered, plaintiff appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Travis & Smith, for appellant. *Eugene B. Travis*, for respondents Peterson. *Elbert P. James*, for respondents Whitney's administrators.

PRATT, J. It is entirely clear that the motive impelling Mrs. Peterson to make the mortgage in suit was her belief that her son had been guilty of forgery, and would be punished criminally if she did not secure the debt. The referee has found that the son was thus guilty, and that a prosecution therefor was estopped by the giving of the mortgage. There is abundant evidence to sustain the referee's conclusion. It is now suggested by plaintiff that the referee was in error in this finding; that he should have given faith to the testimony that Peterson was authorized to place Strang's name on the note, in which case no crime had been committed, and the course of justice was not interfered with by giving the mortgage. But such facts would not make the mortgage valid. *Eadie v. Slimmon*, 26 N. Y. 9, is authority that fear of a prosecution of a near relative is such duress that a security obtained by means thereof cannot stand. *Bayley v. Williams*, 4 Giff. 638, affirmed L. R. 1 H. L. 200, is to the same effect. See, also, Pol. Cont. 557. Judgment affirmed, with costs.

BARNARD, P. J., concurs.

DYKMAN, J., (*dissenting*.) This is an action to foreclose a mortgage made by Catharine Peterson to the plaintiff. Catharine Peterson answered the complaint, setting up her coverture, and the consequent invalidity of the bond and mortgage, and denied the execution of those instruments with knowledge of their character. The administrators of Seth Whitney were afterwards brought in as defendants, and they served an answer denying that they had any lien upon the mortgaged premises subsequent to the lien of the plaintiff's mortgage, and claiming priority of lien for a mortgage which they held. In this state of the pleadings, the action went to a referee to be tried and determined; and, during the progress of the trial, Catharine Peterson and the administrators of Whitney were permitted by the referee, against the objection and exception of the plaintiff, to amend their answers by setting up fraud and duress in the procurement of the bond and mortgage, and that they were obtained and executed under an agreement to suppress a criminal

prosecution for forgery against the son of Catharine Peterson. The trial was then continued under the new pleadings, and the referee decided in favor of the defendants, and dismissed the plaintiff's complaint. The allowance of the amendment to the answers by the referee upon the trial was clearly erroneous. New issues were thereby introduced into the case, which entirely changed the character of the defense, and that was inadmissible upon the trial.

As our view of the case will require a reversal of the judgment, we will proceed to an examination of the merits. We will make no further examination of that error, however, as our view of the whole case is essentially different from that of the referee who rendered the judgment. The material facts are these: Herman F. Peterson, the son of Catharine F. Peterson, the mortgagor, was a butcher, and prior to March 13, 1880, the date of the mortgage in question, Herman became indebted to Benet Miller and Edward B. Brady, in considerable sums, for cattle purchased of them, respectively, and for such indebtedness he had made his promissory notes to each of them, payable to the order of the plaintiff, Ami K. Strang, and indorsed them himself with the name of Strang, and delivered the same to Miller and Strang, respectively. Such indorsements were forgeries. When it became known that Strang denied the authenticity of the indorsements upon these notes, the holders began to demand payment or security, and used language indicative of a purpose to invoke the aid of the criminal law if some arrangement was not made for the payment of their claims. Under pressure of those circumstances, Herman endeavored to induce Strang to take an assignment of some claims of his, and assume the payment of the notes, which Strang declined to do. Then Strang, at the request of Herman, had an interview with his mother; and an arrangement was made by which she was to give Strang a mortgage upon her property, and he was to undertake the payment of the notes. In pursuance of that arrangement the mortgage in suit was executed, and delivered to Strang, and he paid the notes. Upon this subject the finding of the referee is that Strang called upon the mortgagor to learn if she would give him a mortgage on her real estate to secure him for his indorsement of the notes, and she finally consented to do so. The referee has found that the bond and mortgage were made under an agreement that their execution would prevent the prosecution of her son criminally for the forgeries of the indorsements of Strang, and that the parties interested in such notes would refrain from such prosecution, and that the only consideration to her for giving the bond and mortgage was to save her son from such prosecution.

Assuming, as we may, that the referee intended to find that the execution of the bond and mortgage was induced and obtained by threats of imprisonment of the son of the mortgagor, then she could avoid those instruments if they had been given to the creditors of her son to secure the payment of his liabilities to them. *Adams v. Bank*, 116 N. Y. 606, 23 N. E. Rep. 7; *Eadie v. Slimmon*, 26 N. Y. 9. This case, however, is not like that of Adams, and others of a kindred character; for, in all those cases where the doctrine has been applied, the threats of arrest have proceeded from the creditors, and the payments have been made or the securities executed to them. Here the case is very different. Strang had nothing at stake, and no reason to institute criminal proceedings against Herman. The spurious paper was not passed upon him, and the forgery gave him no concern. If the criminal law was to be set in motion, the creditors alone were interested in its movement. He simply agreed to assume the payment of the notes upon receiving security for the assumption of such liability. In substance and legal effect, he agreed to make a loan of money to discharge the debts evidenced by the notes, and he made the loan in reliance upon the security he received; and the purpose of the loan, or the use to which the money was to be appropriated, was a matter of entire indifference to him. Suppose the bond and mortgage had been made to another person. They could not be avoided because their execution

was induced by a desire to raise money to prevent the arrest and imprisonment of the son of the mortgagor. And we suppose the same rule applies to Strang. He has been induced to make a loan in reliance upon the bond and mortgage; and the mortgagor, having thus obtained his money, should not now be permitted to repudiate the transaction. The question of priority between the two mortgages must be settled upon another trial. It must be borne in mind that this is not a case of the composition or compounding of a felony, and the decision proceeds upon no such ground, and is not in hostility to the decisions in the cases where that question has been involved. The judgment should be reversed, and a new trial granted, with costs to abide the event.

In re CAMP, (three cases.)

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

1. GUARDIAN AND WARD—ACCOUNTING—LIMITATION OF ACTION.

Lapse of time since the majority of a ward will not bar a petition to compel the guardian to account, when the guardian has kept the fund separate from his own property, and has never informed the ward of its existence, and has in no way repudiated or denied the trust. Affirming 8 N. Y. Supp. 885.

2. SAME—ESTOPPEL TO DENY.

A father was appointed general guardian of his children to enable him to obtain the amount of an award in proceedings to condemn land owned by their mother at the time of her death, and he received the money in pursuance of the appointment, and receipted therefor as guardian. Held that, if he had or claimed any personal interest in the fund so received by him, it was his duty to have at once asserted it; and, having failed to do so, he could not, after the fund had been converted to his own use, and lost, set up an adverse claim to any portion of the money in contravention of his trust.

3. RESULTING TRUST—CONVEYANCE BY HUSBAND TO WIFE.

No trust results to a husband from his conveyance of land to his wife as a cover.

Appeal from surrogate's court, Kings county.

Petitions severally by William C. Camp, Mary Ella Camp, and Julia A. Tebbetts, wards of Calvin B. Camp, for an accounting. Both parties appeal from the decree. For former report, see 3 N. Y. Supp. 335.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Jennings & Russell, (Joseph H. Choate, of counsel,) for petitioners. *W. C. Beecher*, for defendant.

DYKMAN, J. This was a proceeding to procure an accounting by the guardian of the petitioner, and other children of the respondent, Calvin B. Camp. The facts set up by the petition were not denied in any material respect, and the following facts can be gathered therefrom. The mother of the petitioner, and the wife of Calvin B. Camp, died intestate on the 25th day of October, 1866, seised and possessed of certain real estate in the city of Brooklyn, leaving, her surviving, Calvin B. Camp, her husband, James B. Camp, William C. Camp, Julia Adelaide Camp, and Mary Ella Camp, her only children and heirs at law. James B. Camp afterwards died intestate, unmarried, and without children. Prior to the death of the mother of the petitioners, proceedings had been taken by the city of Brooklyn to condemn one of the lots owned by her; and such proceedings were pending at the time of her death, and subsequently resulted in an award to the petitioner, and his brother and sisters, of \$26,000 for their interest in the real estate so taken. At the time of such award the petitioner, and his brother and sisters, were minors; and Calvin B. Camp, in order to enable him to obtain the amount of said award, was appointed general guardian of the petitioner, and his brother and sisters, by separate proceedings in the surrogate's court, on the 17th day of February, 1868. Under and by virtue of such appointment as guardian, Calvin B. Camp received from the comptroller of the city of New York the sum of \$26,000 on the 18th day of February, 1868, being the amount of such award, one-quarter

of which belonged to the petitioner. The comptroller's warrant was drawn to Mr. Camp as general guardian, and he receipted for the same in that capacity. Prior to the commencement of these proceedings, no inventory had been filed, and no portion of the sum received had been paid over to the petitioner by his guardian; and the petitioner had learned the facts only within a short time prior to the institution of these proceedings. Subsequently, and under the decision of the general term of the supreme court, (3 N. Y. Supp. 335,) the guardian filed his account in this proceeding as general guardian of the petitioner, in which the guardian acknowledged the receipt of the \$26,000 in question, and made no attempt to set up specific items claimed to have been paid upon account of the petitioner, or his brothers and sisters, out of the said sum received by him as their guardian; but he did claim as an offset against his liability as such guardian certain sums therein stated to have been paid by him towards their support. The petitioner filed objections to such account, and the matter was referred by the surrogate to a referee, to examine the account, and determine the questions arising upon the settlement, and report thereon to the surrogate. Upon the hearing before the referee, it was admitted that the sum of \$26,000 had been received by Mr. Camp as the general guardian of his four children, and that he had never accounted for the same; and the questions before the referee related to the validity of the several items of expenses charged against the said trust fund in his account. The facts as we have stated them were substantially admitted by the guardian before the referee, and were not materially changed or modified by the testimony there taken. The referee, while holding that the guardian became liable to account for the fund so received by him as such guardian, further held and decided that he would have been entitled to a life-interest in the fund when he received it, and was entitled to credit for the value of such life-interest at the time, and was liable only for the value of the remainder at that time, with interest thereon; and he directed judgment for the petitioners accordingly. The report was confirmed by the surrogate, and an appeal was taken from the decree, by the guardian, to the general term. The petitioner also appealed from that portion of the decree which limited the recovery of the petitioners, and allowed the guardian for his life-interest in the fund.

The points relied upon by the guardian upon this appeal are: *First.* The statute of limitations. *Second.* The fact that the property which was taken by the city did not actually belong to his wife, but had been conveyed to her as a cover, and was held by her as trustee for himself, and that, therefore, the whole of the award made by the commissioners belonged to him, and his children had no interest therein. *Third.* That the guardian, as tenant by the curtesy, had a life-estate in the \$26,000 paid, and could not become liable therefor until after his death.

The first point, respecting the statute of limitations, has already been presented to this court, and decided against the guardian, in these same proceedings. 3 N. Y. Supp. 335.

In respect to the second point, it is sufficient to say that the guardian cannot now be heard to question the legal title of his wife, even assuming the facts claimed by him to be true, of which there is no proof, the testimony offered in proof of that allegation having been properly rejected by the referee; and, even if the fact was as the guardian now claims, no trust resulted to him from such a conveyance.

Upon this appeal, therefore, and the appeal of the petitioner, we have to consider the claim of the guardian to a life-estate in the fund received by him from the city of Brooklyn. Upon all the facts in this case, the only legitimate conclusion to be reached is that the entire sum in question was awarded to the children of the guardian as compensation for their damages in the condemnation proceedings, and belonged absolutely to them. The award was made to the petitioner, and his brothers and sisters. The comptroller's war-

rant was drawn to Mr. Camp, the general guardian, and he received the same, and gave a written acknowledgment therefor as such guardian. He was appointed the general guardian for the purpose of receiving the money. He did receive the same the next day, in pursuance of such appointment; and his present claim is entirely inconsistent with his conduct from the time of his appointment as such guardian down to the time of the rendition of his account in pursuance of the judgment of this court. If this guardian had, or claimed to have, any personal interest in the fund so received by him adverse to his interest as the guardian and trustee of his children, it became his duty at once, upon the receipt of the fund, to assert such interest, and have it adjusted and set apart to them; but he never in any way asserted any claim to a personal interest in the fund until after it had been converted to his own use, and lost. He occupied a place of trust and confidence, received the fund in the capacity of a trustee, and he should not now, at this late day, be permitted to set up an adverse claim to any portion of the money in contravention of his trust. The referee should have found in favor of the petitioner in each of the proceedings for the full amount of \$6,500, with interest; and the decree should be modified by increasing the amount to \$25,000, instead of the amount so reported due by the referee, and as so modified the decree should be affirmed, with costs. All concur.

JAMES v. SAMMIS *et al.*

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

HIGHWAYS—ESTABLISHMENT BY USER.

Laws N. Y. 1865, c. 6, providing for highways by user for 20 years in the counties of Suffolk and Queens, immediately upon its taking effect, converts roads in those counties which had been previously used by the public as thoroughfares for 20 years into public highways, by operation of law.

Appeal from a judgment on report of referee.

Action by David H. James against Isaac Sammis and others. From a judgment entered in favor of defendants the plaintiff appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Charles R. Street, for appellant. George C. Hendrickson, N. S. Achery, and W. B. Codling, for respondents.

DYKMAN, J. This is an action for trespass on land for taking down a fence near the residence of the plaintiff, and the defense is based upon the existence of a highway upon which the fence so removed was an encroachment. The trial was before a referee, to hear and determine the action, and he decided in favor of the defendants. He found that the land from which the fence was removed was a public highway, and had been used as such continuously for at least 40 years prior to the time of the erection of the fence, in 1869, and that the fence was an encroachment and obstruction on such highway. He then found that the defendants, Isaac Sammis, Charles A. Ritter, and Whitson M. Smith, were commissioners of highways on the 23d day of May, 1887, when the acts of which the plaintiff complains in this action were committed, —were commissioners of highways of the town of Huntington, where the premises of the plaintiff are situated; that the highway bounding the plaintiff's farm on the south had been used as a public highway continuously for at least 40 years prior to the erection of the fence in question; that on or about the 7th day of September, 1885, Selah Smith, Charles A. Ritter, and Jonathan Jarvis were the commissioners of highways of the town of Huntington, and duly ascertained, described, and entered on record in the town-clerk's office of that town such highway; that the fence of the plaintiff encroached upon the highway, and the last-named commissioners on the 29th day of March, 1886, made an order ascertaining and properly describing and defining such

encroachment, and on the 1st day of April, 1886, served the same on the plaintiff, with a proper notice requiring him to remove the fence, which he neglected and refused to do, and then the first-named commissioners, on the 23d day of May, 1887, made an order requiring the defendant James Kirby, who was the overseer of highways for the road-district where the highway was situated, to remove such fence, and the same was removed under that order; and such removal constituted the trespass complained of by the plaintiff in this action. All these findings of the referee are sustained and supported by evidence which was substantially uncontradicted, and we find them entirely satisfactory, and sufficient to justify the judgment from which this appeal is taken.

The plaintiff, however, seeks to escape from the effect of the proceedings of the highway commissioners for the removal of his fence by an appeal to the old highway law, known as the "Long Island Counties Act," passed in 1789, in which there was no provision for a highway by user. That statute was amended in 1830 and in 1863. Then the act of 1830, and the amendments thereto, were repealed by chapter 514 of the Laws of 1864, and an effort was made by the second section of that act to extend the provisions of the Revised Statutes relative to highways and bridges to the counties of Suffolk and Queens. The effort failed, however, by reason of an erroneous reference to the title of the Revised Statutes; the reference being to title 2, instead of title 1. That error was cured by chapter 6 of the Laws of 1865, by which it was enacted that the provisions of title 1, c. 16, pt. 1, of the Revised Statutes, and all acts amending or repealing the same, relating to highways and bridges, were extended and made applicable to the counties of Suffolk and Queens. The effect of the extension of the provisions of the Revised Statutes relating to roads and bridges over the counties of Suffolk and Queens was to make the road in question a public highway. The contention of the plaintiff is that the highway in question could not have been established by user unless it had been used as such for 20 years prior to 1797, and that insistence is based upon the Long Island counties act, and the amendments thereto, and the fact that the provisions of the Revised Statutes respecting highways had no operation in Suffolk county prior to 1865. This argument, however, is fallacious; and its fault lies in the failure to recognize the effect of the extension of the Revised Statutes to the Long Island counties. When that extension was made, in 1865, the road in question was in existence, and had been used as a thoroughfare for more than 20 years; and it was immediately converted into a public highway by operation of law, and it was such when the fence in question was erected and set within its limits, in 1869. Such fence, therefore, constituted an encroachment when it was built on the street, and its removal might have been secured by some proceeding known to the law. If it be true, as the plaintiff contends, that the fence could not have been removed at that time by proceedings for an encroachment, because the highway had not been laid out under the Revised Statutes, it is equally true that the statute was amended by chapter 245 of the Laws of 1878 so as to include all highways; and that act avoided the difficulty which had been found to exist under the former statutes, and provided for the removal of obstructions and encroachments from roads which had been laid out, or ascertained and described and entered of record, and also from all roads not recorded which have been, or shall have been, used as public highways for 20 years or more. That statute became applicable to the road in question immediately upon its enactment, and clothed the highway commissioners with the power which they exercised. It must be remembered that it was not the proceedings of the commissioners that made the road in question a public highway. That office was performed by the statute when the road had been used for more than 20 years, independent of any judgment of the commissioners. The erection of the fence was wrongful from the beginning, and

the statute of 1878 furnished an additional means for its removal, which was available as soon as it was provided. It was an additional remedy for an existing evil. The plaintiff had no right to maintain the fence where it was, and never had, and it was at all times subsequent to its erection subject to removal; and the claim of the plaintiff, that it could not have been removed when it was erected, cannot be allowed. Its removal could have been secured at any time by appropriate legal proceedings.

The plaintiff endeavors to raise some objection to the order of the commissioners for indefiniteness or uncertainty, but he can make no attack upon any of those proceedings in this action. They stand for the justification of the action taken under them, and they are valid and effectual until they are set aside on review. The plaintiff charges the defendants with a wrongful trespass on his land, and their justification is complete when they show that the premises which they entered did not belong to the plaintiff, but had been for a long time a public highway, which they cleared from encroachment in the manner provided by law.

Our conclusion, therefore, is that the road in question had been used by the public for more than 20 years prior to 1865, when the provisions of the Revised Statutes relating to roads and bridges were extended over the counties of Suffolk and Queens; that immediately upon such extension the road became a public highway by operation of law; that when the fence removed by the defendants was set out upon the highway, in 1869, it became an unlawful encroachment thereon, and its removal might have been procured at any time by the means and measures provided by law; that the statute of 1878 provided another means for the removal of the fence, which was adopted by the defendants; that the plaintiff never had any right to the continuation of the fence, and can maintain no action against the commissioners, and those acting under them, for its removal. The exceptions present no error, and the judgment should be affirmed, with costs. All concur.

VAN TASSEL v. DERRENBACHER, County Treasurer.

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

1. TOWNS—TAXATION—RAILROAD AID.

Laws N. Y. 1869, c. 907, § 4, as amended by Laws 1871, c. 288, providing that all taxes, except school and road taxes, collected for the ensuing 80 years by any town, "on the assessed valuation of any railroad," for which said town has issued bonds, shall be paid over to the county treasurer to redeem such bonds, applies to renewal bonds issued to refund the original bonds as they fell due, though the railroad has been sold under a mortgage, and purchased by another company.

2. SAME—GENERAL AND SPECIAL LAWS.

By Laws N. Y. 1870, c. 762, amending Laws 1868, c. 811, so as to provide by taxation a sinking fund sufficient to pay at maturity bonds issued in aid of the Wallkill Valley Railroad, it was not the intention of the legislature to supersede the provision made by the general act of 1869, but merely to give an additional fund for the payment of said bonds.

Appeal from Ulster county court.

Petition by William P. Van Tassel against John Derrenbacher, county treasurer, to require him to apply the sum of \$1,453.08, being the amount of taxes (except road and school taxes) levied and collected, and paid to the treasurer, on the assessed valuation of the Wallkill Valley Railroad in the town of Rosendale, in Ulster county, for the year 1887, towards the redemption of the bonds issued by said town to aid in the construction of said railroad. By chapter 880, Laws 1866, amended by chapter 811, Laws 1868, certain towns, including the town of Rosendale, were authorized, upon complying with the provisions of said acts, to take stock, and issue bonds therefor, in aid of the construction of the Wallkill Valley Railway. The town of Rosendale did comply with such provisions, and such proceedings were had under said acts as resulted in the subscription in behalf of the town for the stock of the rail-

way company, and the issue of the bonds of the town, in the sum of \$92,800 the bonds bearing date April 1, 1869. The railroad was built through the town, and the proceeds of the bonds applied in aid of its construction. Section 4 of chapter 907, Laws 1869, amended by chapter 283, Laws 1871, provides that "all taxes, except school and road taxes, collected for the next thirty years, or so much thereof as may be necessary, in any town, village, or city on the assessed valuation of any railroad in said town, village, or city, for which said town, village, or city has issued or shall issue bonds to aid in the construction of said railroad, shall be paid over to the treasurer of the county," the same to be applied by him in the manner prescribed in said section for the redemption of such bonds issued by the town. In case of the failure of the county treasurer to comply with the provisions of the act, any tax-payer of the town may apply on petition to the county judge, who may make an order directing compliance by the county treasurer. Of the original bonds issued by the town of Rosendale, at the time of the commencement of this proceeding \$8,000 of the principal sum remain outstanding. New bonds to the amount of \$8,400 have been issued to refund to that amount the original bonds as they fell due. The balance has been paid. The county treasurer refused to apply to the sinking fund the taxes aforesaid for the year 1887, and now appeals from the order of the county judge directing his application thereof.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

A. T. Clearwater, for appellant. Linson & Van Buren, for respondent.

LANDON, J. Nearly every question presented in this class of cases has been decided adversely to the county treasurer. *Clark v. Sheldon*, 106 N. Y. 104, 12 N. E. Rep. 841; *Strough v. Supervisors*, 23 N. E. Rep. 552; *Bridge v. Supervisors*, 92 N. Y. 570; *Vinton v. Supervisors*, 2 N. Y. Supp. 367; *Hand v. Supervisors*, 81 Hun, 531. The following only are now urged:

1. Does section 4 of chapter 907, Laws 1869, include the renewal bonds? So long as there are outstanding sufficient of the original bonds to absorb the taxes, the question is not material; but, if material, the renewal bonds renew the original debt in effect, though probably not in form. For 30 years the taxes upon the railroad are applicable to the payment of the debt. Such was the intention of the legislature. We should give it effect, and regard the substance, rather than the letter, to the end that the intent of the legislature may not be defeated.

2. The Walkill Valley Railway Company defaulted upon its mortgage; the mortgage was foreclosed; the railroad sold, and became the property of the Walkill Valley Railroad Company. But the railroad remains, and the taxes applicable to the sinking fund are those collected upon "the assessed valuation of the railroad." Change of title or of name, or of both, does not change the property from which the taxes are derived.

3. Chapter 880, Laws 1866, under which the original railroad company was organized, contains provisions looking towards the liquidation of the bonds issued by the several towns in aid of the construction of the railroad. Thus the dividends upon the stock, and the stock itself, were devoted to this purpose, and taxation was authorized after 10 years to the amount of 5 per cent of the principal of the bonds, to the end that the bonds might be paid within 30 years from their date. Section 7 of chapter 311, Laws 1868, was amended by chapter 762, Laws 1870, so as to require a sinking fund to be provided by taxation every year after 10 years from the date of the bonds, sufficient to provide for their payment at maturity. The act of 1868, thus amended in 1870 relates solely to the Walkill Valley Railroad. It is urged that, special provision being made by the act of 1868 for the bonds to be issued in aid of the construction of this railroad, the general provision made by the act of 1866 did not extend to these bonds; and that if the act of 1869 did apply before

the act of 1870, amendatory of the seventh section of the act of 1868, the amendment was the latest special provision for the protection of the Walkill Valley Railroad town bonds, and must be deemed to have superseded the provision made by the general act of 1869. But the general and special acts are consistent with each other; and the general act, by its general terms, includes the bonds in question. The object of all the acts was to provide security and means for the payment of the bonds. The creditor was by the special act of 1866 and the general act of 1869 given different securities. If the amendment of 1870 increased the security under the special act of 1868, it could not, certainly in the absence of express language to that effect, take away any security the creditor already held under the general act of 1869. The creditor was at liberty to accept every security tendered him; and the legislature could not, without impairing the obligation of the contract, deprive him of any security he already held, unless the pledge of the new security was given and accepted upon condition of a release of the old. These acts, providing securities for payment, are in the nature of contracts between debtor and creditor; and the legislature cannot, as in the case of ordinary legislation, supersede at will the earlier by the later act, unless the later act provides a full equivalent. We discover no intention to supersede the security given by section 4 of the act of 1869 by the amendment in 1870 of the seventh section of the act of 1866. Order affirmed, with costs. All concur.

HUNTER v. STENDER.

(Supreme Court, General Term, Third Department. May 26, 1890.)

PLEADING—BILL OF PARTICULARS—ACTION ON ACCOUNT.

A complaint alleged that plaintiff, between certain dates, rendered defendant's testator services and advanced him money, in all of the value of \$2,000; that they adjusted their accounts at \$2,000, and agreed that the same should be payable at testator's death, and that he would make testamentary provision to that effect; and that testator died without having paid or made provision for the payment of said sum. *Held* that, as the complaint stated a cause of action on an account, as well as on the account stated and promise of testamentary provision, plaintiff would be required to furnish the items of her account.

Appeal from special term, Albany county.

Action by Margaret J. Hunter against Emma F. Stender, executrix, etc., of Smith Quackenbush, deceased. A motion to require plaintiff to furnish a bill of particulars was denied, and defendant appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

De Witt & Spoor, for appellant. *N. C. Moak*, for respondent.

LANDON, J. The complaint alleges that the plaintiff from September 1, 1879, to July 6, 1881, rendered the testator services and advanced him money, in all of the value of \$2,000; that on that day she and the testator adjusted the accounts between them at \$2,000, and agreed that the same should be payable at his death, and that he would make provision to that effect in his will; that the testator did make provision to that effect in his will, but by a subsequent will revoked it, and died in 1887 without having paid, or having made provision for the payment of, the said sum. The answer puts in issue the rendition of services, the loan of money, the accounting and promise, and the making of any will making provision for plaintiff; pleads payment, and the statute of limitations. The complaint is framed in a double aspect,—to recover either upon the account, or upon the account stated, and the promise to provide for payment of the amount by will. Under the first aspect of the complaint, we think it reasonable that the plaintiff should furnish the items of her account. The plaintiff's contention that the action is not upon the account, but upon the account stated, and promise of testamentary provision for its payment, may prove to be true upon the trial; but, as the com-

plaint is framed, the action upon the account seems to be sufficiently stated. Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs. All concur.

MARVIN v. TOWN, Receiver of Taxes, et al.

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

1. MUNICIPAL CORPORATIONS—SEWER ASSESSMENTS—DESCRIPTION OF PROPERTY.

Under Laws N. Y. 1887, c. 186, § 72, authorizing the trustees of the village of Saratoga Springs to assess the cost of constructing sewers "upon the property adjoining and along the line of the same, and such other property as the board may deem to be benefited thereby, or may at any time enjoy the use thereof," an assessment for a sewer against plaintiff in person, where neither the list nor the warrant purports to be a proceeding *in rem*, or makes any mention of land, but merely locates plaintiff on a particular street, and described the tax as "benefits," is a personal assessment, and not a compliance with the statute, and therefore void.

2. SAME—VOID ASSESSMENT—ACTION TO ENJOIN SALE.

Under Laws N. Y. 1880, c. 68, § 8, making a deed executed by the receiver of taxes "presumptive evidence that the sale, and all proceedings prior thereto," were regular, and authorizing any person interested in property on which an assessment has been made to bring an action to restrain a sale, an action may be brought to set aside an assessment, and enjoin a sale thereunder, though the assessment is void, as a sale thereunder would create a cloud on plaintiff's title, and could be impeached only by proof *abundante* the record.

3. SAME—OBJECTIONS WAIVED.

The right to maintain such an action is not waived by plaintiff appearing before the board of trustees on grievance day, and objecting to the amount of the assessment. Distinguishing *Hilton v. Fonda*, 86 N. Y. 889.

Appeal from special term, Saratoga county.

Action by James M. Marvin against Byron J. Town, receiver of taxes for the town and village of Saratoga Springs, and the village of Saratoga Springs. There was judgment for plaintiff, and defendants appeal.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Edgar T. Brackett, for appellants. *Charles S. Lester*, for respondent.

MAYHAM, J. This action was brought by the plaintiff, who was a resident of the village of Saratoga Springs, to set aside an assessment levied by the trustees of the village to pay for the construction of a sewer known as "Church-Street Sewer," in said village, and to enjoin the defendants from selling the property of the plaintiff, described in the complaint, to pay such assessment. The complaint set out alleged illegalities and irregularities in making the assessment, and in the acts of the tax receiver in proceeding to sell. The defendants answer separately; the village alleging its power and authority to construct the sewer, and to assess the benefits on adjacent lands, and alleging, among other things, that the plaintiff appeared before the board of trustees on the day for hearing grievances, and only objected to the amount of the assessment, and that the same was subsequently reduced. The answer also denied some of the allegations of the complaint. The defendant Byron J. Town, the tax receiver, answered separately, alleging that he was acting under the authority of the warrant issued by the board of trustees, and in a general way alleging the duty of the board of trustees to make the assessment, and issue their warrant, and his duty to collect the amount of the same, and alleging the proceedings by him in pursuance to that duty. On the trial the learned judge held that the assessment by the trustees was a personal tax; that no real estate was charged by such assessment roll; that the real estate of the plaintiff, not being described in the assessment roll, was not charged by the assessment; that such assessment was unauthorized, illegal, and void as against the plaintiff, and that the warrant issued thereon was unauthorized and void, and conferred no right upon the receiver of taxes, described in his advertisement of sale; that the receiver of taxes had no authority, under said assessment and warrant, to describe and sell the lands of the plaintiff; that

the assessment should be vacated, and the receiver of taxes enjoined from selling such property, or any part of the same, and directed judgment accordingly. Judgment was entered according to the direction of the trial judge, and the defendants appeal to this court.

The trial court held that the assessment in this case was a personal assessment against the plaintiff, and was not a compliance with the provisions of the charter of defendants, which provides specially for assessments for the purpose of construction of sewers and drains in such village. The village of Saratoga Springs, through its board of trustees, assume to have made this assessment under the provisions of chapter 186 of the Laws of 1887. Section 72 of that chapter provides that "the cost of constructing such sewers, drains, or conduits shall be assessed by the board of trustees upon the property adjoining and along the line of the same, and such other property as the board may deem to be benefited thereby, or may at any time enjoy the use thereof, and in proportion to such benefit, as the same shall be determined by said board of trustees." The only assessment which appears to have been made by the board of trustees in this case is in the following form of a warrant directed to the tax receiver: "You are hereby commanded to levy and collect from the several persons, firms, and corporations named in the foregoing list of assessments the amounts opposite their respective names, in the manner provided for in the act creating the office of receiver of taxes and assessments in the town and village of Saratoga, of Saratoga Springs, and of the several acts amendatory thereof." This warrant was signed by the president and board of trustees. The list referred to in this warrant consisted of a number of names, arranged as follows, among which was the plaintiff's:

Names.	Street.	Benefits.
Marvin, J. M.,	Church,	\$160 00

The trial judge finds that the clerk,—without any official act of the trustees authorizing him so to do,—before delivering to the receiver of taxes a copy of this assessment roll, added to the name of the plaintiff, as it appeared in the assessment roll, these words: "Sagar & Richards, occupants, Church St." No description of plaintiff's lands sought to be assessed for this sewer appears anywhere in the assessment roll except as above. But plaintiff admitted on the trial that Sagar & Richards occupied his premises on Church street, described in the complaint, at the time of the assessment. The form of the tax receiver's notice or advertisement of sale does not appear in the record. It is difficult to see how it can be maintained that the vague and indefinite language used by the trustees in making this assessment can be understood as a charge upon any specific piece of land. The assessment does not, in the list or warrant, purport to be a proceeding *in rem*. It describes not even in the most general way any particular piece of land, nor does it mention land at all. It purports to levy a tax against the plaintiff in person. True, it locates him on a particular street, and describes the tax as "benefits;" and, if we were permitted to guess, we might, by taking this tax in connection with the fact of the construction of a sewer, suppose it to be a tax assessed against plaintiff's land. But the court is not permitted to guess or speculate in this class of cases. The levying of this class of taxes is purely a statutory proceeding, in which the plaintiff's property is to be taken or incumbered in derogation of his common-law rights, and the provisions of the statute must be strictly pursued. Even the authorities cited by the learned counsel for the defendants concede that land sought to be reached in this class of assessments must be described with reasonable certainty. In *Pink v. Barberi*, 17 Wkly. Dig. 521, cited by the defendant, the court says: "Property must be described in such a way that it can be known upon the books, or a reference given by which it can be determined." That cannot be done in this case from the assessment alone, as it seems to be conceded in this case that the defendant the receiver of taxes, in his description in the notice of sale, embraced a piece of

property belonging to Henry B. Hanson. The receiver of taxes is not authorized to sell lands for a personal tax. Section 2 of chapter 68 of Laws of 1880 under which the receiver assumed to act, provides: "Whenever any tax charged on real estate * * * shall remain unpaid, * * * the receiver shall proceed to advertise and sell such real estate."

But the defendants insist that even if this is a personal assessment, and the lands not sufficiently described in it to create a charge upon them by virtue of the assessment alone, still that the appearance of the plaintiff before the board of trustees on grievance day, and objecting only to the amount of the assessment, was a waiver of the alleged irregularities of the defendants in the assessment, and that the plaintiff cannot now be heard to object; and the case of *Stewart v. Fonda*, 19 Hun, 191, is relied upon as establishing that proposition. But we think that case clearly distinguishable from this. In that case the plaintiff, who sued the assessors in trespass for the sale of his property on a personal assessment against him while he claimed to be a non-resident of the town, had appeared before the assessors, and submitted to their determination whether or not he was in fact a non-resident; and the assessors were held not to be trespassers in making the assessment, upon that authority, in part, of *Lange v. Benedict*, 73 N. Y. 12, where the court says: "Whether or not the defendants' proceedings were so strictly regular that sale of the land would have conveyed a title is not the question. The question is simply whether the defendants * * * are liable,"—thus clearly distinguishing between a case where title to property is affected, and a case charging the officers with a personal tort. The trustees and tax receiver must in this case have acquired and maintained jurisdiction of the property by virtue of the statute, if at all, and not by the appearance of the plaintiff before them on grievance day.

But the defendants insist, that even if the proceedings of the tax receiver are irregular and invalid, still the assessment should be upheld. We have already seen that the irregularity of the assessment, in that it is a personal assessment, and not an assessment against the property, is a radical defect in the defendants' proceedings which defeat the assessment. The assessment being void, the plaintiff was right in bringing his action to restrain the defendants' proceedings in the enforcement of this tax. Section 8, c. 68, Law of 1880, provides that a sale by the tax receiver, and the execution after two years of a deed to the purchaser, is "presumptive evidence that the sale, and all proceedings prior thereto, were regular." This would be a cloud upon the plaintiff's title, and would call upon him, if he attacked the sale, to rely upon extrinsic proof *aliunde* the record to defend his title. The same section authorizes any person interested in the property upon which an assessment has been made to bring an action to restrain the sale. The action was therefore properly brought, and, as we think, properly disposed of by the learned justice at the trial. The judgment must be affirmed, with costs.

LEARNED, P. J., concurs. LONDON, J., not acting.

HANSON v. TOWN, Receiver of Taxes, et al.

(Supreme Court, General Term, Third Department. May 26, 1890.)

Appeal from special term, Saratoga county.

Action by Henry B. Hanson against Byron J. Town, receiver of taxes, etc., and the village of Saratoga Springs. There was a judgment for plaintiff, and defendants appeal.

Argued before LEARNED, P. J., and LONDON and MAYHAM, JJ.

Edgar T. Brackett, for appellants. Charles S. Lester, for respondent.

MAYHAM, J. The case on this appeal discloses substantially the same state of facts as those contained in the appeal heard at the present term of this court, in which James M. Marvin was respondent, and the appellants herein were appellants. *Ante*, 14

The assessment in this case, as in that, was a personal assessment against the respondent, and does not purport to be an assessment "upon the property adjoining and along the line of the same, [sewer,] and such other property as the board may deem to be benefited thereby, or may at any time enjoy the use thereof," as required by section 72 of chapter 136 of the Laws of 1887. Plaintiff's land is in no way described in the assessment, nor is any land, in terms, referred to therein. All the assessment shows is a list of names, opposite to each of which is carried out, and set down in a column, the amount of the assessment, to which is attached a warrant commanding the receiver of taxes "to levy and collect from the several persons, firms, and corporations named in the foregoing assessment the several amounts set opposite their respective names." This warrant is signed by the board of trustees. Under and by virtue of this warrant, the case shows that, at the time of the commencement of this action, the defendant Town, as receiver of taxes, had advertised the respondent's land, described in the complaint in this action, for sale, claiming to act under such warrant. On the trial at the circuit and special term, this assessment was set aside, and an injunction ordered restraining the defendant Town, as tax receiver, from proceeding to sell the plaintiff respondent's land, and judgment was entered accordingly; and from that judgment the defendant appealed to this court. We think, within the authority of the case of *Morton v. Town*, above referred to, and for the reason stated in the opinion in that case, the judgment in this case should be affirmed. Judgment affirmed, with costs.

CORN EXCHANGE BANK v. BLYE.

(Supreme Court, General Term, Second Department. May 12, 1890.)

REPLEVIN—DAMAGES FOR DEPRECIATION PENDING APPEAL.

Where a judgment in favor of plaintiff in replevin for coupon bonds is affirmed by the court of appeals, and defendant thereupon returns the bonds, plaintiff may sue for their depreciation in market value pending the appeal; Code Civil Proc. N. Y. § 1722, giving plaintiff in replevin, who recovers a chattel depreciated in value while in defendant's possession, a right of action for such depreciation, if it happened under such circumstances that defendant is liable therefor.

Appeal from special term, Orange county.

Action of the Corn Exchange Bank against Alphonso W. Blye, receiver of the Middletown National Bank. The complaint alleges that defendant obtained possession of and wrongfully refused to deliver on demand plaintiff's chattels, consisting of bonds, with interest coupons attached, of the value of \$23,000; that plaintiff thereupon brought an action therefor, which was tried November 5, 1885, and resulted in a judgment in his favor for the chattels or their value, \$23,000, together with damages for their detention down to the time of trial; that defendant took successive appeals to the general term and to the court of appeals, where said judgment was in all things duly affirmed; that defendant refused to deliver said chattels to plaintiff till after the affirmance of the judgment by the court of appeals; and that during defendant's wrongful detention, and since the trial of the former action, the same have become damaged and depreciated in value in the sum of \$20,000. Defendant demurred to the complaint for insufficiency, his demurrer was overruled, and he now appeals. For reports of the replevin action, see 7 N. Y. Supp. 434, and 23 N. E. Rep. 805.

Argued before VAN BRUNT, P. J., and DYKMAN and PRATT, JJ.

William Vanamee, for appellant. *L. A. Gould*, for respondent.

BARNARD, P. J. The action was brought to obtain possession of a chattel by the owner against one who without right claimed possession thereof. The plaintiff, in 1885, recovered a judgment, finding the title and the right to immediate possession to be in the plaintiff. The judgment, as required by law, fixed the then value of the property so that, if the plaintiff could not have the specific property, the value might be collected in lieu thereof. It was then competent for the wrong-doer to return the property, but he did not do so. An appeal was brought by him to the court of appeals, when it was heard and decided in 1889, some four years after the trial and judgment. Pending this appeal, the property fell in value nearly or quite \$20,000. The defendant, upon the affirmance of the judgment, released the identical property, as he

was permitted by the judgment appealed from and affirmed by the court of appeals. The question presented by the demurrer is whether an action will lie for the depreciation by the owner against the claimant. The judgment only settled the title. The plaintiff owned the chattel, both before and after the judgment of the trial court. No damages for the future detention could be included in the judgment, and, if the appeal continued an unlawful possession without remedy, the plaintiff will not have any complete remedy for the invasion of his property rights. The cases cited, that an action for damages for a wrong cannot be split up, do not seem to apply to a case like this. If the action had been one for a conversion only, when the judgment would make a complete restitution in damages, no action would lie for a further increase in value of the property pending appeal. The judgment and interest upon it would be collectible at all events. The result is not so in this action. If the contest had been about a package of bank-bills, no judgment in replevin could include the interest, based upon a prospective appeal, nor a depreciation pending such appeal. This action must be supported, or a wrong will go unredressed. Section 1722 of the Code was designed to give this remedy. It provides that, when depreciation in value happens while the chattel is in possession of the defendant, the plaintiff can have an action for the depreciation, if it happened under such circumstances that the plaintiff might recover for the injury or depreciation of the defendant therefor. For the damages up to the trial he has recovered. The detention after the trial is a new offense, and wholly without remedy, unless the plaintiff can treat the additional detention as a new cause of action, under this section, and also under section 1691 of the Code, which rescinds the right of action of a defeated plaintiff in replevin to recover damages for the detention, unless the judgment was given against him on the merits. The value of the use during the time of the illegal detention is the proper measure of damages in replevin of a personal chattel when it has a usable value. *Allen v. Fox*, 51 N. Y. 562. This case referred to a horse. How could the usable value of the horse be recovered, unless by this action? The judgment sustaining the complaint should therefore be affirmed, with costs. All concur.

QUINLAN v. STRATTON *et al.*

(*Supreme Court, General Term, Second Department. May 15, 1890.*)

SUBROGATION—TO RIGHTS OF MORTGAGEE.

On foreclosure of a second mortgage, where it appears that the loan by the second mortgagee was made on an agreement with the mortgagor that it should be applied to extinguish the first mortgage, and that part of the loan was actually so applied, the second mortgagee is entitled to a decree subrogating him to the rights of the first mortgagee on payment of the balance due on the first mortgage.

Appeal from special term, Queens county.

Foreclosure by John J. Quinlan against Emily A. Stratton and Samuel W. Judson. On July 25, 1862, defendant Emily A. Stratton mortgaged the premises in suit to Joseph Fitch for \$2,500. One thousand dollars of the principal was paid off, and then Fitch died. Amos L. Fitch was appointed executor, and, default having been made in paying interest on the bond and mortgage, foreclosure proceedings were begun. Emily Stratton, mother of defendant Emily A. Stratton, loaned at various times sums of money to defendant aggregating \$2,000. A portion of this money was used in paying off the incumbrances of the Fitch mortgage, and preventing the property from being sold in foreclosure. Subsequently, on February 18, 1881, the bond and mortgage, and the decree of foreclosure and sale in the action of Fitch against Stratton were assigned to defendant Judson. Before this assignment, on July 27, 1880, defendant Emily A. Stratton executed the mortgage in issue in this action to her mother, Emily Stratton, to secure the payment of the

\$2,000 advanced by her. This mortgage was subsequently assigned to Susan C. Currie, and by her to plaintiff, who brought this action. The defendants answered separately, defendant Judson claiming that the assignment of the first mortgage gave him a prior lien. Defendant Emily A. Stratton alleged that Susan C. Currie was the real party in interest in this action to foreclose the second mortgage; that on April 10, 1865, one James T. Stratton mortgaged to defendant Emily A. Stratton three acres of other land for \$2,750; that in September, 1872, she assigned this mortgage to Hallett C. Hicks, covenanting that the mortgage was collectible, and that the proceeds thereof, \$2,750, were loaned to Susan C. Currie; that two months thereafter Susan C. Currie purchased the land, and assumed the mortgage, but that she never paid it, and that Hicks foreclosed, and also obtained a personal judgment for deficiency against defendant Emily A. Stratton. Defendant answered further that, when the James T. Stratton mortgage was assigned to Hicks, in September, 1872, this defendant Emily A. Stratton executed another mortgage to him on the land in controversy as security for the \$2,750 paid by Hicks on the assignment of the James A. Stratton mortgage, and loaned to Susan C. Currie; that Hicks subsequently obtained a judgment of foreclosure of this mortgage; and that this judgment remains unpaid. There was no evidence, however, tending to show that Susan C. Currie was the real plaintiff in interest in this action, as alleged in the answer, or that she had anything to do with the loans made to Emily A. Stratton by her mother. The court found in favor of plaintiff as against defendant Stratton, and in favor of defendant Judson to this extent: that the assignment of the decree in foreclosure in the Fitch action was for the benefit of Emily Stratton as well as defendant Judson; that plaintiff succeeded to her rights; and that on payment of \$2,015.33, with interest from February 14, 1881, to defendant Judson, plaintiff would be subrogated to all his rights. Defendants appeal. For opinion on motion for new trial, see 7 N. Y. Supp. 786.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Samuel W. Judson, for appellants. *Frank A. O'Brien*, (*James D. Bell*, of counsel,) for respondent.

BARNARD, P. J. The plaintiff is the assignee of a second mortgage. It was given by Emily A. Stratton to her mother, Emily Stratton, and assigned by her to one Susan C. Currie, and by her to the plaintiff. There is no question made as to this mortgage, nor as to the amount due upon it. There was a first mortgage for \$2,500 on the property, and the complaint averred that this mortgage was to have been paid by the loan procured on the second mortgage, by agreement between Emily A. Stratton and her mother; that it was only paid in part, and that the defendant Judson had taken an assignment of the first mortgage in concert with Emily A. Stratton, and claiming that the plaintiff's mortgage should be deemed the first lien on the premises. The proof failed to show that the first mortgage was subject and inferior to the plaintiff's mortgage in respect to the amount paid by Judson for the first mortgage, which was the actual amount left unpaid on it. The proof did show that some of the money obtained by the second loan actually went to extinguish the first mortgage, and that the agreement between Emily A. Stratton and her mother was that the loan was all to be used to pay the first mortgage. So far the equities seem to be plain. Judson can hold his claim for all he paid to get it; but the mortgage he holds after he is paid in full should be held for the money, which went to extinguish it, derived from the second loan. That was the agreement between the owner of the land and the person who loaned the money, and no reason is perceived why Judson can object. He is paid in full. Mrs. Stratton cannot object that her property be held as if the portion of the new loan had been used to purchase the first mortgage *pro tanto*. *Gans v. Thieme*, 93 N. Y. 225. The evidence

shows that one James T. Stratton gave a mortgage to Susan C. Currie for \$2,750 in April, 1865. The defendant claims that Emily Stratton, her mother, asked her to make the loan, and that she "reluctantly sold" the mortgage now owned by Judson, and had to covenant that the \$2,750 mortgage was collectible, which realized a large loss. The proof fails to show that the defendant Emily A. Stratton had any claim against Emily Stratton or Susan C. Currie when they severally made the assignments of the mortgage now held and owned by the plaintiff. The first objection to the decree has no weight, if these conclusions are just. The case will then stand as if the plaintiff held a second mortgage, and the defendant Judson a first mortgage, and the decree provided that the first mortgagee should take his debt, interest, and costs, and assign to the second mortgagee. This is in accordance with settled law. *Twombly v. Cassidy*, 82 N. Y. 155. The judgment should therefore be affirmed, with costs. All concur.

ABEL v. DELAWARE & H. CANAL CO.

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

MASTER AND SERVANT—RULES TO PROTECT SERVANT—INSTRUCTIONS.

In an action for causing the death of plaintiff's testator, while performing his duties as car-repairer, by the absence of the red flag which defendant's rules required to be placed at the end of cars undergoing repairs, the court submitted to the jury the question whether a red flag thus posted was a reasonably safe protection, and, after referring to the rules of other companies for protection of car-repairers, and adding that it was not the duty of defendant to adopt such rules, the court told the jury they had a right to consider "whether some rule which occurs to you, even though no company had adopted it, would have been a better rule, and given better protection, and such a one that ought to have been adopted and maintained. Held, that the charge did not, in effect, tell the jury that, if they could think of some better rule, then they could find defendant negligent for not adopting it.

Appeal from circuit court, Saratoga county.

Action by Agnes E. Abel, as executrix, etc., against the Delaware & Hudson Canal Company to recover for the death of her testator while in the employ of defendants. There was verdict and judgment for plaintiff, and defendant appeals. For former report, see 9 N. E. Rep. 325.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Edwin Young, for appellant. *N. C. Moak* and *L'Amoreaux & Dake*, for respondent.

LEARNED, P. J. The plaintiff's testator was a repairer of cars, working in the yard of the defendant at Mechanicsville. He was repairing one of several cars on what is called the "cripple" track, that is, the track where cars out of order are placed, and in doing this he was between two cars. While he was there, other cars were backed in, or "kicked in," on the cripple track. Some one called out: "Look out; they are backing in there." The deceased attempted to get from between the cars, but did not succeed. He was caught and killed. Cowen was the foreman of the car-repairers, and employed the men. He told every man that was working to work under the protection of a red flag. He directed the two men who worked at the north end of the cars, and the two who worked at the south end, to take care of protecting the red flag, and not to go to work until the red flag was put in position at the draw-head of the car. He also stated to Donnelly, the yard-master of that yard, and to all the brakemen there, that the car-repairers would work under the protection of a red flag. Donnelly, the yard-master who had charge of moving the cars, told the brakeman not to move the cars unless the red flag was down. If there was a flag, then he understood that some one was at work on the cars; if not, then that nobody was there. When the red flag was there, he understood that the cars must not be meddled with, and he so told his men. The car-repairers worked in sets of two, Hickey and

Patrick at the north end; and, as above stated, it was their business to take care of protecting the red flag at that end. On the day of the accident, and about one hour and a half or two hours before it, Hickey put the flag in the draw-head, and left it there. He did not know of any one's taking it out. If he had found it out, it would have been his business to place it back. About half an hour before the accident, Donnelly says that the flag was not in its place, but was lying on the ground. He called the attention of one of the repairers to this fact, because he knew there was danger unless the men were notified. The man picked up the flag, and said he would put it up. He was about 20 feet from the north end of the cars, where the flag should have been placed. It was evidently the duty of this man to put the flag in its place at the north end. Had he done so, there is no reason to think that the accident would have happened, for the general rules of the company provide: "A red flag by day, and a red lantern by night, are signals of danger, on perceiving which the train must be brought to a full stop as soon as possible, and not proceed until it can be done with safety." These rules were known to Donnelly, the yard-master, who had control of the movement of the cars on this cripple track, and he had told his men that when the red flag was maintained they must keep away from the cars. It seems, then, evident that the accident occurred through the fact that the flag had by some one been taken out of its place, and by the neglect of the train-repairer to put it back when his attention was called to the matter by Donnelly. It appears by the testimony of witnesses that the Boston, N. Y. & W. R. Co. uses a red flag to protect repairers on a cripple track; and their master builder testifies that the red flag is always understood as a signal of danger, and that in his opinion it is the best signal for the protection of repairers. A rule of the company substantially like that given above is the rule for such protection. The same testimony is given as to the practice of the Boston & Albany Railroad Company up to 1885, since which time the company has used a yellow flag. The rules of the New York Central & Hudson River Railroad Company say that a blue flag placed in the draw-head at the end of a train of cars standing on the main track or siding denotes that repairers are at work beneath, and that such car must not be coupled or removed until the flag is removed by the repairers.

On the former trial of this case the plaintiff was nonsuited. The judgment was reversed by the court of appeals. 103 N. Y. 581, 9 N. E. Rep. 325. In the opinion of the court it is remarked that the rule that there should be a red flag at the end of the cars undergoing repairs does not appear to have been known to the engineers engaged in running trains. It now appears that this was known to Donnelly, and to all the brakeman under him; and, as the accident was caused by the act of some of the persons under him who were engaged in moving cars, it is not apparent of what consequence it is whether other engineers knew of the rule or not. If the person who kicked the car against the cars where deceased was at work knew that a red flag indicated that repairers were at work, then it would seem that, if such flag had been in place, it would have been as good a notice as if it had blue, yellow, or any other color. The court further say, in its opinion, that the rule above cited of the defendant was "mainly, if not exclusively, intended for the government of moving trains." Moving trains were the very source of danger to these repairers. There would be no danger to the repairers from trains standing still. And it was for the purpose of stopping any moving trains that this red flag or the yellow flag or the blue flag was intended. Thus it appears in the rules that, in case of stoppage on the main track, the conductor must immediately station men with red flags. This is for the protection of the train which has stopped, and gives notice "that human life is in danger," if a train behind should come on. We do not see, therefore, how a signal which was intended for the government of moving trains by causing them to stop was not adapted to protect men who would be injured if the train did not stop.

We can hardly understand, from the opinion, that the court considered the color of the flag important, when that which was in use on this road was the well-known signal of danger. In the complaint there are numerous charges of negligence. The only one material on the evidence is that defendants were negligent in not maintaining suitable signals and watchmen to notify and warn the employees. We understand the opinion of the court to hold that, even if the red flag were a proper and suitable signal, yet, as there was no rule of the defendant requiring its use, and the flag was put up by the order of the yard-master, the defendant would be liable because the rule was not regularly promulgated by the defendant, although acted upon by the yard-master. Of course, whatever rules might be made, it would be impossible to prevent the risk that some person carelessly or maliciously might remove the flag required by the rules. The learned judge, however, who tried the case held that, if the yard-master had made rules that were sufficient, as explained by the court in the charge, it would be the same act as the act of the company. He therefore submitted to the jury the question whether the provision that a red flag should be posted at the end of the outermost car, where the men were at work, as a signal of danger, was a reasonably safe protection, provided it had been fairly observed. The jury must therefore have found that the red flag thus placed was not a reasonably safe protection; unless, however, they may have been influenced by another part of the charge, to which defendant excepted, and which is as follows: "You have a right to consider whether some rule which occurs to you, even though no company had adopted it, would have been a better rule, and given better protection, and such a one that ought to have been adopted and maintained." This part of the charge authorized the jury to consider, not simply whether the red flag was a reasonably safe protection, but, further, whether they could not think of some rule, never before known, which would have given a better protection, and which ought to have been adopted and maintained. Now, if the court had charged that, in case the jury could think of some better rule, then they could find the defendant negligent for not having adopted such rule, the charge would have been improper. But, taking the whole charge together, we think that this was not the meaning. The court had previously spoken of the rules of other companies, had said it was not the duty of defendant to adopt such rules; and, after making the remarks above quoted, the court added that, because some other company has adopted a rule, the jury could not hold, as a matter of right, that the defendants should have adopted it. Therefore it seems to us that the sentence excepted to did not have the objectionable meaning attributed to it by defendant. The whole matter was left to the jury to say whether the rules of the defendant afforded a reasonable and safe protection. This seems to be the question under the decision of the court of appeals.

This accident happened in 1884. While it is in evidence that at that time the rules of the New York Central & Hudson River Railroad Company required the blue flag in such cases, it is also shown that at that time other companies used the red flag, as was done in this case; and one witness of experience had never heard of any other color being used prior to that time. As the evidence now stands, therefore, it appears that the red flag was at the time of the accident in general use, and the blue flag was exceptional; and, as has been already stated, the defendant's witness shows that the use of the red flag was the rule in that yard.

In regard to appliances, it has been said that the employer does not owe the duty of furnishing the best known or best conceivable, but only reasonably safe and suitable. *Burke v. Witherbee*, 98 N. Y. 562; *Probst v. Delamater*, 100 N. Y. 272, 3 N. E. Rep. 184. And the same rule must, in substance, apply here. It may be, however, that the decision of this present case in the court of appeals is to be construed (as claimed by plaintiff) as holding that

the rule requiring the use of the red flag was insufficient, and that the blue flag should have been used. If it were not for that, we should think that the proof was abundant that at the time of the accident the red flag might be used as a reasonably safe and sufficient protection, and that the accident would not have occurred if the rule and practice of the company, as established in that yard, had not been interfered with through the unauthorized removal of the red flag by some unknown person. We suppose that the plaintiff does not claim that the defendant is liable for the neglect of one of the repairers, charged with the duty, in not replacing the flag when his attention was called to the fact that it was lying on the ground. He was one of those whose duty it was to put the red flag in its place at the end of the crippled cars. We must notice that the proximate cause of the accident was the removal or the absence of the flag. If the red flag had been in place, and notwithstanding that the accident had happened, then some argument might have been made as to the sufficiency of the red flag, and the desirableness of a flag of some other color. But that was not the case, because the proximate cause was the absence of any flag at all. This cause came from the neglect of the train-repairer at the end of the train. He had notice that the flag was not in its place. He had been ordered by the foreman under whom he worked to keep the flag in the end of the train, and he neglected this duty. Even if there had been a positive rule promulgated by the company that the flag was only to be removed by the repairers, yet he was the repairer on whom this special duty was imposed; and, instead of putting the flag back in its place, he walked away with it towards some other part of the train; thus practically removing it himself. In the *Burke Case*, above cited, in which the court of appeals reversed the judgment when the jury had found the defendant guilty of negligence, some stress was laid in the opinion on the fact that the appliance had been in use in other places, and had never failed of its purpose; and the court say that it was inadmissible to impute negligence under such circumstances. In the present case we have a rule in general, though not universal, use, and no evidence is given that the rule has not always served the purpose, when obeyed, of warning those who were engaged in moving cars in such places to stop. If it accomplished this, it would seem to have been reasonably safe.

Some exceptions were taken by defendant to evidence given by plaintiff on cross-examination of one of defendant's witnesses. This evidence consisted of questions as to his opinion whether certain rules read by the counsel out of a book were good rules. That kind of examination was possibly admissible as tending to show the good or bad judgment of the witness. On the direct issue it was probably quite immaterial. But we do not think that its admission would justify a reversal of the judgment. It is undoubtedly true that the evidence as it now stands is different from that on the former trial. We think, however, that respect for the court of appeals should prevent us from taking any view which might be contrary to their decision, and we therefore leave it to that court to apply its former decision to the present state of the case. Judgment and order affirmed, with costs. All concur.

PEOPLE v. BRADT.

(*Supreme Court, General Term, Third Department. November, 1887.*)

1. INTOXICATING LIQUORS—SALE WITHOUT LICENSE—COMPLAINT.

A complaint alleging that defendant sold "one bottle of port wine" without a license does not charge an offense under Laws N. Y. 1867, c. 628, § 13, prohibiting the sale of liquors "in quantities less than five gallons at a time without having a license therefor."

2. SAME—EVIDENCE—PREVIOUS ARREST.

Where defendant in a prosecution for selling liquor without a license introduces evidence that he was not the proprietor of the place in question, but had leased it to another, evidence that defendant was arrested about a year before for keeping

a disorderly house at the place in question is not admissible to prove proprietorship, unless there is also evidence that it was the practice to refuse licenses to persons who had been charged with such offenses, of which fact defendant knew, or that an application by him had been refused on that ground, or that he had reason to fear that it would be so refused, as showing a motive for his making a pretended lease, and applying for a license in the name of another.

Appeal from special sessions, city of Albany.

Proceeding against Isaac Bradt for selling liquor without a license. The complaint, which was made by one James Powell, alleged that complainant on October 5, 1887, "at Nos. 66 and 68 Green street, in said city of Albany, did purchase as a beverage one bottle of port wine from one Susan Mitchell and Isaac Bradt, and did then and there drink the same," and that said Mitchell and Bradt had no license to sell liquors in quantities less than five gallons at a time. On trial by the court without a jury, defendant was found guilty, and sentenced to six months' imprisonment. Defendant was compelled to testify, over objection, that he had been arrested about a year before on a charge of keeping a disorderly house at the place where the liquor was sold to complainant; the evidence being admitted to prove proprietorship.

Argued before PARKER, LANDON, and FISH, JJ.

John W. Walsh and *Edward J. Meegan*, for appellant. *Andrew Hamilton*, Asst. Dist. Atty., for the People.

PARKER, J. The averments in the complaint are insufficient to charge the offense of which the defendant was found guilty. The charge it assumes to make against the defendant was based upon chapter 628, Laws 1857, § 13: "Whoever shall sell any strong or spirituous liquors or wines in quantities less than five gallons at a time, without having a license therefor," etc. The complaint alleges a sale of one bottle of port wine, without alleging that only one bottle was sold, or that the quantity sold was less than five gallons. Averring affirmatively that the defendant did sell one bottle, without some words negating a larger quantity, is not bringing the case within the statutes. Bish. St. Crimes, § 1039.

It was error to compel the defendant to testify that he had been arrested for keeping a disorderly house in the premises in question over a year before. It is well settled that the mere fact of an arrest, based upon some other charge than that of which a defendant is being tried, is not admissible for the purpose of affecting his credibility. *People v. Crapo*, 76 N. Y. 288. The court, evidently bearing this rule in mind, in overruling the objection made by the defendant, received the evidence "solely for the purpose of showing proprietorship." To justify the ruling, therefore, it must appear to have been material evidence upon the question of proprietorship. The people proved that the defendant was the owner of the premises in which the bottle of port wine was alleged to have been sold, and was at the house every day and evening nearly, and at times was seen behind the bar. The defendant testified that, about the 1st of May previous to the alleged selling, he leased the premises to one Lizzie Welch for \$15 a week and his board; he to retain a room in the house for his personal occupancy. As to the leasing, he was fully corroborated by Lizzie Welch, who further proved that she had obtained a government license in her own name, and had also applied for a license from the local authorities, and had deposited the sum of money usually required, but that no license had been granted her. It was claimed on the part of the people that the pretended leasing was a mere cover, the defendant being the actual proprietor; and it is argued that evidence of the arrest was proper, in that it furnished a reason for his applying for a license in some other name than his own. I am unable to find anything in the evidence justifying such an argument. Had the defendant been convicted for a year before the violation of the excise law, the statute would have prevented him from obtaining a license; and, as every man is bound to know the law, it could have been argued fairly

from the record of conviction and the statute that the defendant, knowing that the law prevented him from obtaining a license in his own name, sought to obtain it for his own benefit by using the name of another. The mere arrest, however, for the violation of the excise law, not followed by a conviction, does not forfeit his license as a matter of law; neither does his arrest for the offense of keeping a disorderly house work a forfeiture of it. It follows that defendant had no reason to apprehend that such arrest constituted a legal obstacle to his obtaining a license. Then, unless facts were proven tending to show that it was the practice of the excise commissioners not to grant license in such cases, of which fact he knew, or that he had been refused, on application, because of such trouble; or that from information obtained he had been led to expect such a result,—it is difficult to see what possible bearing that evidence can have upon the question of proprietorship. There was no such evidence. Not a word can be found in the case showing or tending to show, or from which it can be argued, that the defendant apprehended difficulty in obtaining a license because of the arrest. That fact, then, standing alone, as it does in this case, was not material to the issue, and the court was not justified in receiving that which it was clearly objectionable to receive generally by simply limiting it to an issue concerning which it was not a material fact. Judgment and conviction reversed, and defendant discharged.

LONDON, J., concurs. FISH, J., concurs upon the first ground stated only.

MARX v. MANHATTAN RY. CO.

(*Supreme Court, General Term, First Department. May 16, 1890.*)

WITNESS—COMPETENCY—PHYSICIANS—WAIVER.

Where plaintiff, in an action for personal injuries, testifies as to his consultation with a physician concerning the injury, he waives his privilege, under Code Civil Proc. N. Y. § 886, providing that the prohibition of section 834, against disclosing information acquired while acting as a physician, shall "apply to every examination of a person as a witness, unless the provisions thereof are expressly waived" by "the patient."

Appeal from circuit court, New York county.

Action by Pierce S. Marx against the Manhattan Railway Company. There was a judgment for plaintiff, and defendant appeals. For former report, see § N. Y. Supp. 113.

Argued before VAN BRUNT, P. J., and BARTLETT, J.

Davies & Rapallo, (Edward S. Rapallo, Howard Townsend, and Samuel Blythe Rogers, of counsel,) for appellant. Aaron Kahn, (Christopher Fine, of counsel,) for respondent.

VAN BRUNT, P. J. This action was brought to recover damages for injuries claimed to have been sustained by the plaintiff to his eye, while standing beneath the defendant's railway in the Bowery, from coal falling from one of the defendant's engines. The trial resulted in a verdict for the plaintiff, and from the judgment thereupon entered, and an order denying a motion for a new trial, this appeal is taken. Various exceptions are brought up upon this record, but in the disposition of this appeal it will be only necessary to consider those taken to the exclusion of the evidence of Dr. Knapp, a witness called on behalf of the defendant. The plaintiff, when examined upon his own behalf, testified that he had visited Dr. Knapp two or three times to consult him about his eye; that Dr. Knapp did not examine him; that he merely looked at his eye,—examined his eye,—asked him no questions; did not ask him a word; and that he told him nothing; and upon the third visit Dr. Knapp told the plaintiff to get examined by a doctor. Dr. Knapp was then called as a witness by the defendant, for the purpose of showing that

the plaintiff had not truly stated what took place between the plaintiff and himself. The counsel for the plaintiff objected to the doctor's giving any evidence of anything said or done by him, upon the ground that the plaintiff had consulted him in a professional capacity, and that the doctor was prevented by section 834 of the Code from testifying as to anything which took place between them. The court sustained the objection, and the evidence was excluded. This we think was error. It is undoubtedly true that the plaintiff occupied the relation of patient to Dr. Knapp, and the physician was precluded from giving evidence of what took place between them by section 834 of the Code, unless the privilege was waived. Section 834 reads as follows: "A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." Section 836 provides for exceptions to the rule. It is as follows: "The last three sections shall apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing,—the patient or the client." It has been well settled that this express waiver may be inferred from circumstances. Thus the provisions of the Code in respect to an attorney are the same as those relating to physicians; and it has been held that, where a testator has asked his attorney to become a witness to his will, he has expressly waived this privilege. *In re Coleman*, 111 N. Y. 220, 19 N. E. Rep. 71. In the case of *McKinney v. Railroad Co.*, 104 N. Y. 352, 10 N. E. Rep. 544, it was held that, where the plaintiff had examined a physician who had attended him in a professional capacity upon a previous trial, upon a new trial the defendants might call and examine the same witness, against the objection of the plaintiff, the court saying: "The patient cannot use his privilege both as a sword and a shield,—to waive when it inures to her advantage, and wield when it does not." The plaintiff, upon his direct examination in the case at bar, had pretended to give all that took place between himself and Dr. Knapp; had opened the door of the consultation room to the jury; and had pretended to give them a statement of what had occurred between himself and Dr. Knapp. Can it be that, having done this, when Dr. Knapp is called to give his version of what took place, his mouth is shut, and the truth cannot be laid before the jury? Can it be that a patient can distort the features of a consultation with his physician so as to do the physician the greatest of injury, and the physician be prohibited from defending himself? Clearly not. The patient may keep the door of the consultation room closed, but he cannot be permitted to open it so as to give an imperfect and erroneous view of what is taking place there, and then close the door when the actual facts are about to be disclosed. This would be allowing a plaintiff to manufacture evidence for himself in cases of this description, and prevent the defendant from resorting to the only means to elicit the truth. The legislation in question was not intended to be the means of such injustice, and it may be claimed with great force that, as the section in question was intended to prevent the disclosure by a physician of his patient's condition, either physical or mental, when such condition comes in question, and physicians are examined at the instance of the plaintiff in respect thereto, the privilege is waived, and the opposite party has a right to resort to the same class of evidence. In the case at bar the evidence offered related to the same interview as to which the plaintiff had testified, and of the occurrences of which he had pretended to give an account. It seems to us clear that, having thus himself gone into the privileged domain to get evidence upon his own behalf, he cannot prevent the defendant from assailing such evidence by the only testimony available for that purpose. In construing this legislation, we must consider the object which was sought to be attained, viz., the greatest freedom in confessions to minister or priest, and consultations with attorney or physician. The reason

for the rule no longer exists where the party himself pretends to give the circumstances of the privileged interview. The judgment and order appealed from should be reversed, with costs to appellant to abide event.

PEOPLE ex rel. WELLING v. MEAKIN et al., Commissioners of Excise.

(*Supreme Court, General Term, First Department. May 16, 1890.*)

1. MANDAMUS—To COMPEL JUDICIAL OFFICER TO ACT.

Under Laws N. Y. 1870, c. 175, § 8, as amended by Laws 1878, c. 549, § 4, providing that the board of excise of any city, etc., may, and upon the complaint of any resident of said city, etc., "shall," summon before them any person licensed to sell intoxicating liquors, and, if satisfied that he has violated any provision of the act, cancel his license, *mandamus* will lie to compel commissioners of excise of New York city to decide a complaint presented to them by a resident of their city against a saloon-keeper for keeping his saloon open on election day, in violation of the statute.

2. SAME—PEREMPTORY WRIT.

The complaint was presented to the commissioners on January 27th, set for hearing February 19th, and submitted for decision February 28th. On the last-named day the license had 58 days to run. When the *mandamus* proceedings were commenced the license had only 18 days to run. *Held*, that the facts justified the inference that the delay was equivalent to a refusal to act, and warranted the issuance of a peremptory writ.

Appeal from special term, New York county.

Application by Richard W. Welling for *mandamus* to Alexander Meakin and others, commissioners of excise. The order was granted, and defendants appeal.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Edward Browne, for appellants. L. L. DeLafield, for respondent.

VAN BRUNT, P. J. This is an appeal from an order granting a peremptory *mandamus* against the commissioners of excise of this county, directing them to decide a certain complaint presented to them by the relator against one Scheuplein. The relator presented this complaint on the 27th of last January. It was for keeping open a saloon upon election day, in violation of the statute. Notice was given to Scheuplein, and the matter was set down for hearing upon the 12th of the following February. Upon the latter date the board adjourned the hearing, although the relator was ready to proceed, to the 21st of February, when it was again adjourned (the relator being still prepared to proceed) to the 28th of February. On the 28th of February the hearing took place. Two witnesses testified that Scheuplein's saloon, which was but 229 feet from a neighboring polling place, was open on the last general election day, and that beer was then and there sold. This was not denied, though Scheuplein was examined, and testified that he knew nothing about this violation of law, and that he left orders not to sell anything over the bar that day. Upon these very simple facts the case was closed, and left with the board for decision. Subsequently the commissioners were repeatedly called upon for a decision, but without avail; and as late as the 8th of April they informed a person who applied to them upon behalf of the City Reform Club, of which the relator is treasurer, that "there was no decision."

Upon this state of facts the *mandamus* was granted simply to set the board in motion. The appeal was submitted, and the first point which we find in the appellants' brief is that the power to revoke licenses is a purely discretionary power lodged in the commissioners of excise, and therefore *mandamus* will not lie to compel them to exercise, or to refuse to exercise, such discretion. This point, although elaborately considered and enforced by the citation of numerous authorities, seems to us to have no bearing upon the real question presented by this appeal, and for the sufficient reason that there was no attempt on the part of the special term to interfere with the discre-

tion or judgment of the board. The *mandamus* required the board to exercise its discretion and judgment, and required nothing else. The rules on this subject are well settled. Where the duty is peremptory or absolute, the writ may require the doing of a specific act. Where, however, official discretion and judgment are involved, the writ only commands the board to act. It will not direct the board to act in a specific manner, nor attempt to control its judgment. Even in the case of inferior courts, *mandamus* lies to compel them to proceed with the trial of causes which they have delayed without sufficient reason, (High, Extr. Rem. § 250,) and the author adds (section 251, citing numerous cases) that "the rule may now be regarded as well established that *mandamus* lies in all cases to compel an inferior court to proceed to the trial of a cause, and to set it in motion, when it has unreasonably delayed the proceedings, or where its refusal to proceed amounts to a denial of justice." See, also, sections 147, 148, Id.; and 3 Bl. Comm. 111. The case in this and other states are numerous where ministerial officers, clothed with *quasi* judicial powers, have thus been set in motion, although the courts have scrupulously avoided interfering with the manner in which the discretionary duty should be performed. The learned counsel for the appellant evidently misapprehends the language of EMOTT, J., in *People v. Board*, 27 N. Y. 37, quoted and followed in *People v. Booth*, 49 Barb. 81, and *People v. Taylor*, 1 Abb. Pr. (N. S.) 200. The learned judge there observed that, to entitle the relator to a *mandamus*, "there must be a legal right not merely to a decision in respect to the thing sought, but to the thing itself." That language has reference to a case where the *mandamus* was granted to compel the thing sought, not merely to compel a decision. Plainly, what was meant was that the mere right to a decision did not involve the right to a decision in a particular way. The language does not convey the idea that, where there is a right to a decision of some kind, a *mandamus* will not lie to compel such decision. Such a doctrine would be contrary to the entire current of authority in this country and in England.

The appellant's second point is that no right existed in the relator, either individually or as a citizen, to a judicial determination of any question by the commissioners of excise. This proposition overlooks the fact that it is a public duty which is sought to be here enforced; and that, as was observed by Mr. Justice DANIELS in *People v. Daley*, 37 Hun, 461, "all citizens are equally concerned in securing its performance." See the cases and treatises cited in that opinion. It also overlooks the fact that under the statute the board is required to act "upon the complaint of any resident" of the city; and that the present relator, as such resident, was the complainant in the case charged to have been unreasonably delayed. The precise point was decided by Mr. Justice LEWIS in *People v. Becker*, 3 N. Y. St. Rep. 202, and we concur in his conclusion on that head. It is also urged that the board was not bound to act upon the complaint further than to examine the witnesses on both sides; that is, if we understand the learned counsel, to hear the case, and not to decide it. This is a strange proposition, and, if correct, it would lead to a strange perversion of the legislative intent. The act reads as follows: "The board of excise of any city, town, or village may at any time, and upon the complaint of any resident of said city, town, or village shall, summon before them any person or persons licensed as aforesaid; and if they shall become satisfied that any such person or persons has or have violated any of the provisions of this act, or of the acts hereby amended, they shall revoke, cancel, and annul the license of such person or persons, which they are hereby empowered to do, and, where necessary, to enter upon the premises, and take possession of and cancel such license. Upon an inquiry, the said board, the party complained of, may summon, and the said board may compel the attendance of, witnesses before them, and examine them under oath." Laws 1870, c. 175, § 8, (as amended, Laws 1873, c. 549, § 4.) Taking this literally,

the appellants contend that they are only bound to act when "they shall have become satisfied" that the accused person has violated the act, and that their non-action is proof conclusive that they have not become satisfied. The difficulty with this position—and it is not the only difficulty—is that the statute contemplates the satisfaction of the board, and that the absence of such satisfaction on the part of the board cannot be predicated of non-action; otherwise, the law could be evaded by the failure of the board to meet. Whether the board is satisfied or dissatisfied can only be known after a consideration of the case by the board, and the taking, at a meeting thereof, of the sense of its members. But the entire provision plainly contemplates a summary trial. *People v. Haughton*, 41 Hun, 560; *People v. Schewe*, 29 Hun, 124; *People v. Commissioners*, 59 N. Y. 96. Upon the complaint of the resident, a summons must be issued and served upon the accused. The board or the accused may thereupon summon or compel the attendance of witnesses, and examine them under oath, and the proceeding is styled an "inquiry." Such an inquiry must have a definite result. It would be the height of absurdity to go through all the machinery of a trial, and then and there let the whole matter rest without any consideration by the board; the complaint being treated as thus fully disposed of, and the case decided. Such a construction would be as dangerous to the accused as it would be injurious to the public. The non-action of the board could be continuously and indefinitely held over the head of the accused. He would never know the day or the hour when the rod of affirmatively expressed satisfaction as to his guilt might be laid upon him. He would be completely in the power of the board; and the grossest oppression, personal or political, might be practised upon him. Upon the other hand, of what avail to the people would be the complaints of public-spirited citizens,—residents of the city,—seeking to enforce the law for the benefit of all, if such complaints are deemed to be legally passed upon by contemptuous silence? In our judgment, it was the plain intent of the legislature, as expressed in this act, that, after hearing all the testimony, the board, as a board, should consider such testimony, and thereupon decide, by a vote of the commissioners, whether the accused person has or has not violated any of the provisions of the act. If such accused person has so violated any of the provisions of the act, the duty to revoke the license is imperative. In that case, to quote the language of the act, "they shall revoke, cancel, and annul the license." And this duty cannot be evaded, or the rights of the people trifled with, by non-action or silence. In *People v. Board*, 24 Hun, 195, the court held that the duty of revoking licenses was dependent upon the board's becoming satisfied that "the licensee had violated some provision of the statute." The language used in that case involved the concession that the statute is mandatory, and casts upon the board the duty of revoking licenses when so satisfied of a violation of some provision of the statute. In *People v. Wright*, 8 Hun, 309, HARDIN, J., said that the commissioners "were simply to become satisfied in their judgment, and then this right, as well as duty, to revoke the permit which had been given the relator was clear." And in *People v. Commissioners*, 59 N. Y. 96, GROVER, J., says that the statute authorizes "an inquiry into and determination of the question whether the party licensed continues to be a suitable and proper person to sell intoxicating liquors." That there must be an affirmative "determination" has in fact never been doubted.

The remaining question is as to whether a peremptory writ should have been granted. The appellants insist that an issue of fact on the question of unreasonable neglect was raised by the opposing affidavits, and that consequently the relator was only entitled to an alternative writ. It is undoubtedly true that a peremptory writ can issue only when, upon the conceded or undisputed facts, the right is dependent upon questions of law. In the present case none of the facts stated in the moving affidavits are denied, nor is new mat-

ter stated in justification, explanation, or extenuation of the neglect of the board to consider this particular case. The commissioners deny that they have "unreasonably delayed or neglected and refused to decide or take any action upon the complaints so made as aforesaid by the City Reform Club," referring, not to this particular case of Scheuplein, but to numerous "complaints for violation of the excise law, made since the 1st of January, 1890," by the said City Reform Club against persons licensed in the city of New York. As to this particular case the commissioners were charged as follows: "(10) That, in violation of the provisions of law in such case made and provided, the said commissioners have unreasonably delayed, have wholly neglected and have refused to decide or take any action upon the deponent's said complaint." The only answer to this charge is a denial of what is not directly averred, namely: "That the said board, or any of the commissioners thereof are unwilling or have refused to revoke the license of said Scheuplein, or any other licensee, for a violation of the law, as is alleged in said affidavit. On the contrary, deponent alleges that the board of excise, and the commissioners thereof, are entirely willing to decide the said matter of Scheuplein, and all other matters brought before them." This is clearly an admission of (by failure to specifically deny) the charge that the commissioners have "unreasonably delayed, have wholly neglected, and have refused to decide or take any action upon" the relator's complaint. It is simply an expression of present willingness, at the time when the affidavit was verified, to decide the case; that is, of willingness under the stress of the proceedings. But, even if the commissioners had denied the charge of unreasonable delay, they have not attempted to deny any of the facts upon which that charge was predicated. It appears without dispute that Scheuplein's license was to expire on the 25th of April, 1890. Yet on the 8th of April the case had not even been considered, although the commissioners had "often been requested so to do." That it appears that when the case was closed, and submitted for decision, on the 28th of February, the license had 58 days to run. Forty of these 58 days were permitted to pass without the slightest action; and thus, when these proceedings were commenced, but 18 days were left of the term of the license. Under such circumstances a denial of unreasonable neglect would simply be a denial of the self-evident conclusion that there was gross neglect, and that the commissioners, by their willful non-action, were permitting the accused to enjoy with impunity the remainder of his term. We agree with the respondent that the facts fully justified the legal inference that the commissioners did not intend to take any action in the matter; that their delay was unreasonable as matter of law, and equivalent to a refusal to act. In *People v. Supervisors*, 20 N. Y. 252, a judgment refusing a peremptory *mandamus* was reversed, although the claim under consideration was "not allowed nor disallowed by any formal action of the board." JOHNSON, C. J., speaking of the claim, said: "It was laid aside without other action when the duty of the board was to proceed and act upon the claim; * * * and we must hold their conduct to be equivalent to a rejection of the claim, or else leave it in the power of the board of supervisors to postpone action in all cases till such time as they think it fit to proceed." This case was followed in *People v. Supervisors*, 41 N. Y. 291, where PORTER, J., observed that it was quite evident "from the inaction and delay of the board of supervisors, as well as from the grounds on which the application for a *mandamus* was resisted, that the board did not recognize its obligations to raise the moneys in question under the act of 1860. There was, it is true, no formal refusal; but we think the court below was right in holding that, under the circumstances disclosed in the affidavit, the neglect of the board was equivalent to a refusal to comply with the requisition. See, also, *Queen v. Vestrymen*, 8 Adol. & E. 889, and *Queen v. Commissioners*, reported as note, Id. 901. The case of *People v. Leonard*, 74 N. Y. 445, does not conflict with these cases. There the *mandamus* was

not merely to set the officer in motion, and to require him to act upon his judgment, but it directed him to do the specific thing as to which he was clothed with discretion. But, even there, CHURCH, C. J., said it was not a case of refusal to act at all. "Delay is alleged, and this is explained by the defendant." Where the facts are undisputed, the question of what is a reasonable time is ordinarily one of law. *Roth v. Railroad Co.*, 34 N. Y. 553, and cases there cited; *Hedges v. Railroad Co.*, 49 N. Y. 225; *Davis v. Gwynne*, 57 N. Y. 677. Whether that doctrine is strictly applicable here need not be definitely decided, as not only are the facts undisputed, but also the conclusion directly charged against the commissioners with regard to this particular complaint. Upon both the facts and the law, we think the order appealed from was right, and should be affirmed, with costs. All concur.

CLAGGETT *et al.* v. METROPOLITAN NAT. BANK.

(*Supreme Court, General Term, First Department. May 16, 1890.*)

BANKS AND BANKING—DISSOLUTION—REDEMPTION OF NOTES.

Laws N. Y. 1865, c. 97, § 2, provides that any state bank becoming a national bank shall be deemed to have surrendered its charter on compliance "with the requirements of this act," but that it shall continue a body corporate for three years afterwards for the purpose of closing its concerns, but not for the purpose of the business for which it was established. Section 6 provides that, when authorized to commence business as a national bank, all assets of the old bank shall vest, without any conveyance, in the national bank, which, on returning the bills of the state bank to the banking department of the state, may receive the stock pledged to secure the redemption of the same, and that it shall be subjected to the same rules as the state banks with regard to the final redemption of the circulating notes of "such state banks so converted into national associations." Section 8 provides that the act shall not be construed so as to release the national bank from any obligation incurred before becoming such association. *Held*, that the conversion of a state bank into a national bank did not constitute such a "closing of the business" of the state bank that it could limit its liability to redeem its circulating notes by proceedings under Laws 1865, c. 236, authorizing state banks intending to close business to publish notice that any persons having any of the circulating notes of the bank should present them for redemption within six years, and, failing to do so, the bank would no longer be liable on such notes. *Affirming* 4 N. Y. Supp. 115.

Appeal from special term, New York county.

Action by Sumner E. Claggett and Charles T. Chickering, as administrators of the estate of James H. Paine, against the Metropolitan National Bank, to recover the amount of certain bank-bills issued by the Metropolitan Bank while incorporated under the laws of the state, and before it became a national bank. On March 14, 1867, such bank deposited with the bank superintendent of the state a sum of money equal to its outstanding circulation, and the superintendent published notice that the circulating notes of the bank would be redeemed at par at any time within six years from the date of notice, and that all notes that were not presented for redemption within that time should cease to be a charge upon the fund in the hands of the superintendent for that purpose. The bank-bills in suit were not presented for redemption within seven years from the date of such notice. There was judgment for plaintiffs, and defendant appeals. For opinion of Mr. Justice PATTERSON at special term, see 4 N. Y. Supp. 115.

Argued before VAN BRUNT, P. J., and BRADY and BARTLETT, JJ.

Peabody, Baker & Peabody, (Fisher A. Baker, of counsel,) for appellant.
Theo. H. Swift, (Leslie W. Russell, of counsel,) for respondents.

BRADY, J. The defendant, while a banking association under the laws of this state, and in 1865, having become a national banking association under the provisions of the act passed in that year, (chapter 97,) and desiring to retire its circulating notes issued while a state bank, proceeded to comply with the provisions of the act of 1859 (chapter 236) relating thereto. In its con-

version to a national bank, and in the proceedings, under the act last mentioned, to retire its notes, every requirement was observed; and the question presented, therefore, *in limine*, is whether the act of 1859, the conversion having taken place, is applicable. The learned justice in the court below held that it was not, for the reason that the act of 1859 applied only to banks having an intention to close their business absolutely, and not to those intending to continue under any other form. It may not be necessary to add to the views expressed by the learned justice in the court below, sustaining this proposition, but nevertheless a few observations will be indulged in.

It is true that by section 1 of the act of 1865 it is declared that its provisions shall be taken and deemed as an amendment of the laws of this state in reference to the banking business, and therefore they were ingrafted on those laws; and for this reason, if no other exists, it must be conceded that whether it was the intention of the legislature to provide that the two proceedings should go on *pari passu*, that is, the national organization, and the retirement of its notes by the bank while a state corporation, is a difficult and troublesome question. The act of 1865, it must be observed, will be read in vain to discover any language, except by remote implication, which tends to express such a design. In the act of 1859, however, we find not only language indicating the expressed purpose of the statute to be to facilitate existing state banks to retire their circulation, but language from which that purpose, and that purpose only, is declared and quite manifest. It provides, among other things, that there shall be a publication in the state paper by the superintendent of banking that the bank-notes will be redeemed by him, and must be presented within six years from the date of the notice; and that upon the expiration of such six years (all proceedings being regular) it shall be lawful for the superintendent to surrender to the banking association, and it shall be entitled to receive from him, all the money remaining in his hands after such redemption, except so much as may be necessary to pay the reasonable expenses chargeable against the accounts, including the publication of the required notices. The money so to be refunded is whatever remains of the amount required to be deposited in order to fully meet the outstanding circulation at the time the proceeding is initiated, whatever that may be. By section 5 it is further provided that a banking association, after the payment of all the circulating notes issued by it which shall have been presented within the time required by the notice to be published, as already stated, and of all other lawful claims and demands against the bank, it shall divide the remaining property and effects of the bank among the stockholders thereof, or their personal representatives, according to the respective shares and interests therein. It will at once be perceived that if the bank continues in another form, all its assets being transferred to the new formation by operation of the statute, the division contemplated by the section cannot be made and in that respect, at least, the object and design of the act is frustrated. A provision of this kind would, by implication, if there were no express language leading to such a result, determine the character of the statute and its purpose. It seems to be a necessary corollary, if the distribution is to take place of any surplus, that the absolute death of the corporation is not only contemplated, but indispensable, in order to carry out the provisions of the statute. For these reasons, in addition to those assigned by the learned justice in the court below, (4 N. Y. Supp. 115,) it is thought that the judgment is correct, and should be affirmed, with costs.

VAN BRUNT, P. J., concurs. BARTLETT, J., concurs in result.

SCHELL v. ELKINS *et al.**(Supreme Court, General Term, Second Department. May 12, 1890.)*

MORTGAGE—FORECLOSURE SALE—REDUCTION OF TAXES.

Where completion of title under a foreclosure sale is postponed, and in the mean time taxes on the property are reduced under the arrearages act, (Laws N. Y. 1883, c. 114,) the purchaser is entitled to allowance for the tax as it stood when his bid was made.

Appeal from special term, Kings county.

Foreclosure proceedings instituted by Edward Schell, trustee of Mary Payson Cargill, against George B. Elkins and others. An order was entered denying plaintiff's motion to be released from his purchase at the foreclosure sale, and setting aside the order confirming the sale, and directing the sheriff to make a new report allowing plaintiff less on account of taxes and interest, and plaintiff appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Edward H. Schell, (James O. Hoyt and Frederick A. Ward, of counsel,) for appellant. *J. Ralph Burnett, J. Hunt Betts, and Sherman Boarts, (William D. Veeder, of counsel,)* for respondents.

BARNARD, P. J. The plaintiff, in 1875, obtained a decree for the foreclosure and sale of certain mortgaged premises in Brooklyn. No sale was made under the decree until April, 1881, when the plaintiff bought in the property for \$15,000. The taxes then upon the property were \$4,505.58, which were, by condition of sale, to be deducted. The title under this sale was left unperfected until 1889, when the sale was adjudged a good sale, and the plaintiff was required to complete the purchase and take title under it. The taxes on the property in 1889 had been reduced, under chapter 114 of Laws of 1883, to the sum of \$3,026. The sheriff, on giving the deed, allowed the tax as it stood when the bid was made, and the order appealed from corrects this by allowing only the reduced tax, under the arrearages act above mentioned.

I think the sheriff's report was correct. The order appealed from is based upon the statement in it that the sale should have been closed on the 4th of May, 1881. If that had been done, an allowance of the tax as it then stood would have been a matter of course. A subsequent reduction under a law two years later would not have inured to the benefit of the mortgagor or his representatives, but to the exoneration of the land which the plaintiff owned. The arrearage law was designed to reduce a tax on the land to a sum which it justly ought to pay at the time of the passage of the act. The tax was not necessarily bad, but it had become so large that it was deemed better to reduce it, and get payment, than to sell the land for the larger amount, and lose it, as the act states that the tax has become greater than the assessed value of the land in some states. The accounting should be as of 4th May, 1881, allowing the tax as it then stood. The debt was then \$11,437.31; the costs and interest on the amount, \$440.23; the sheriff's fees, \$211.50; the tax is \$4,505.58. This would leave a debt on May 4, 1881, of \$1,594.87. The order should be modified so as to conform to this result.

COLLINS v. CITY OF LONG ISLAND.

(Supreme Court, General Term, Second Department. May 12, 1890.)

TAXATION—ASSESSMENT—NON-RESIDENT OWNERS.

Under Laws N. Y. 1890, c. 839, providing that tax assessments on land in Long Island City shall not be invalidated "by reason of any error, mistake, or insufficiency in the owner's name," and that the tax shall be a "lien on the property assessed until discharged by payment," an assessment of the land of a non-resident is not vitiated by being assessed to unknown owners.

Appeal from judgment on report of referee.

Action by Benjamin Collins against Long Island City to vacate taxes on lands in defendant city for the years 1884, 1885, and 1886. The lands were vacant and unoccupied. There was judgment for plaintiff. Defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.
W. J. Foster, for appellant. *H. Nott Anable*, for respondent.

BARNARD, P. J. The case shows that the assessments were made to unknown owners, and to one Zollikoffer. The lands were then owned by Mary Norwood, a non-resident of Queens county. There is no difference, as to assessments upon lands in Long Island City, between lands of residents and non-residents. No separate column is required for the two classes of persons. Chapter 461, tit. 6, Laws 1871. The entry of the wrong name as owner did not invalidate the tax. No assessments, which shall be made for any taxes in Long Island City, shall be invalidated "by reason of any error, mistake, or insufficiency in the owner's name." The tax is a "lien on the property assessed, until discharged by payment." Chapter 839, Laws 1880. By these laws, it is provided that no tax upon lands shall be invalidated in consequence of the omission of the name of the rightful owner. When the assessment under this act was made against an estate of a deceased person, it was held that the tax was good. *Haight v. Mayor*, etc., 99 N. Y. 280, 1 N. E. Rep. 883. The judgment should therefore be reversed, and a new trial granted at special term, costs to abide event. All concur.

GLOUCESTER IRON-WORKS v. BOARD OF WATER COM'RS.

(Supreme Court, General Term, Second Department. May 12, 1890.)

ACTIONS—CONSOLIDATION.

Plaintiffs sued for the contract price of goods delivered to defendant. The answer averred a failure by plaintiffs to perform their part of the contract, whereby defendant was sued by other parties, and notice was given to plaintiff to assume the defense of such action, which had been referred. Held, that a motion by plaintiffs to have the two actions consolidated so that the rights of the respective parties might be adjusted so as to conform to the facts alleged in the moving affidavits, which facts were disputed, was properly denied.

Appeal from special term, Kings county.

Action by the Gloucester Iron-Works against the board of water commissioners of the village of Sing Sing. Plaintiff appeals from an order denying a motion for consolidation of actions, and for further relief.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Moses R. Crow, for appellant. *Samuel Watson* and *Smith Lent*, for respondent.

BARNARD, P. J. There is no basis for this motion. The plaintiff made a contract with the defendant to deliver iron castings at a certain price agreed upon. Upon a failure to pay the price for the property after its delivery, the plaintiff has brought an action. The answer avers that by the terms of the contract the plaintiff agreed to indemnify and save harmless the defendant for a failure to perform the contract, and avers a failure, whereby the defendant was sued by other parties, which suit is still pending. The pleadings in this action are set forth in the papers. The defendant gave notice to the plaintiff to assume the defense of the action, which is referred to a referee by agreement of the parties to that action. At this state of the two controversies this motion is made, with a design to have the two controversies adjusted so that "the position and standing of the respective parties under the facts as set forth in this [the plaintiff's] affidavit" may conform thereto. The facts are disputed, and the two actions must be based upon the real facts as found upon the trial. The motion papers assert that the two actions cannot

be properly joined in one action upon the facts. The motion was properly denied. The ordinary method of trial would be replaced by a trial upon affidavits *ex parte*. Order affirmed, with costs and disbursements. All concur.

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KEARNEY v. FLEMING et al.

(Supreme Court, General Term, First Department. May 16, 1890.)

TRUSTS—IMPLIED TRUSTS—PAYMENT OF PURCHASE MONEY.

A. and B. purchased land, A. paying the consideration with an understanding that title should be taken in his name, and the profits of sale shared equally; but without his knowledge title was taken in the name of a third person, who, for a nominal consideration, conveyed to a fourth, who in turn conveyed without notice to defendant, with whom B. had agreed to share the profits of a sale of the land if he would pay off the liens. *Held*, that a subsequent deed from B. to plaintiff conveyed no interest, and that defendant was entitled to be paid, out of the proceeds of sale, the advances actually made by him in good faith in paying off liens, and that the balance of the proceeds should be equally divided between him and A. after payment to A. of the advances made by him, with interest. Modifying 8 N. Y. Supp. 189.

Appeal from special term, New York county.

Action for partition, brought by Rosetta M. Kearney against Charles E. Fleming, and Sarah, his wife, and Charles Jones. In February, 1884, it was agreed between Jones and James Kearney, who was acting as his attorney, that the property in question, which was incumbered with taxes, assessments, and sales, and could be bought for a small sum, should be purchased, Jones furnishing the money and Kearney his services in removing the liens and assessments, and each to have a one-half interest. Under this agreement, Jones paid \$442, the purchase price, with the understanding that the title should be taken in his name. The deed was executed, however, to W. F. Parks, nominally for the consideration of \$275. In March, 1886, Parks conveyed to Joseph Moore, who in the same month executed a deed to Fleming, with whom Kearney had made an arrangement similar to the one formerly made with Jones; and in November, 1886, Fleming, who had taken an assignment of an outstanding mortgage, began to pay off liens. In 1887 Kearney conveyed his interest to the plaintiff, his wife. From the judgment entered in the action defendant Jones appeals.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

Alexander Thain, for appellant. *George S. Daniels*, for respondents.

BARRETT, J. We concur with the learned judge at special term that the defendant Fleming was protected by the recording act. We think, however, that he was so protected only to the extent of advances actually made in good faith. Fleming did not really purchase the property from Moore. He simply took a deed from the latter, pursuant to an arrangement made with Kearney. Kearney had previously induced the defendant Jones to advance the money with which to purchase the property, upon an agreement to take title in their joint names and for their joint benefit. Jones advanced the money, but Kearney defrauded him by taking title in the name of one Parks, through whom Moore received his deed. Then Kearney made an agreement with Fleming similar to that which he had made with Jones. Fleming, however, was wiser than Jones, for he looked after his record title. He knew nothing of the prior arrangement, and he innocently made certain payments upon the faith of the deed which he received from Moore. To the extent of those advances, we agree that he was protected; but after their payment, we think, in equity Jones' advances came next. The learned judge made no provision for Jones' advances, but decreed that the proceeds of the sale, after the payment of Fleming's advances, be divided equally between Jones and Fleming. This was upon the theory that each of these parties had agreed with Kearney to share such proceeds after the payment of their respective advances.

We do not think that Fleming's rights under the sharing part of the agreement were superior to Jones' equity for the repayment of his cash advances. Fleming was not a *bona fide* purchaser for value from Moore. He paid nothing to Moore, and made no agreement with him. His entire arrangement was with Kearney, and Moore's deed resulted solely from that arrangement. The sharing agreement made with Kearney was simply a reward for the proposed advances. So far as Kearney was concerned, Fleming was secured for this reward. But the profit thus flowing from the advances is not a superior equity to the trust in favor of Jones, which was impressed upon each of the several grantees from Parks to Moore; and this trust, subject to all proper advances and cash payments actually made in good faith, is also impressed upon the deed from Moore to Fleming. We think, therefore, that the judgment should be varied accordingly. This might be done without a new trial, but for the circumstance that one of Fleming's payments does not seem to have been wholly in good faith. A new trial, however, may be avoided if Fleming will make a suitable stipulation. He says he paid \$835 for the assignment to him of a mortgage upon the premises. This mortgage was for but \$300, and why he paid more than was due upon it does not appear. This payment he made before he received the deed from Moore. Subsequently he paid off large arrears of back taxes and assessments. Kearney had agreed to have these liens removed, but Fleming was compelled to do this himself, because of Kearney's neglect, probably because of Kearney's flight from justice. Fleming's testimony on this head is as follows: "I removed the incumbrances after Kearney was among the missing." We think the learned judge properly allowed Fleming all these payments for taxes and assessments. If, therefore, Fleming will stipulate to reduce the allowance made for the mortgage payment to the sum actually due upon such mortgage at the date when it was assigned to him, the judgment will be modified by directing the referee—*First*, to pay him from the proceeds of the sale the amount of his payments as found at special term, less such reduction; *second*, to pay the amount of Jones' advances and interest; and, *third*, to divide the balance equally between them. If Fleming refuses to so stipulate, the judgment must be reversed, and a new trial ordered; for we have no means of liquidating the precise sum which was due upon the mortgage at the time it was assigned to Fleming, nor have we any testimony explanatory of the fact that the sum paid was largely in excess of the amount due. If the stipulation is given as herein indicated, the judgment will be modified accordingly, without costs of this appeal to either party, and without varying the costs and allowance awarded at special term; otherwise, a new trial is ordered, costs to appellant to abide the event. All concur.

WILLARD *et al.* v. WHITE *et al.*

(Supreme Court, General Term, First Department. May 16, 1890.)

1. FACTORS AND BROKERS—LIEN FOR ADVANCES—ASSIGNMENT BY PRINCIPAL.

W. & Co., stock-brokers in Syracuse, filled orders to purchase stocks on margin, by directing plaintiffs, their New York correspondents, to buy the stocks desired. Plaintiffs held the certificates of the stock thus purchased, and also received other stocks from W. & Co., as collaterals, to secure the price, and kept their accounts with W. & Co., knowing no other person in the transactions. During this course of dealing, W. & Co. made an assignment for benefit of creditors, and plaintiffs sued to determine the rights to the stocks thus held by them. *Held*, that plaintiffs' advances to W. & Co. would first be satisfied out of the proceeds of the stocks in their hands at the time of the assignment, and that, as between the assignee and the customers of W. & Co., who identified stocks in plaintiffs' hands as having been purchased for them, the customers had the prior right.

2. SAME—PLEDGE TO COVER MARGINS—RIGHTS OF PLEDGEOR.

Among the collaterals pledged by W. & Co. to plaintiffs was stock which M., a customer of W. & Co., had deposited with them to cover margins, but plaintiffs

had no knowledge of M.'s rights. *Held* that, after satisfying plaintiffs' claim, M. was entitled to the proceeds of the stock pledged by him before the alleged owners of the securities bought on margin could receive anything.

2. PLEDGE—CONFLICTING CLAIMS—ACTION BY PLEDGEE—ATTORNEY'S FEES.

In such action, it was error to allow plaintiffs fees and disbursements claimed to have been paid to their counsel in examining the claims of the various parties and conducting the litigation, as the relation of trustee and *cestui que trustant* in no sense existed between them and W. & Co.

Appeal from judgment on report of referee.

Action by Edward K. Willard and others, composing the firm of E. K. Willard & Co., against Edward N. Westcott and Alfred Wilkinson, their assignees, James S. Crouse, Hamilton S. White, Giles Everson, Lucius Moses, and others, brought to determine the rights to stocks in the possession of plaintiffs. The action was referred, and from the judgment entered upon the report of the referee defendants White, Everson, and Moses appeal.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

F. H. Hiscock, for appellants White and Everson. *W. G. Tracy*, for appellant Moses. *T. D. Kenneson* and *H. A. Root*, for respondents E. K. Willard & Co. *L. Marshall*, for respondent Krouse.

VAN BRUNT, P. J. The evidence in this case showed that the plaintiffs, for many years prior to the 11th of December, 1884, had been stock-brokers, doing business in New York under the firm name of E. K. Willard & Co., and that the defendants Westcott and Wilkinson were at the time of the transactions hereinafter mentioned, and for some time previous thereto had been, copartners and also stock-brokers, doing business at Syracuse, N. Y., under the firm name of Westcott & Co. Westcott & Co. had been in the habit of receiving from their customers in or about Syracuse orders for the purchase of stocks. These orders Westcott & Co. filled by directing the plaintiffs Willard & Co. to buy the stocks. The plaintiffs, in their transactions with Westcott & Co., kept their account with them, and with them only, and knew no other persons in connection therewith. Westcott & Co., in giving these orders to purchase stock, did not inform the plaintiffs for whom these purchases were made, and they were made by the plaintiffs for and on account of Westcott & Co. The plaintiffs required ample margin to cover the advances which they made in money in the purchase of stocks ordered by Westcott, for which they received remittances of money and of securities, and also held the securities purchased. The plaintiffs made up monthly balances, and sent them to Westcott & Co., as to the condition of their account. These statements contained all the items of transactions between the plaintiffs and Westcott & Co. In October, 1884, the defendant Everson had ordered Westcott & Co. to purchase for him 100 shares of the Chicago, Rock Island & Pacific Railroad stock, paying to them the sum of \$3,755.47, which Westcott & Co. were to hold as a margin upon the purchase. Westcott & Co. directed the plaintiffs to purchase this stock, which they did for the sum of \$11,231.25, and they placed the stock in the account of Westcott & Co., crediting them with it on their books, and debiting them with the price. This stock has ever since been continuously held by the plaintiffs in said account to the credit of Westcott & Co. In like manner, on the 11th of August, 1884, the defendant White had ordered Westcott to purchase for him three of the first mortgage \$1,000 bonds of the Lafayette, Bloomington & Muncie Railroad, and at the time of such purchase had in the hands of Westcott & Co. \$1,265.90 as a margin upon said purchase. Westcott & Co. directed the plaintiffs to purchase these bonds, which was done at the price of \$2,448, in the same manner as in the previous case, and the plaintiffs have ever since held said bonds. All of these stocks were purchased upon margin, and were never paid for by the parties for whose account they were purchased, and none of the certificates were ever transferred to them or to Westcott & Co.; Willard & Co. holding the same as security for the indebted-

edness of Westcott & Co. to them. On the 11th of December, 1884, Westcott & Co. failed, and made an assignment for the benefit of creditors to the defendant Krouse. The defendants White and Everson, after the failure, and before the commencement of this action, demanded of the plaintiffs the amount so paid by them on their respective purchases, and, upon refusal thereof, demanded of the plaintiffs their respective purchases, at the same time tendering the amount of the purchase price thereof unpaid, which was refused, the plaintiffs disclaiming any knowledge of the defendants White and Everson in this transaction, and claiming Westcott & Co. as their principals, who were largely indebted to them. It further appeared that at the time of the failure of Westcott & Co. they had purchased from the plaintiffs, for account of the defendant Moses, 200 shares of Northwestern stock, 100 shares of Lake Shore stock, and some Erie stock, and were carrying the same for said Moses upon margin; and that, to secure Westcott & Co., Moses had pledged to them 100 shares of Lake Shore stock owned by him, and that before the failure of Westcott & Co., and without the authority of Moses, or his knowledge or consent, Westcott & Co. had repledged said 100 shares of stock owned by Moses, with other stocks, to the plaintiffs, as security for a general balance of account, amounting to over \$100,000. It further appeared that, subsequent to the failure, the plaintiffs, to reimburse themselves for the advances made by them, sold a large number of stocks standing to the credit of Westcott & Co., among which was the stock belonging to the defendant Moses,—both that which Westcott & Co. had purchased for his account, and the 100 shares of Lake Shore stock which Moses had pledged as margin. And it further appeared that the proceeds of the sale of said stock, with the dividend collected thereon, amounted to \$3,690 over and above the indebtedness of Moses to Westcott & Co. It further appeared that, by the sale of the stocks aforesaid, the plaintiffs had repaid themselves all but \$8,865.79. They still held the 100 shares of Chicago & Rock Island stock bought by the plaintiffs upon the order of Westcott & Co., and which the defendant Everson had directed Westcott & Co. to buy, and also the \$3,000 first mortgage bonds bought by the plaintiffs for Westcott & Co., and which the defendant White had requested Westcott & Co. to purchase; also, 20 shares of Rock Island stock, claimed by the defendant Tracy, and 100 shares of Chesapeake & Ohio Railway stock. The total value of these stocks, exclusive of interest and dividends, on the 15th of December, 1884, was about \$16,000. There being various claimants for these stocks, the plaintiffs filed this bill to determine the rights and interests of the parties; and, a reference being had, upon the foregoing facts the referee adjudged that the stock remaining in the hands of the plaintiffs should be sold, and that the plaintiffs should repay themselves out of the proceeds thereof the sum of \$10,414, with interest, included in which amount was the sum of \$2,504.85, counsel fees and disbursements which the plaintiffs claimed to have paid to their counsel in examining the claims of the various parties and conducting the present litigation; and, further, that the plaintiffs should pay over to the assignees of Westcott & Co. all surplus moneys resulting from the sales above directed to be made, after payment therefrom of the lawful expenses of such sale, and deducting the above amount that the plaintiffs are directed to retain therefrom to their own use, and also that the plaintiffs should deliver to certain defendants therein named certain other stocks which they had on hand; and from the judgment thereupon entered the defendants White, Everson, and Moses have appealed.

It is claimed upon the part of the defendants White and Everson that Westcott & Co. were their agents, and, as to their stocks, trustees, and Willard & Co. held them subject to the same rights, and that White and Everson were entitled to have their securities at any time upon demand and upon payment of the balance of the purchase price, and that Westcott & Co. were guilty of wrongful conversion in depositing or leaving them with the plaintiffs as se-

curity for future advances. Upon the part of the defendant Moses it is claimed that he has a superior right to this fund over any of the other defendants to the amount of \$3,691 and interest, being the proceeds of sale of his 100 shares of stock deposited with Westcott & Co., and which they pledged with the plaintiffs, over and above the indebtedness due from Moses to Westcott & Co. It seems to us to be entirely clear that the referee erred in holding that the surplus of these sales should be paid to the assignee. He was not a purchaser for value, and he had no right to take any more than Westcott & Co. could themselves have taken if they had not made the assignment. These parties, having traced their security or securities which had been bought upon their account in the hands of the plaintiffs, were at least entitled to receive from the plaintiffs whatever balance might remain after paying the indebtedness for which they were pledged. It is true that the plaintiffs had the right to hold these securities for the purpose of the payment of the balance due to them from Westcott & Co. They knew nothing of the rights or interests of these various parties, and these were negotiable securities which they held for value, and, consequently, they were entitled to reimburse themselves before they could be compelled to deliver up these securities which had been deposited with them as margin. The fact that Westcott & Co. had received part payment from White and Everson upon the purchase of these stocks in no manner affected the rights of the plaintiffs. They knew nothing in respect to this payment. They were dealing entirely with Westcott & Co., and they were holding these securities as the property of Westcott & Co., as security for the indebtedness due from Westcott & Co. to them. Under these circumstances, it is clear that the plaintiffs had the right to hold these securities until their indebtedness from Westcott & Co. should be paid. It is urged that the plaintiffs must have known that Westcott & Co. were acting for other people. It may be true that they knew that Westcott & Co. were giving these orders for the purchase of stock on behalf of other people. But what other people, or who they were, or whether in fact Westcott & Co. were operating on their own account, they had no means of knowing and no reason to surmise. They were dealing with Westcott & Co., and with them alone, and they looked to Westcott & Co. for the payment of their account, and held these securities received from Westcott & Co. as security therefor.

As to the defendant Moses, in respect to the 100 shares of Lake Shore stock pledged by him with Westcott & Co., it seems to us that he stands in a different position from that occupied by White and Everson. White and Everson knew, in fact all these parties knew, that Westcott & Co. were executing these orders through correspondents in New York; but whether Westcott & Co. were themselves carrying the stocks after they were purchased, or their correspondents, they did not know, and, when the defendant Moses deposited these 100 shares of Lake Shore stock with Westcott & Co. as an additional margin, he by no means conferred upon Westcott & Co. any title further than such as was necessary to secure the indebtedness of Moses to them; and therefore, as the referee has found, the pledge by Westcott & Co. of this 100 shares deposited with them, as collateral, to the plaintiffs was wrongful, and, he having traced that stock in the hands of the plaintiffs, it would seem that he is entitled to receive whatever excess might arise from the sales of the stock over and above the indebtedness due from him to Westcott & Co., provided the debt to the plaintiffs was satisfied. In other words, his equity seems to be greater than the equity of those parties, who gave the orders for the purchase of these stocks with the expectation that money should be raised by the pledge of these stocks to pay for the same. This 100 shares of the defendant Moses was his own property, apparently, which he had paid for, and which in no manner formed the subject of the speculation which was being carried on in the purchase of these stocks. We think, therefore, that his equity is superior to that of the other parties, and that he should be paid the surplus aris-

ing from the sale of these 100 shares of stock before any sum should be received by the alleged owners of the other securities involved in this appeal.

We think, also, that the referee erred in the allowance made for counsel fees and disbursements. It is sought to sustain this claim upon the ground that the plaintiffs were in some sense acting as the trustees of Westcott & Co., and their counsel fees in protecting their interests as trustees were a proper charge against the *costui que trust*. But we think that this relation in no way existed between the plaintiffs and Westcott & Co. The sole position which the plaintiffs occupied towards Westcott & Co. was that of creditors, with security for the payment of their debt, and this idea that they were trustees in any way does not seem to have any foundation in the facts, any more than every creditor holding security for his debt is a trustee of the debtor. The plaintiffs may have thought it prudent to file this bill in order to have the rights of the parties determined, but it was not necessary. They could have gone on and sold these securities and paid their debt without the intervention of this litigation, and that is in fact what they did in respect to a large part of the securities which they held. They sold securities sufficient to pay every dollar of debt which they felt certain Westcott & Co. were bound to pay to them, and it was only in respect to a claim in regard to the payment, whereof there might be some doubt as to their right to hold these securities, that they sought the intervention of the court. Some authorities have been cited for the purpose of sustaining the decision of the referee in this respect, but they do not seem to be applicable. The case of *Griggs v. Hows*, 2 Abb. Dec. 291, presents an entirely different state of facts. There the holder of the security was compelled to sue upon it in order to collect it, and was compelled to incur expense in realizing upon the collateral, and which he was allowed to charge as expenses. In the case at bar the plaintiffs were under no difficulty in realizing upon their claim. All they had to do was to sell upon proper notice, and the only question seems to have been as to the amount which they could claim against Westcott & Co. as an indebtedness, for which they held these securities as collateral; in other words, they proposed to make the collaterals pay the expense of determining the amount of their own claims. This we do not think any of the cases cited permit, and therefore the allowance of these counsel fees was erroneous.

It seems to us, therefore, that the judgment appealed from should be reversed, and a new trial ordered, with costs to the appellants to abide the event. All concur.

WELCH v. OLD DOMINION MIN. & RY. CO.

(*Supreme Court, General Term, First Department. May 16, 1890.*)

1. ATTORNEY AND CLIENT—SERVICES—SCOPE OF EMPLOYMENT.

After an attempted organization in New York in 1886, under a paper purporting to be an assignment of a charter of incorporation granted in 1882 by the legislature of Virginia, under the laws of which state a corporation must be organized within two years after the charter is granted, else the grant will be absolutely void, plaintiff was employed as counsel by persons who desired to put the company into operation, if the charter were valid, to give his opinion "upon the validity of the first charter of our company, and every act or event that has happened, or that may hereafter occur, by legislation which has or may affect it." Plaintiff, after having discovered that the original incorporators had organized in Virginia under the charter in 1883, and had changed its name in 1884, since when it had continuously prosecuted its business, went to Virginia, and procured an act of legislature changing the name of the company given by the act of 1884. Held, that plaintiff could not recover for service in procuring such change of name.

2. CORPORATIONS—ASSIGNMENT OF CHARTER—VOID ORGANIZATION.

A charter of incorporation is not assignable, and an attempted organization of a corporation by persons to whom the charter is attempted to be assigned is void, and a corporation *de facto* cannot be created by user under such organization.

Appeal from circuit court, New York county.

Action by David Welch against the Old Dominion Mining & Railway Company, to recover for professional services rendered by him as an attorney at law. There was a verdict for plaintiff for \$2,793.33, and from the judgment rendered thereon defendant appeals.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

Arnoux, Ritch & Woodford, (William H. Arnoux and Haley Fiske, of counsel,) for appellants. *Arthur P. Hodgkins*, for respondent.

BARRETT, J. The plea *nul tiel* corporation was here specially interposed. Upon the proofs, the learned judge at circuit held that a corporation *de facto*, though not *de jure*, had been established, and that the plaintiff might recover if the jury were satisfied upon the merits. In *Methodist, etc., Church v. Pickett*, 19 N. Y. 485, it was held that "two things are necessary to be shown in order to establish the existence of a corporation *de facto*, viz.: (1) The existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law." Where an attempt is made in good faith to organize a corporation under general laws, followed by actual user, a defect in the proceedings or an irregularity in the organization will not avail parties who have contracted with it. *Baton v. Aspinwall*, Id. 119; *Brouwer v. Appleby*, 1 Sandf. 158. User alone, however, will not suffice. People cannot create corporations merely by acting as such. There must at least be an organization under some existing charter or law. And such organization must be in good faith. Parties cannot take a charter with which they have no concern, and which belongs to other people, and effect a corporation *de facto* by a pretense of user thereunder. That is this case. The parties who, in this city, in the year 1886, attempted to organize a corporation under an act of the legislature of the state of Virginia passed in 1882, had not even a semblance of right. The corporation contemplated by that act had already, in the state of Virginia, in the year 1888, been duly organized by the original incorporators, and that corporation has ever since regularly proceeded with its lawful business. It seems that shortly after the act of 1882 was passed one Gallagher intimated to some of the original incorporators that he could sell the charter, and these gentlemen thereupon sent him an assignment in blank. Shortly afterwards the negotiation fell through, and the parties requested a return of the assignment. Gallagher said that he had destroyed it, as it was of no use to him, and no further notice was taken of the matter. This assignment, however, reappeared in the year 1886, in this city, with the name of one Clough inserted as assignee in the space which was originally blank, and "one dollar" inserted as the consideration. It was under this document, supplemented by various assignments from Clough and his assignees, that the pretended organization was here attempted. The assignment itself, even if it were not fraudulent, was wholly inoperative to convey the franchise. That could only be done by organizing the company, issuing the stock, and then transferring such stock to the purchasers. But the assignment was fraudulent, and under the circumstances even criminal. The organization attempted under its authority was a complete nullity. That organization was also void for other reasons. Under the laws of Virginia, a corporation must be organized within two years after the grant of its charter. Otherwise the grant is absolutely void. And this results, without legal proceedings of any kind, from mere operation of law. It appeared, too, by the testimony of a Virginia lawyer, who was a competent expert, that at the time when this organization was attempted in New York the laws of Virginia required such organization to be effected within that state.

After the sham and entirely futile organization in New York, the plaintiff was brought in as counsel by some gentlemen who were willing to advance money, and to resuscitate the company, provided the charter was valid. The

plaintiff advised that it was valid. He subsequently discovered that in the year 1884 the legislature of Virginia changed the name of the corporation from the "London & Buckingham Construction & Mining Company" (which was the name given to it in the original act of 1882) to the "Flat-Top Coal Company." Thereupon he proceeded to Richmond, and actually secured the passage of a bill (in May, 1887,) changing the name given to the company by the act of 1884 to the "Old Dominion Mining & Railway Company." He did this with knowledge of the existence of the other company, which thus had its name changed without its consent by the gratuitous act of a stranger; for certainly this was the only legal effect of the plaintiff's extraordinary action. And it was for these services, in the main, that the plaintiff sought compensation in this action. Upon this state of facts the complaint should have been dismissed. There was no corporation created by the attempted organization in this state in 1886, either *de jure* or *de facto*. There was neither semblance of an existing charter nor user. The only substantial user was the attempted organization, and the action advised by the plaintiff thereunder. His opinion was expressly requested, not only on the validity of the original act of 1882, but upon the effect thereon of subsequent events. The language of the written request called for his opinion "upon the validity of the first charter of our company, and every act or event that has happened, or that may hereafter occur, by legislation which has or could affect it." Plainly his clients put themselves in his hands, quite as a proposed purchaser of real estate does with regard to the title. It was his duty to examine the title to the charter quite as much as to pass upon the validity of the act conferring it. If he had done his duty in this regard, he would, or he certainly should have ascertained the real facts, and advised his clients that they had no title to the charter, and that the attempted organization was founded upon fraud in fact, and nullity in law. For this service he would have been entitled to proper compensation from the persons who employed him, but not from the defendant; for there was no such corporation, and he would or should have known that fact. But after he discovered that an organization had been effected in Virginia in the year 1883, that the name of the company had been changed by the legislature of that state in 1884, and that the Virginia company had been ever since uninterruptedly prosecuting its legitimate business under such changed name, he had no excuse whatever for proceeding as he did; and the claim for services subsequently rendered, even as against the individuals who originally employed him, was, to say the least, wholly without merit.

There are several other doubtful questions in the case, notably the refusal to admit in evidence the papers upon which the order amending the answer was granted. The original answer admitting the corporation had been put in by the plaintiff. This must have had its natural effect upon the jury, entirely apart from the question (taken from them by the court) whether there was a corporation *de jure* or *de facto*. It tended to throw doubt, from the defendant's own lips, upon the good faith of their present plea that they had been badly advised as to the validity of the charter. They were consequently entitled to explain how they came to make the admission, and how they came to withdraw it. The affidavits and papers used upon the motion for leave to withdraw the admission, and to be permitted to plead *null tiel* corporation were therefore, under the circumstances, proper for the consideration of the jury. But we need not pursue the subject, or consider the other points presented by the appellants, for the reason that the questions already discussed go to the root of the action, and, so far as we can see on this evidence, must necessarily result in a dismissal of the complaint. The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., concurs. BARTLETT, J., concurs in the result.

HAMILTON et al. v. STECK et al.*(Supreme Court, General Term, First Department. May 16, 1890.)***ATTACHMENT—AFFIDAVIT—INFORMATION AND BELIEF.**

AN affidavit for an attachment which states that plaintiffs sold goods to defendants; that affiant, who was in charge of plaintiffs' office in New York, made the sale, and had been informed by plaintiffs that they dealt with defendants only through affiant as agent; and that plaintiffs are entitled to recover the sum sued for, over and above all counter-claims known to plaintiffs or affiant,—is not objectionable as being one on information and belief. *Affirming 5 N. Y. Supp. 831.*

Appeal from special term, New York county.

Action by Ralph S. Hamilton and Ralph S. Hamilton, Jr., against Frederick D. Steck, William H. Payne, and another. The motion of Robert B. Holden and Charles I. Gardiner, as junior lienors, to vacate an attachment obtained by Ralph S. Hamilton and another against the property of William H. Payne, on the ground of the insufficiency of the papers on which the warrant was granted, was denied, and the applicants appeal. For report of decision at special term, see 5 N. Y. Supp. 831.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Franklin Bien, for appellants. *Charles H. Machin*, for respondents.

VAN BRUNT, P. J. The affidavit upon which the attachment was granted seems to be sufficient. The allegations therein set forth are not all upon information and belief. The affidavit states the cause of action: That the plaintiffs sold and delivered goods to the defendants; that the affiant sold them; that he is in charge of the plaintiffs' office in New York, and manages their business there; that their principal place of business is Providence, R. I.; that he has been informed by them that they have had no dealings with the defendants except through the affiant as agent, and that the plaintiffs are entitled to recover the sum sued for, over and above all counter-claims known to the plaintiffs or to the affiant; and that the defendant Payne is a non-resident. We think this is sufficient. The goods were sold by affiant. He managed the plaintiffs' business in New York, and consequently is presumed to have the best knowledge as to the condition of the transactions between the plaintiffs and defendants. There is an express allegation of sale and delivery of the goods, and we see no reason for disturbing the attachment. The order appealed from should be affirmed, with \$10 costs and disbursements. All concur.

THOESSEN v. CROWE.*(Supreme Court, General Term, First Department. May 16, 1890.)***PLEADING—BILL OF PARTICULARS.**

Where the answer, in an action for goods sold, stated that some of the goods had been returned to and accepted by plaintiff, that others had never been purchased or received, and that defendant had paid more than the price of the goods delivered to him, defendant will be required to serve a bill of particulars of the articles declined and returned, but not to state therein what articles he was willing to admit had been delivered to him.

Appeal from special term, New York county.

Action by Henry Thoesen against Thomas D. Crowe. Defendant appeals from an order directing him to serve a bill of particulars.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Jacob L. Haines, for appellant. *Howard Van Buren*, for respondent.

DANIELS, J. The action was brought to recover the price of goods sold and delivered by the firm of Thoesen & Uhl to the defendant. The plaintiff alleged himself to have acquired the interest of his copartner in the demand, and a bill of particulars of the goods forming it was served. The defendant's
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answer stated that divers articles in the bill of particulars were returned to the firm, which they accepted and retained, and that the defendant never purchased or received from the firm divers articles of merchandise charged in their bill of particulars. And the order from which the appeal has been brought directed the defendant to serve a bill of particulars of the articles in this manner referred to in the answer, and so far the order seems to have been entirely right. It was further averred in the answer that the defendant had paid the firm more than the price of the goods alleged to have been delivered to him. Of these payments a bill of particulars had been served, and that fact is stated in the order; but the defendant was directed to serve a bill of particulars of the amounts and names of the articles which are stated in the defendant's answer to have been sold by the firm to him. This clause of the order was entirely unnecessary, and it had no substantial support from anything appearing on the hearing of the motion. The defendant was not bound to make any statement to the plaintiff indicating what articles in the bill of particulars he was willing to admit the firm had delivered to him. *Goddard v. Medicine Co.*, 52 Hun, 85, 5 N. Y. Supp. 119. All that he could be required to do was to serve a bill of particulars of the articles declined and returned to the firm. This last direction contained in the order should be reversed and set aside, and the residue affirmed, without costs of the appeal to either party. All concur.

SWEENEY v. SWEENEY *et al.*

(Supreme Court, General Term, First Department. May 16, 1890.)

WILLS.—PAYMENT OF LEGACY.—PRESUMPTION.—LAPSE OF TIME.

Where a legacy of \$1,500 is payable on the legatee's attaining his majority, and either in one amount or installments, as the executor might elect, its payment will be presumed, as against the unsupported testimony of the legatee, after the death of the executor, and a lapse of 45 years from testator's death, and 80 years from the legatee's becoming of age, coupled with testimony showing that the executor had discharged all the other obligations of the will, educated and housed the legatee, kept his house always open for him, obtained him situations, furnished him with outfits, and to a great extent with clothing, for many years.

Appeal from special term, New York county.

Action by John E. Sweeney, individually, and as administrator *o. t. a.* of Ephraim Sweeney, to enforce the execution of certain trusts created under his testator's will, and for an accounting, by Charles D. Sweeney and Jeremiah J. O'Connor, as executors of Daniel Sweeney, the executor named in said will. There was judgment for defendants, and plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Alex. Finelite, (*Daniel T. Robertson*, of counsel,) for appellant. *Wager & Acker*, for respondents.

BRADY, J. In addition to the opinion delivered in the court below, it will not be necessary to say much. That opinion is as follows:

"PATTERSON, J. On the trial of this cause, three questions were presented for consideration,—one relating to the construction of a bequest for the benefit of the plaintiff contained in the will of Ephraim Sweeney; another relating to an alleged fraud on the part of Daniel Sweeney, the executor of that will, by which it is claimed the plaintiff was deprived of the provision made for him by the testator; and the third related to the claim now urged by the plaintiff being barred by the statute of limitations. The record presents an unusual state of facts. Ephraim Sweeney, the uncle of the plaintiff, died in August, 1846, leaving a last will and testament, of which Daniel Sweeney, his brother, now also deceased, was the executor. Among other things, it was provided in Ephraim Sweeney's will, and by the third clause thereof, as follows: 'I direct that the sum of \$300 annually shall be paid by my said exec-

utor out of my estate, for the education, support, and clothing of my nephew, John Sweeney, son of my deceased brother, John Sweeney, it being my wish that his education shall be continued for five years from the present time, at the discretion of my executor hereinafter named; and, upon his attaining the age of twenty-one years, I give and devise (*sic*) to him the further sum of fifteen hundred dollars, to be paid to him either in one sum, or in such portions as the discretion of my executor shall suggest.' The proper construction of this provision for the benefit of the plaintiff is that, within the discretion of the executor as to time, three hundred dollars for five years might be expended for the education and maintenance of the plaintiff, and, upon his attaining the age of twenty-one years, he was to receive \$1,500, either in one payment or in installments, as the executor might elect. This action is brought upon the theory of an annuity being granted of \$300 a year, and a specific legacy of \$1,500, payable upon the plaintiff becoming twenty-one years old. As to the annual allowance for education and support, it is perfectly clear that Daniel Sweeney, the executor, did, for some years after the testator's death, maintain and support the plaintiff, first at St. John's College, at Fordham, and afterwards educated him at the Columbia College Grammar School, and provided for him as an inmate of his own family, and precisely as he did for his own children. There is nothing whatever to indicate unfaithfulness or fraud on the part of Daniel Sweeney, the executor, in this regard. Nor is there anything appearing on this record with respect to the specific bequest of \$1,500 which, after this lapse of time, nearly forty-four years from the death of Ephraim Sweeney, and over thirty years since the plaintiff attained his majority, would justify the court in concluding that this \$1,500 legacy had not been paid in the manner Ephraim Sweeney authorized by his will; for it will be observed that it was not to be paid in one gross sum, necessarily, but the executor had discretion to pay it from time to time in installments. It is proven that he did from time to time, during the irregular and wandering life of the plaintiff, make provision to some extent for him, or on his account. In such a peculiar case as this, I should not feel justified in finding as matter of fact, on the unsupported testimony of the plaintiff alone, that the relative who had harbored him as an infant, treated him as one of his own family, placed him on the footing of a son, welcomed and protected him when he returned from his wanderings, aided him more than once in re-establishing himself in positions of respectability and usefulness, would have fraudulently withheld from him, or, to put it plainly, stolen from him, the inconsiderable amount of fifteen hundred dollars. It is very easy for ingenious counsel to make a patchwork of circumstances affecting the integrity of a dead man, but in this case the only real thing to show that the plaintiff has not received in some form the benefit of his legacy is his own statement that it was not paid to him by anybody; but, so far as that statement is concerned, I cannot receive it as affecting Daniel Sweeney, the executor. *Lerche v. Brasher*, 104 N. Y. 160, 10 N. E. Rep. 58. Without considering the questions of law which were presented and ably discussed in the briefs of counsel, I am constrained to dismiss the complaint on the ground of failure of proof, and judgment is ordered accordingly."

The demand presented by the plaintiff is clearly stale, and there is nothing to justify the charge of fraud upon which, in part at least, it was sought to be enforced. Daniel Sweeney, the executor of Ephraim Sweeney, is shown by positive evidence to have discharged all the obligations imposed upon him by the will except in reference to the plaintiff, and as to him by facts and circumstances. The latter's education was attended to, and he was housed and clothed by Daniel Sweeney. Indeed, it was stated by the son of Daniel that his father did everything for the plaintiff that he did for his own children, and even more. He gave him lessons in music and Spanish, which he

did not give to them. The plaintiff, it must be said, distinguished himself as a rover, but even after his wanderings seems to have returned to his uncle's home, and was cared for by him. The latter's interest in and devotion to him seems to have been unremitting. He says himself that he was furnished with clothing during the time he was at Columbia College Grammar School by his uncle, after leaving which, and having obtained a position, he lived with him, but was not charged for his board, using the money received for his work as he pleased. After that, he ran away from home without his uncle's consent or knowledge, and wandered over the United States, trying to get a job here and there. In 1853 he shipped on board the United States vessel *North Carolina*, but must have returned to Daniel Sweeney's in 1856, and then shipped for a whaling voyage, although he says that in 1854 he was also in a whaling vessel, and that when he went on board the whaling ship, in 1856, he was absent three years and nine months. He also states that after having shipped, in 1853, on board the *North Carolina*, he came back to his uncle, and then shipped in the brig *Bainbridge*, bound for Africa, stayed on her six months, deserted in Rio, went back to his uncle Daniel, and stayed there perhaps a couple of months. He says further that the first time he began to clothe himself was in 1852 or 1853, when he went in the *Bainbridge*, up to which time he had been clothed by Daniel Sweeney off and on. In 1861 he was appointed (October 21st) acting master's mate by the secretary of the navy, a position obtained for him by his uncle Daniel, on which occasion his outfit was furnished by him. He also makes the extraordinary statement that he did not know that his uncle Ephraim, under whose will he now claims, had left any property, and never asked any person in reference to it, and had no idea of it, although he expected to receive something from his uncle Daniel by his will, and was disappointed that he did not,—a circumstance which no doubt prompted this action.

It is not at all astonishing that the judge presiding in the court below should have arrived at the conclusion that this was a peculiar case, and that, on the unsupported testimony of the plaintiff, he could not regard the plaintiff's claim as established. The discharge by his uncle of all the other obligations of the will, his devotion to the interests of the plaintiff, and his liberality to him,—keeping his house always open for him, obtaining situations for him, and furnishing him with outfit, etc., and undoubtedly, to a great extent, clothing him for many years,—would very easily dispose of the sum of \$1,500, the explanation of which might readily be furnished if the uncle were alive. These circumstances make the case one in which the presumption of payment should be entertained. It was a rule of the common law that the payment of a bond or other specialty would be presumed after the lapse of 20 years from the time it became due, in the absence of evidence explaining the delay, although there was no statutory bar. This subject is discussed in *Bean v. Tonnele*, 94 N. Y. 381, and again in *Re Nelly*, 95 N. Y. 382, a case somewhat kindred to this, in which it is said: "It is only where there is an actual, continuing, and subsisting trust that a trustee is precluded from setting up the statute of limitations." The proof in this case is not satisfactory as to the continuance and subsistence of the trust. The presumption is that the trust was discharged by payment. It was said also, in the case cited, that it was one solely of equitable cognizance, and that if, for any reason, the statute afforded no protection, it is the law of courts of equity, independent of positive legislative limitations, that they will not entertain stale demands. It has already been suggested, as illustrated by the opinion of the court below, that this is decidedly a stale demand; and therefore, whether it be tested by legal or equitable rules, under the authorities cited, it should not be enforced. The judgment must be affirmed, with costs.

All concur.

PEOPLE *ex rel.* HICINBOTHAM v. PURROY *et al.*, Fire Commissioners.*(Supreme Court, General Term, First Department. May 16, 1890.)***MUNICIPAL CORPORATIONS—OFFICERS—REMOVAL.**

Laws N. Y. 1882, c. 410, § 48, (consolidation act,) gives the heads of all departments power to appoint and remove all chiefs of bureaus, except the chamberlain, and also all clerks, officers, employees, and subordinates in their respective departments, provided that no regular clerk or head of a bureau be removed unless he has been informed of the cause, and given an opportunity of making an explanation. Section 441 provides that an intention to reduce the force of the bureau of inspection of buildings shall be deemed sufficient cause for the removal of any officer or employee of the bureau except the chief officer thereof, and authorizes the board of fire commissioners to abolish any office, clerkship, or employment in said bureau. *Held*, that the two sections were not antagonistic, and that under section 48 the fire commissioners could remove an inspector of buildings without informing him of the cause, or giving him an opportunity for explanation.

On *certiorari* to review the dismissal of Alexander Hicinbotham from the position of inspector of buildings of New York city by Henry D. Purroy and others, fire commissioners.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.
A. Steckler, for relator. W. L. Findley, for respondents.

VAN BRUNT, P. J. The relator was appointed an inspector of buildings in the fire department on the 16th of January, 1888. He continued to hold this position until the 13th of August, 1889, when, at a meeting of the board of fire commissioners at which two commissioners were present, he was removed and dismissed from the fire department. The other commissioner was absent from the city when the meeting took place, and took no part in the proceedings. The relator applied for a writ of *certiorari* to review the action of the respondents in his removal. It is claimed upon the part of the relator that the respondents had no power to remove him except upon charges and specifications, and an opportunity to be heard. It would seem that at the time of the initiation of this proceeding this was the opinion of the respondents, because on the 10th of August, 1889, a notice, together with charges and specifications in writing, were served on the relator, which notice commanded him to appear before said board of fire commissioners on the 13th of August, at 11 o'clock in the forenoon. The relator was charged with having demanded a bribe in the performance of his official duty. It further appears that at the time and place mentioned the relator appeared with his counsel, and demanded a trial upon said charge; the board having upon the same day, but before the hour named in said notice, made and promulgated an order dismissing the relator from his office. It would seem that, in view of a charge of this nature having been brought against the relator, and that he was called upon to answer the same, even if the commissioners had the absolute power of removal, as a matter of justice to the relator they should have given him an opportunity to answer the charge, whether legally required to do so or not. It is urged upon the part of the relator that the fire commissioners claim to have acted by virtue of the authority conferred by section 441 of the consolidation act, (Laws 1882, c. 410,) which provides as follows: "An intention to reduce the force and expense of the bureau of inspection of buildings, or the clerical force of the department, shall be deemed sufficient ground for the removal of any officer or employee of said bureau, except the chief officer thereof, and of any clerk in the department. The board of fire commissioners is authorized to abolish any office, clerkship, or employment in the said bureau of inspection of buildings, and they may consolidate the duties of any two or more officers, clerks, or employees thereof." It is, of course, clear upon the facts hereinbefore stated that, if the power of removal is dependent upon this section, its terms were not complied with, and the removal was unlawful. But, by an examination of section 48, it will appear that the heads

of all departments have power to appoint and remove all chiefs of bureaus except the chamberlain, and also all clerks, officers, employes, and subordinates in their respective departments, except as therein otherwise specially provided, without reference to the tenure of office of any existing appointee. The section then provides that no regular clerk or head of a bureau shall be removed unless he has been informed of the cause of the proposed removal, and has been allowed an opportunity of making an explanation. Under this section, therefore, the heads of all departments have an absolute authority to remove every person employed in their respective departments, except regular clerks or heads of bureaus, and in respect to them a certain procedure must be pursued. It will scarcely be argued that the fire department is not one of the departments referred to in section 48. Section 441 is not antagonistic to the provisions of section 48, because an intention to reduce the force and expense of the bureau of inspection of buildings, or the clerical force of the department, would authorize the removal of any regular clerk or head of a bureau under section 48, and this is all the power that is intended to be conferred upon the commissioners by section 441, and in no manner was it intended to restrict their power to appoint and remove employes who are not protected by the exceptions contained in section 48. Section 46 seems to have authorized a majority of the members of the board to meet and fully discharge the duty imposed upon them. There seems to have been no irregularity in the proceedings upon the part of the board of fire commissioners, and this court cannot interfere with their removal of the relator. The writ should be dismissed, without costs. All concur.

LYON *et al.* v. DAVIS *et al.*

(Supreme Court, General Term, Second Department. May 12, 1890.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—HUSBAND AND WIFE.

An assignment for benefit of creditors is not rendered invalid by preferring the wife and sister-in-law of the assignor for *bona fide* debts, for money loaned by them to him.

Appeal from special term, Dutchess county.

Action by William H. Lyon and Joseph H. T. Martin, against James M. Davis, Charles M. Kittredge, and Jennie Davis, to set aside an assignment for benefit of creditors executed by said James M. Davis to his co-defendants. The assignment contained several preferences, of which the first was for \$1,500 to the debtor's wife and assignee, and the second was for \$300 to his sister-in-law, both for alleged loans. Plaintiff assails the validity of these preferences. The following findings were filed by the court: "I find that the debt to the sister-in-law of the assignor is not fictitious, but was a good and valid debt for money lent by her to him. I find that the \$1,500 secured to the wife of the assignor was a good and valid debt; that she earned the money in her separate business; that she kept boarders under an agreement with her husband that she should have the profits of the business, and that he would pay the rent for his board; the wife was to, and did, pay all the bills; that the money was deposited in the name of the husband for convenience, and that it was drawn out, and the wife took possession of it, and lent it to a stranger, and, when it was paid back to her, she loaned it to her husband, and he received it from her individual hands and possession. I find that the complaint be dismissed, with costs. J. F. BARNARD, Justice of Supreme Court. From the judgment thereupon entered the plaintiffs appeal. For former report, see 7 N. Y. Supp. 564.

Argued before DYKMAN and PRATT, JJ.

Freeman & Green, for appellants. H. H. Hustis, for respondents.

DYKMAN, J. The plaintiffs are judgment creditors of James M. Davis, and they commenced this action, as such creditors, to set aside an assignment for the benefit of creditors made by Davis to the defendants. The cause was tried before a judge without a jury, and he decided in favor of the validity of the assignment. He found all the facts against the plaintiffs upon sufficient evidence, and his conclusions of law resulted from the facts so found. The decision of the case depended upon facts alone, and as they were found and determined so went the judgment. We concur with the trial judge respecting the indebtedness of the assignor to his wife, and in his conclusion that the debt was properly preferred in the assignment. The judgment should be affirmed, with costs.

DRAKE v. DRAKE *et al.*

(Supreme Court, General Term, First Department. May 16, 1890.)

TESTAMENTARY POWERS—APPOINTMENT—EXECUTION.

Testator devised property to his adopted daughter for life, and after her death to such of her lawful issue as she should appoint, and, in default of appointment, to her issue, to take *per stirpes*, if they should be of unequal degrees of consanguinity. By the ninth clause he provided that, if said daughter should die without issue, she should have power to appoint the property devised to any of testator's sisters, "or to all or any of the lawful issue" of his sisters. The adopted daughter was generally regarded as testator's illegitimate child, and, being much displeased at the manner in which his sisters and their children treated her, he said, before making his will, that he would "make a lady of her in spite of them." When the will was executed, testator's sisters were living, all had children, and one had a grandchild. Held, that the "issue" of testator's sisters mentioned in the ninth clause included any of their descendants, and the appointment to grandchildren of such sisters in the life-time of the appointees' parents was valid. Affirming 8 N. Y. Supp. 760.

Appeal from special term, New York county.

Action by Lawrence Drake against Joseph T. Drake and others. There was judgment for defendants, and plaintiff appeals. For report of decision at special term, see 8 N. Y. Supp. 760.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

Ewatts, Choate & Beaman, (Joseph H. Choate and William V. Rowe, of counsel,) for appellant. James C. Carter, for respondents.

VAN BRUNT, P. J. This action was brought for a construction of the ninth clause of the will of one James Drake, deceased. James Drake made his will in 1868, and died in 1871. He had no legitimate children, but had adopted as his daughter a person whom he called Mary Hopeton Drake, and of whom he was the reputed father. James Drake left him surviving his three sisters, Mary M. Keese, Susan A. Drake, and Sarah A. Lawrence, mentioned in said ninth clause of his will. Mary M. Keese died in 1877, leaving no issue her surviving, and before the execution of the will of Mary Hopeton Drake, hereafter mentioned. Susan A. Drake died in January, 1881, and before the execution of the said will of Mary Hopeton Drake, leaving her surviving seven children, Lawrence, Joseph T., John J., Samuel, Charles, Benjamin, and Mary Drake. Mary was afterwards married to Charles T. Stagg, in 1884, and had no issue. Mrs. Lawrence died in 1882 or 1883, after the execution of the will of Mary Hopeton Drake, hereinafter mentioned. She left her surviving three children, Mary K., Emily T., and Annie T. L. Mary K. married Charles N. Black in 1864 or 1865, and at the time of the death of Mary Hopeton Drake had four children, the youngest of whom, in April, 1888, was about twelve years old, viz.: Charles Newbold Black, born in 1867, and still living; Edith Lawrence Black, born March 15, 1869, still living; the defendants James Drake Black, born September 15, 1871, and Lawrence C. Black, born in January, 1875, and died 26th of March, 1887. Benjamin Drake, the son of Susan A. Drake, married in June, 1873, and at the time of the death of Mary

Hopeton Drake had two children,—William W. Drake, born in April, 1874, and the defendant Mary Hopeton Drake, born in 1877. Emily T., the daughter of Sarah A. Lawrence, married, in 1874, one Smith, and at the death of Mary Hopeton Drake had four children,—Richard Lawrence, born in 1877; the defendants Mary Hopeton, born in 1878; Ethelbert M. Smith, Jr., born in 1879, and Sarah L. Smith, born in 1883. Annie T. L., the daughter of Sarah A. Lawrence, married one Atterbury, in 1870, and had, at the time of the trial, in 1888, five children,—Lawrence, 14 or 15 years old; Sarah, 13; the defendant Hopeton Drake Atterbury, 7, and Annie, 5. Thus there was living at the death of James Drake, in May, 1871, not only his three sisters, Mary M. Keese, Susan A. Drake, and Sarah A. Lawrence, above mentioned, but also their children, and one grand-nephew, Charles Newbold Black, and one grand-niece, Edith Lawrence Black, and at the time of the execution of the will all the above were living except Edith Lawrence Black. Mary Hopeton Drake appears to have been about 28 years of age in 1868, and she died in 1884. James Drake, as has been already stated, died in 1871, having previously duly executed a will on the 22d of January, 1868, and a codicil thereto on the 9th day of August, 1869. The contents of the codicil have no relevancy to the questions involved upon this appeal.

By his will, James Drake, after making certain devises and bequests to his sisters, and to two nephews and a niece, gave, devised, and bequeathed to his adopted daughter, Mary Hopeton Drake, 11 houses and lots in the city of New York, for and during the term of her natural life; and, in case Mary Hopeton Drake left lawful issue her surviving, the testator gave and granted to her full power and authority to devise, and appoints by will the said 11 houses and lots to all or any or either of such issue, as she might in her discretion think proper, and in such shares and proportions as she should think proper; and in default of such appointment the testator devised said houses and lots above named to the lawful issue of Mary Hopeton Drake from and immediately after her death. If such issue was of equal degrees of consanguinity, they were to take equally; if of unequal degrees, the issue of a deceased parent were to take the share the parent would have taken if living. In the next clause of his will the testator provided as follows: "*Ninth.* In case of the death of the said Mary Hopeton Drake without leaving lawful issue surviving at the time of her decease, then, and in such case, I give and devise to her full power and authority to devise or appoint by her last will and testament, or other instrument in writing, executed by her in the manner hereinbefore mentioned, the said eleven dwelling-houses and lots of land herein last above mentioned, and each and every of them, to all or any or either of my sisters, Susan Ann Drake, Sarah Ann Lawrence, and Mary M. Keese, or to all or any or either of the lawful issue of my said sisters, from and after the death of the said Mary Hopeton Drake, forever thereafter, and in such shares and proportions as she may think proper; and in such case I hereby give and devise the same in accordance with such devise or appointment, and, in default of said last-mentioned devise and appointment, on the death of the said Mary Hopeton Drake without leaving lawful issue her surviving, I hereby give and devise the said last-mentioned eleven dwelling-houses and lots of land to my sisters above named, and to their heirs and assigns, from and after the death of the said Mary Hopeton Drake, forever, to be divided among my said sisters in equal shares; and, in case of the death of any or either of my said sisters during the life-time of the said Mary Hopeton Drake leaving lawful issue, then, and in such case last mentioned, the said issue of each one so dying shall take the share or part thereof which the parent of such issue would have taken if she had survived."

Mary Hopeton Drake died in June, 1884, unmarried, and without leaving issue her surviving, leaving a will, executed on June 14, 1881, and a codicil thereto, executed June 21, 1881. By this will and codicil she attempted to

exercise the power of appointment given to her by the will of James Drake in respect to the houses and lots therein mentioned, and devised the same to James Drake Black, grandson of Sarah A. Lawrence, a sister of James Drake, to Mary Hopeton Smith, a granddaughter of said Sarah A. Lawrence; to Mary Hopeton Drake, granddaughter of Susan A. Drake, sister of James Drake; to Mary Keese Black and Annie T. L. Atterbury, daughters of said Sarah A. Lawrence; and to Charles Drake, Samuel Drake, John James Drake, Lawrence Drake, and Benjamin Drake, sons of said Susan A. Drake. All the devises except those to Charles Drake and his brothers, subsequently mentioned, contained a provision that, if any of the appointees died, Mary Hopeton Drake living, leaving issue, the issue should take the share the parent would have taken if living; if without issue, the portion of the property which the appointee or her issue would have taken if living should fall into and be disposed of as part of the testator's residuary estate. Her residuary estate she devised by her will to the above-mentioned James Drake Black, Mary Hopeton Drake, and Mary Hopeton Smith, which was changed by her codicil by adding as a devisee Hopeton Drake Atterbury; all of whom were grand nephews and nieces of James Drake, deceased, and whose parents, children of James Drake's sisters, were living at the death of Mary Hopeton Drake.

The question presented upon this appeal is whether the learned judge below was right in holding that Mary Hopeton Drake had the power, under the power of appointment contained in James Drake's will, to appoint to grandchildren of his sisters, the children themselves, the parents of the grandchildren, being alive. The answer necessarily depends upon the construction which is placed upon the ninth clause of James Drake's will, hereinbefore set out at length. This clause must be construed according to the testator's intention, irrespective of any other consideration, if such intention can be ascertained after examining the will of the testator, his surroundings, and the object which from these we may infer he sought to attain. The ascertainment of this intention is not a matter of speculation or arbitrary conjecture, but must be arrived at having due regard to established rules by which particular words and expressions, standing unexplained, have obtained a definite meaning. If, however, it appears that particular words or expressions which have obtained a definite meaning in the law are used in a different sense, were intended to convey a different meaning, such intention must prevail, notwithstanding the interpretation which these words had previously received. Hence, as no two wills are ever exactly alike, and as the circumstances which surround each testator vary, adjudications upon the construction of other wills have little weight, except so far as they illustrate the general laws governing the construction of such instruments. It is undoubtedly true that where there is a gift or devise by will after the determination of a life-estate to A. B., and in case of his death before the death of the life-tenant to his lawful issue living at such death, if A. B. die before the determination of the life-estate leaving issue, and such issue at the death of the life-tenant should consist of children and grandchildren, whose parents were living, in the absence of circumstances showing a different intent, it would be held that the testator meant that the issue of A. B. should take by representation, and not as a class. This has become the accepted rule of interpretation, because experience has shown that this construction in most instances best accords with the intention of the testator, and that it is only under very peculiar circumstances that a testator desires that a parent and child shall take at the same time, as belonging to the same class; and that such circumstances inducing to such intent, when it exists, can almost always be found evidenced by the will itself, or by the surroundings of the testator. That James Drake, in the framing of the will in question, understood the difference between issue taking by representation and as a class, is amply evidenced by the will itself.

He devised to his sisters certain property during their lives, and from and immediately after their deaths to their lawful issue, to be divided among them equally, in case they shall be of equal degrees of consanguinity; and, in case they should be of unequal degrees, then the issue of each deceased parent take the share which the parent of such issue would have been entitled to if or she had then been surviving. He uses the same language in the limitation over after her death of the property given to Mary Hopeton Drake, in the event of her leaving lawful issue her surviving. Although, if the will had not contained these words as to the degrees of consanguinity, the statutes of descents and distribution would have caused the same distribution to be made of the estate upon the death of the life-tenant as is made by the will, it is evident that the testator did not intend to leave the matter in doubt, and consequently he incorporated the provisions of the statute into the will itself, making the distinct provision which he did as to distribution; making the gift to the issue as a class under some circumstances, and under others to the issue in their representative capacity.

When the testator desires the issue of his sisters to take in their representative capacity only, he is equally careful in the employment of his language. By the latter part of the ninth clause of his will, in case of the death of Mary Hopeton Drake without issue, and without having made the appointment said clause provided for, the testator gives the houses and lots devised to Mary Hopeton Drake during her life to his sisters, and to their heirs and assigns from and after the death of Mary Hopeton Drake; and in case of the death of any or either of his said sisters, during the life-time of Mary Hopeton Drake leaving lawful issue, then the said issue of each one so dying to take the share or part thereof which the parent of such issue would have taken if she had survived. By this provision the testator evidently purposely excluded the possibility of the issue of his sisters taking this property as a class, restricting their rights to take to their representative capacity; making a marked distinction in the rights of the issue of his sisters in respect to the property of which Mary Hopeton Drake was a life-tenant from those which he had conferred upon such issue in respect to the property in which his sisters had a life-estate. Was this difference in these provisions accidental, or was it made in pursuance of an intelligent intention? We think that no one can read the will, evidently drawn with so much care, and come to any other conclusion than that this difference was the result of intelligent action. He meant that although the issue of his sisters should not take in either case, their parents living, other than an expectant estate, their rights should be different; and he did not intend that there should be any uncertainty as to how either his sisters or their issue should take when the estate should devolve upon them, and hence he used plain and unequivocal language to define their rights. And we think that the testator used equally apt words in that part of the ninth clause by which he confers the power of appointment upon Mary Hopeton Drake, the construction of which is the object of this action, and confusion only arises when we attempt to construe as a devise that which was not, and was not intended to be, a devise, but was merely the conferring a power of appointment among a designated class. The provision is as follows: "In the case of the death of the said Mary Hopeton Drake without leaving issue surviving at the time of her decease, then, and in such case, I give and devise to her full authority to devise or appoint by her last will and testament, or other instrument in writing executed by her in the manner hereinbefore mentioned, the said eleven dwelling-houses and lots of land herein last above mentioned, and each and every of them, to all or any or either of my sisters Susan Ann Drake, Sarah Ann Lawrence, and Mary M. Keese, or to all or any or either of the lawful issue of my said sisters, from and after the death of the said Mary Hopeton Drake, forever thereafter, and in such shares and proportions as she may think proper."

The claim of the appellants is, and upon which is founded the whole of their argument, that, to quote the the language used by them, the fact that throughout the will, in the general limitations already referred to in the other clauses, as well as in the ninth clause, substituting "issue" in the place of "parents," the testator has clearly manifested an intention to permit "issue" to take only by way of representation, and never concurrently with or to the exclusion of their living parent or ancestor. If there is anything certain about this will, it is that in designating the class from which Mary Hopeton Drake might select her appointee or appointees under the power conferred by the ninth clause, the doctrine of representation should not prevail, and that a child or children might be appointed to the exclusion of its or their parent. In the other paragraphs of the will, and the latter part of the ninth clause, where he desires children to take as representatives of their parents, the testator distinctly so directs; but in the part of the ninth clause under consideration the testator not only does not use any language such as he had previously used, and also subsequently employed, but distinctly states that the issue of his sisters may be appointed although his sisters may be living. In all the other parts of the will the issues of his sisters took nothing but an estate in expectancy until their parent's death. In the clause in question, by the appointment of Mary Hopeton Drake the issue of the testator's sisters could take under the appointment, such sisters being alive. This is distinctly what the testator says: Mary Hopeton Drake may appoint to all or any or either of his sisters, or to all or any or either of the lawful issue of his said sisters. The power to appoint to the lawful issue of his sisters is not dependent upon the death of any or all of the sisters, but may be made by the express language of the power to the issue, all the sisters being alive. Upon this point there is no room for construction. It is plain that, in respect to this power of appointment, the testator did not wish the doctrine of representation to prevail. He had provided for it in the other portions of his will, but in the part under consideration it is apparent that he did not intend that a child should, in its candidacy for the favors of Mary Hopeton Drake, be dependent upon anything for success but upon its own claims. His omission of all clauses looking to representation, which he had so carefully inserted in the other parts of the will, and which he subsequently uses in the latter part of this very ninth clause, when providing for the contingency of Mary Hopeton Drake not exercising the power of appointment, shows that the failure to limit the power of appointment to issue, only in the case of the parent's death, was no oversight, but was intended, and that the testator's purpose was only to limit the power of Mary Hopeton Drake to appoint to his sisters and their blood in the descending line, not in a representative capacity, but as a class, and that she might appoint to whom, and to as many as she pleased within that class. In the clause in question the idea that the death of the parent should precede the possibility of issue benefiting thereunder is conspicuously absent, whereas in every other clause of the will this provision is unnecessarily inserted, where such results were expected to follow. Indeed, it is difficult to see how the testator could have shown more clearly than he has done that the doctrine of representation should have no application. If it should be claimed that the provision in respect to the death of his sisters, at the end of the ninth clause, qualifies all the provisions of that clause, a simple inspection thereof shows that such claim is entirely without foundation. This provision relates exclusively to the devise over in case of failure to appoint, and cannot relate to the provisions conferring the power of appointment, because entirely disconnected therewith and hostile thereto. The testator had completed his direction as to the power of appointment, and then proceeds to provide for the case of a failure to appoint; in which case, upon the death of Mary Hopeton Drake, he gives the said 11 houses and lots to his sisters and their heirs and assigns, and then adds the words that, in case of

the death of any or either of his sisters before that of Mary Hopeton Drake, the life-tenant, leaving issue, such issue is to take the share the parent would have taken; that is, the sister if she had survived.—a provision utterly inapplicable to the provisions of clause conferring the power of appointment, and evidently relating to the case of a failure to exercise this power. It thus seems to us, from the will itself, that, in respect to the appointees under the power in question, the doctrine of representation was not intended by the testator to prevail; and this conclusion is greatly strengthened when we consider the surroundings of the testator, and the objects he desired to attain.

Mary Hopeton Drake was, as has been already stated, believed by the testator's relatives to be his illegitimate child. The testator had adopted her as his daughter, and she was not treated with the same cordiality by his sisters and their children as they manifested to each other. The testator was very fond of this child, and such slights angered him, and upon one occasion he is reported to have said that he would "make her a lady in spite of them,"—referring to his sisters and their children; and it was undoubtedly with a view of securing civility and kind treatment from his relatives that the testator limited the power of appointment in the manner he did. He intended to make it apparent to his sisters and their children that Mary Hopeton Drake could reward kindness and punish incivility, and hence her power of appointment was only limited to his sisters or their blood in the descending line. At the time of the drawing of his will, the three sisters of the testator were living; two of them having children, and one having also a grandchild, and, at the death of the testator, grandchildren. All the grades of issue were thus before the testator's mind, and when he used the general words in the gifts of the power without restriction, having previously as well as subsequently used the same words accompanied by restrictions, it seems to us that we must inevitably conclude that he intended such general words to be used in their widest sense. There are other considerations which might be adverted to to aid the construction adopted, but it does not seem to be necessary to refer to them, as it seems to be conclusively shown by the very language used by him that the testator did not intend that the issue of his sisters should take under the power of appointment by representation, as he had intended they should take, where mentioned in the other portions of the will; and, if he did not so intend, then such issue were a class from which appointees were to be selected under the power. The judgment appealed from should be affirmed, with costs.

BARRETT, J. I concur. This is a case where the legal meaning given to technical words corresponds with the testator's intention. Those words were used advisedly to express that intention. The free use of the disjunctive in the same connection favors this view. The power was plainly to operate upon an area co-extensive with parents, children, grandchildren, etc., concurrently; in other words, upon the area of lawful issue in the full sense of descendants. And for this extensive and all-embracing power, within the limits of the testator's blood, there was, as clearly pointed out by the presiding justice, adequate reason as matter of fact.

BARTLETT, J., concurs.

HAHLO *et al.* v. GRANT *et al.*

(Supreme Court, General Term, First Department. May 16, 1890.)

1. SALE—RESCISSION—FALSE REPRESENTATIONS BY PURCHASER.

In replevin for goods alleged to have been fraudulently obtained from plaintiff by means of false representations by defendant as to his ability to pay for them, it appeared that when plaintiff W., who sold the goods, asked for a statement, defendant replied that he had not long since made a statement to plaintiff H., then absent, and that he stood "better than ever," and that W. reported this to the credit

clerk, who let the goods go. H. testified to the statement, as it was made to him, and that he communicated it to plaintiffs' credit clerk at the time it was made. Held, that it was competent for plaintiffs to show by the credit clerk that, in letting the goods go, he took into consideration the communication made to him by H.

2. SAME—EVIDENCE OF FRAUDULENT INTENT.

On the direct examination of defendant in an action by the sellers to recover goods alleged to have been procured from them by defendant's false representations as to his ability to pay for them, the question whether defendant was asked to purchase goods from other merchants after his purchase from plaintiffs is properly excluded as having no bearing on the intent with which he purchased plaintiffs' goods.

Appeal from circuit court, New York county.

Action by Herman Hahlo and others, composing the firm of H. Hahlo & Co., against Hugh J. Grant, sheriff of the city and county New York, and others, to replevy goods in possession of defendant Grant, under executions against Isaac Shackman, who claimed to have purchased the goods of plaintiffs. Plaintiffs recovered a verdict and judgment, and defendants appeal.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

Turner, McClure & Rolston, (*David McClure*, of counsel,) for appellants. Blumenstiel & Hirsch, for respondents.

BARRETT, J. The question here is purely one of fact. It was submitted to the jury under appropriate instructions to which there was no exception. Every possible view of the case which could benefit the defendants was presented in the form of 12 separate requests to charge, and each one of these requests was charged. Under such circumstances, the only question is whether there was sufficient to justify the submission of the case to the jury, or whether the verdict was contrary to the weight of evidence. After a careful review of the testimony, we are against the appellants on both heads. There was ample evidence to justify the submission, and in our judgment the verdict was a righteous one.

The appellants claim that the court erred in admitting and excluding testimony, and the exceptions on this head may be briefly considered. The action was in the nature of replevin for certain goods alleged to have been fraudulently obtained from the plaintiffs by one Shackman. The plaintiffs took two positions: *First*, that the goods were purchased by means of fraudulent representations; and, *second*, that the purchase was with the preconceived design not to pay for such goods. In seeking to establish the fraudulent representations, it became necessary to connect a statement made by Shackman to the plaintiff Hahlo some months prior to the transaction in question with a statement made at the time of the purchase, and for this reason: Hahlo was in Europe at the time of the purchase, and the plaintiff Woolf, who in his absence sold the goods to Shackman, asked the latter for a statement. Shackman replied that he had not long since made a statement to Hahlo, and that he stood, at the time of Woolf's inquiry, "better than ever." Woolf reported this observation to one Sobel, who was in charge of the plaintiffs' credit department; and Sobel, partly upon the strength of that statement, and partly upon the faith of information received from Dun's Commercial Agency, checked the bill, and permitted the goods to be delivered. It thus became important to show that Sobel relied in part upon the statement made some months before by Shackman to Hahlo, and to that end the following question was put, and answer given: "*Question*. What else did you do in connection with the shipment of these goods besides obtaining the agency statement, and the conversation with Mr. Woolf? (Objected to as immaterial. Objection overruled. Exception.) *Answer*. I took into consideration some information that I had received from Mr. Hahlo, I believe, towards the end of February, 1888." Mr. Hahlo prior to that time had communicated the statement made by Shackman to him, as he stated. We think this testimony was properly admitted. Hahlo went upon the stand, and gave the original statement, as it was made

to him, *in extenso*. He communicated that statement to Sobel at the time it was made. When, therefore, Sobel was reminded thereof by Woolf, and was told that Shackman declared that he was then "better than ever," it was proper to show what Sobel really relied upon.

The question which was excluded was this,—put to Shackman upon his direct examination: "*Question*. Subsequently to these purchases that you made of Hahlo & Co., had you been asked to purchase goods from other merchants in the trade?" This question was an improper one, and the objection to it was correctly sustained. The issue did not involve the question of an accumulation of goods fraudulently purchased from other persons after the transaction with the plaintiffs. Whether Shackman was subsequently asked to purchase goods from other merchants had no bearing upon the intent with which he purchased those claimed by the plaintiffs. The logic of the question seems to be that Shackman's honest intent with regard to the plaintiffs would be evidenced by the fact that he had had an opportunity to cheat other people, and did not avail himself of it.

There are no other questions in the case, and the judgment and order denying motion for new trial should be affirmed, with costs. All concur.

LAMBERTY v. ROBERTS.

(*Supreme Court, General Term, First Department. May 18, 1890.*)

APPEAL—MATTERS NOT APPARENT ON THE RECORD.

Where, after reply to an answer setting up a counter-claim, defendant files an amended answer, also pleading a counter-claim, and a motion for judgment on the counter-claim is denied on the ground that "the reply served" was a sufficient reply thereto, it will be presumed on appeal, in the absence of the original answer from the case, that the counter-claim set up in the amended answer was the same as that set up in the original answer.

Motion for reargument. For decision on appeal, see 9 N. Y. Supp. 607.

Action by John Lamberty against Milton J. Roberts for services performed. A judgment for plaintiff was affirmed on appeal (9 N. Y. Supp. 607,) and appellant (defendant) now moves for a rehearing.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.
Eugene Frayer, for appellant. *J. C. McGuire*, for respondent.

PER CURIAM. This motion proceeds upon an analysis of the dates of the several pleadings contained in the judgment roll, and of the prefatory statement which precedes it. It is contended that the absence of a reply to the paper styled an "answer to the amended complaint," but called an "amended answer" in the verification, is thus established. This answer was verified on the 26th of January, 1887, and the reply was served on the 7th of the following March. We are asked to infer that this answer, thus verified, was retained, unserved, in the attorney's possession until after the service of the reply, and that it was not in fact served until the 25th of March, 1887. The conclusion is then drawn that, as the prefatory history of the case states that no further or other pleading was served after March 25th, there could have been no reply to the counter-claim contained in this answer. We do not think that the case should be thus microscopically analyzed for the purpose of disturbing a perfectly just judgment upon a pure technicality. We should rather seek the means of upholding a judgment rendered after a fair trial upon the merits, and, if needful, we might even permit any proper amendment to be made *nunc pro tunc*. There can be no doubt, however, that this counter-claim was in substance replied to. The appellant does not contend that the counter-claims in the original and amended answers differed, so far as the subject-matter was concerned. He merely suggests that "there was a distinct allegation inserted in the counter-claim by the amended pleadings which

the pleader deemed important to express, rather than to leave to inference, as he had done in the original pleadings." The respondent, on the other hand, says that the original answer was amended, "but the counter-claim was not." The motion for judgment upon the counter-claim was denied upon the trial upon the distinct ground "that the reply served March 7, 1887, was a sufficient reply to said counter-claim." The judge, in order to make that ruling advisedly, must have had the two answers before him. He thus necessarily held that the counter-claims were substantially alike. If the appellant thought otherwise, and desired a review on that head, he should have had the original pleading inserted in the case. Assuming, then, as we have a right to assume, that the counter-claim in each pleading was the same, we think the court was right, upon the trial, in denying the motion, and that it was unnecessary to serve another reply to a mere repetition of matter already replied to. It was so held under the old Code, (*Leslie v. Leslie*, 11 Abb. Pr., N. S., 317; *Howard v. Railroad Co.*, 5 How. Pr. 206;) and there is nothing in section 543 of the Code of Civil Procedure militating against this rule. The motion for a reargument should be denied, with \$10 costs. All concur.

NEW YORK, L. E. & W. R. CO. v. BEIRNE *et al.*

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

APPEAL—REVIEW—WRIGHT OF EVIDENCE.

Where only two witnesses testify, the determination of the trial judge on a question of fact will not be reviewed by the general term.

Appeal from special term, Orange county.

Action by the New York, Lake Erie & Western Railroad Company against James W. Smith and Edward C. Beirne, to have determined who was the proper person to whom it might make payment of the wages due defendant Smith. The court found that assignments of his wages executed by Smith in favor of Beirne were given for usurious loans, and gave judgment for Smith. Defendant Beirne appeals.

Argued before DYKMAN and PRATT, JJ.

John W. Lyon, for appellant. A. Van Etten, for respondent Smith.

PRATT, J. This case depends on the testimony of two witnesses. The trial judge, who saw them and heard their testimony, could decide which was in the right far better than an appellate court can do. There are no questions of law that require discussion. Judgment affirmed, with costs.

BAYLES *et al.* v. WALLACE.

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

STATUTE OF FRAUDS—ORIGINAL PROMISE.

Where plaintiffs refused to furnish any more lumber to a contractor for use in the erection of a house for defendant unless defendant became responsible, defendant's promise to pay for lumber thereafter delivered was an original undertaking, and therefore not void, under the statute of frauds, because not in writing.

Appeal from Suffolk county court.

Action by David T. Bayles and others against Howard Wallace. There was judgment for plaintiffs. Defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Thomas J. Ritch, Jr., for appellant. Thomas S. Mount, for respondent.

DYKMAN, J. This is an appeal from a judgment entered upon a verdict rendered in the county court of Suffolk county in favor of the plaintiff, against the defendant, and from an order denying a motion for a new trial on the

minutes of the court. The action was brought for the recovery of a balance due upon an account for lumber used in the erection of a building for the defendant. The contractor for the erection of the building was Samuel H. Brewster, and the agreement to furnish the lumber was originally made with him; but the claim of the plaintiff, upon which this action is based, is that after he had delivered some lumber under his agreement with this Brewster, he became suspicious, and informed the defendant that, unless he became responsible for the lumber, he would furnish no more, and that the defendant then agreed to become responsible for the lumber delivered subsequent to that time. That agreement was denied by the defendant, and the two theories were presented to the jury, with instructions to render a verdict for the plaintiff if the agreement was made as he claimed, and to find for the defendant if it was not made. The jury rendered a verdict for the plaintiff, and we must therefore assume that the agreement was made according to the testimony of the plaintiff. Assuming the existence of the agreement, the defendant became the original debtor, and the contract did not fall within the statute of frauds, because it was an original undertaking. There was no error in the charge of the trial judge, but, on the contrary, the case was properly presented to the jury by the charge. The verdict is evidently just, and fully sustained by the evidence. The judgment and order denying the motion for a new trial should be affirmed, with costs. All concur.

POUNTNEY v. POUNTNEY.

(Supreme Court, General Term, Second Department. May 12, 1890.)

DIVORCE—Costs—ALLOWANCE TO WIFE.

Where a wife has been allowed \$100 counsel fees to prosecute her action for a limited divorce, she cannot, after she has succeeded in making out her case, have another allowance. Following *Beadleston v. Beadleston*, 103 N. Y. 402, 8 N. E. Rep. 735.

Appeal from special term, Orange county.

Action by Mary A. Pountney for a limited divorce from her husband, William Pountney. Plaintiff appeals from an order denying her motion for an allowance for counsel fees in addition to the taxable costs, which motion was made at the close of the trial, the issue having been decided in her favor.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

C. E. Cuddeback, for appellant. John W. Lyon, for respondent.

BARNARD, P. J. The plaintiff recovered a judgment for a limited divorce, with the costs and disbursement of the action. There had been granted previous to judgment \$100 for a counsel fee pending the litigation. The court, on application, denied a motion for an additional allowance, upon the ground that no power existed in the court to make such an allowance in a divorce action, and citing *Beadleston v. Beadleston*, 103 N. Y. 402, 8 N. E. Rep. 735. The case upholds the decision at special term. We think, however, in view of the fact that \$100 counsel fee had been allowed, and no further application made, that the \$100 and the costs of the action were sufficient compensation to the plaintiff's attorney for the trial of the issue in the action. Even if the court had the power to grant an extra allowance, the case was not one where such an allowance was called for by anything disclosed by the appeal papers. Order affirmed, with costs and disbursements. All concur.

POUNTNEY v. POUNTNEY.

(Supreme Court, General Term, Second Department. May 12, 1890.)

DIVORCE—Costs—ATTORNEY'S FEES.

In an action by a wife for a limited divorce, an order was entered allowing all money, and "\$100 for counsel fees, pending the litigation." Plaintiff recovered judg-

ment. *Held*, that defendant was not entitled to have any portion of the \$100 applied to payment of witness fees, and that the fact that the check therefor stated that \$50 was for witnesses did not change the order.

Appeal from special term, Orange county.

Defendant appeals from an order denying his application for retaxation of costs, and reduction of the judgment for costs entered in plaintiff's favor. For nature of action, see the preceding case, *ante*, 192.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

John W. Lyon, for appellant. *C. E. Cuddeback*, for respondent.

BARNARD, P. J. This action was for a divorce. A motion was made by the plaintiff for alimony and expenses before trial. The affidavit of the plaintiff states that \$50 was granted for counsel fees, and \$50 for witness fees. The order was not so entered, but alimony was allowed, and "\$100 for counsel fees, pending the litigation." With this order standing, there is no basis for a retaxation of costs. The order allows nothing for witness fees or expenses, and the defendant has no right to ask the plaintiff's attorney to apply any portion of the \$100 to the payment of witness fees. The form of the check by which the \$100 was paid, stating that \$50 was for counsel fees and \$50 for witnesses, did not change the order. The plaintiff's attorney could receive the \$100 as his right, under the order. Order affirmed, with costs and disbursements. All concur.

QUEENS CO. BANK v. LEAVITT.

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

HUSBAND AND WIFE—CONTRACTS—ACCOMMODATION PAPER.

Notes executed by a wife to her husband for his accommodation are not contracts between them; and under Laws N. Y. 1884, c. 381, giving to married women the power to contract as if they were unmarried, and making them and their separate estate liable on their contracts, whether they relate to such separate estate or not, but excepting from the provisions of the act all contracts between husband and wife, a bank taking such notes in payment of an indebtedness of the husband is entitled to recover thereon against the wife. Following *Bank v. Sniffen*, 7 N. Y. Supp. 520.

Appeal from circuit court, Queens county.

Action by Queens County Bank against Eliza M. Leavitt on a promissory note for \$2,800, made November 5, 1888, by defendant to order of her husband, Rufus W. Leavitt, and indorsed by him to plaintiff. There was a judgment for plaintiff. Defendant appeals. Laws N. Y. 1884, c. 381, provides: "Section 1. A married woman may contract to the same extent, with the like effect and in the same form, as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary." Section 2 provides that "this act shall not affect nor apply to any contract that shall be made between husband and wife."

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

C. A. S. Van Nostrand, for appellant. *Rice & Bjur*, (*Nathan Bjur*, of counsel,) for respondent.

DYKMAN, J. This action was brought upon a promissory note, of which the following is a copy: "\$2,800. FLUSHING, November 5, 1888. Four months after date I promise to pay, to the order of Rufus W. Leavitt, twenty-eight hundred dollars, at the Queens County Bank, Long Island City, value received. In consideration of one dollar to me in hand paid, I hereby bind my separate estate for payment of the above amount. ELIZA M. LEAVITT." At the time of the execution of this note, the maker was a married woman, the wife of the payee, Rufus W. Leavitt, and the note was made without

consideration as between the husband and wife, and was made for the accommodation of the husband, and he indorsed the same and delivered it to the Queens County Bank for the purpose of taking up another note which the bank held against him, which was also made by his wife. Upon the conclusion of the testimony at the trial, the court directed a verdict for the plaintiff, and the defendant has appealed from the judgment entered thereon. We can discover no error. The note in suit was made with full knowledge of the use to which it was to be appropriated, and there is no claim interposed of any diversion of the paper. The note was made by the wife for the accommodation of her husband, and the existence of the debt from the husband to the bank was a sufficient consideration between them to sustain the transfer of the note to the bank. *Schepp v. Carpenter*, 51 N. Y. 602. Being an accommodation note, it did not inure as a contract between them, because it had no inception until it was discounted or taken by the bank in place of the old note. *Bank v. Sniffen*, 7 N. Y. Supp. 520, (December 19, 1889.) There never was any intention to create an obligation of the wife to the husband by the execution of the note in question, and the paper had no inception as a contract until the delivery of the same to the bank in payment of the old note. These remarks are made to show that chapter 38 of the Laws of 1884, respecting the capacity of married women to make contracts, and the reservation and proviso contained in the second section of that act can have no application to this action. It was the evident intention of the defendant to become surety for her husband, and she had capacity and competency to enter into such obligations previous to the law of 1884, and her obligation thus assumed is valid and binding. *Insurance Co. v. Babcock*, 42 N. Y. 613. We find no exceptions well taken, and no error. The judgment should be affirmed, with costs. All concur.

QUEENS COUNTY BANK v. LEAVITT.

(Supreme Court, General Term, Second Department. May 12, 1890.)

1. CONTRACT—CONSIDERATION—RENEWAL NOTE.

A renewal note, signed by a married woman as surety for her husband, is supported by a sufficient consideration where the payee surrenders the old note of the husband.

2. PLEDGE—ACTION FOR DEBT—RETENTION OF COLLATERAL.

The retention of securities deposited as collateral security will not bar an action on the note secured, nor is there any obligation on the payee to sell the securities before bringing his action.

Appeal from circuit court, Queens county.

Action by Queens County Bank against Eliza M. Leavitt. There was judgment for plaintiff, and defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

C. A. S. Van Nostrand, for appellant. Rice & Bjur, (Nathan Bjur, of counsel,) for respondent.

DYKMAN, J. This is an action founded on a promissory note, of which the following is a copy:

"\$3,100.

L. I. CITY, May 1, 1888.

"On demand, I promise to pay to Queens County Bank or order thirty one hundred dollars, for value received, with interest at the rate of six per cent. per annum, having deposited with them as collateral security, with authority to sell the same at the brokers' board, or at public or private sale, at their option, or on the non-performance of this promise, and without notice Cert. 100 shares Houston and Texas R. R., bond and mortgage of John H.

Stall, \$2,648.50. In consideration of one dollar to me in hand paid, I hereby bind my separate estate for payment of the above amount.

"ELIZA M. LEAVITT.

"RUFUS W. LEAVITT."

It is stated in the points for the respondent that the note is not correctly printed as it is given above, but that the agreement of Eliza M. Leavitt was written on the face of the note, and signed by herself alone, and independently of the signature of Rufus W. Leavitt. Eliza M. Leavitt is a married woman, and the wife of Rufus W. Leavitt; and it appeared in evidence on the trial of this action that the plaintiff held a note against Mr. Leavitt for \$5,100, with 100 shares of Houston & Texas railroad stock, and a bond and mortgage for \$2,648.50, as collateral security. Considering the security insufficient, the bank officers requested Mr. Leavitt to pay \$2,000 on the note, which he did; and then the defendant signed the note on which this action is brought for the purpose of taking up the old note. Mr. Leavitt testified that after he paid the \$2,000 in cash, and handed to the cashier his note for \$3,100, his old notes were surrendered to him, and then, shortly afterwards, the cashier came to him, and said he thought that Mrs. Leavitt ought to sign the note also, and "So you will see she signed above me on this note." This testimony contradicts the statement in the points, but the precise location of the signature on the face of the paper is quite immaterial, for the note is to be regarded as the joint and several promissory note of the parties who signed it. Story, Prom. Notes, § 57. The proof shows the husband to be the principal debtor, and that the wife signed the note as his surety, and charged her separate estate with its payment, as she might lawfully do. *Insurance Co. v. Babcock*, 42 N. Y. 618. The surrender of the old paper by the bank was a sufficient consideration to impart validity to the new note, and the defendant cannot escape liability because she signed as surety. *Schepp v. Carpenter*, 51 N. Y. 602. Much of the commercial paper discounted by banks bears the name of an accommodation maker or indorser; but, when it falls into the hands of a *bona fide* holder before maturity, it becomes a binding obligation against all the parties.

The retention of the securities recited in the note is not a bar to this action. According to the recitation in the note, they were deposited as collateral security, and then were in no sense received as payment of the note. Neither was there any obligation resting upon the bank to sell the securities before commencing this action. The remedy upon the primary obligation might be pursued independently, or even concurrently with the remedy upon the collaterals. *Insurance Co. v. Babcock*, 57 Barb. 231. We find no error in the record, and the judgment should be affirmed, with costs. All concur.

WOOD v. BALDWIN.

(Supreme Court, General Term, Second Department. May 12, 1890.)

ATTORNEY AND CLIENT—ACTION FOR ATTORNEY'S FEES.

In an action to recover \$50 for legal services rendered "in case of *Baldwin v. Robinson*," plaintiff testified: "I defended a suit brought by Robinson against Baldwin. After the conclusion of that suit, I brought an action in the supreme court for Baldwin against Robinson. I know the value of such services rendered. The value of said services is \$50." Held, that plaintiff's estimate of value would be regarded, on appeal from a judgment in his favor, as referring to the services in *Baldwin v. Robinson*, and not to all the services testified to.

Appeal from Dutchess county court.

Action by William H. Wood against Elisha T. Baldwin, originally brought in a justice's court, where plaintiff recovered a judgment, which was approved by the county court. Defendant again appeals.

Argued before BARNARD, P. J., and PRATT and DYKMAN, JJ.

Herrick & Lossey, for appellant. *C. Morschauer*, for respondent.

PRATT, J. The complaint alleges that plaintiff performed work for defendant reasonably worth \$50. The bill of particulars is, "To services in case of *Baldwin v. Robinson*, fifty dollars." On the trial the defendant did not appear, and plaintiff testified: "I went to Hopewell Junction, and defended a suit brought by Robinson against Baldwin. After the conclusion of that suit, I brought an action in the supreme court for Baldwin against Robinson. I know the value of such services rendered. The value of said services is fifty dollars." Judgment went for the plaintiff for that sum. The defendant appeals, and for cause of reversal alleges that the value was predicated, not merely on what was done in the action of *Baldwin v. Robinson*, but in part on what was done in *Robinson v. Baldwin*, which was not included in the bill of particulars, and for which no recovery could be properly had. That question is discussed by the court below, and the conclusion there reached is that a proper construction of the testimony shows that the witness did not base his estimate of value to any extent upon what was done in the action the witness defended, but that the \$50 value was applied solely to the action of *Baldwin v. Robinson*, where he brought the suit. An examination of the testimony shows that conclusion clearly right. Immediately before giving his estimate of value, the witness was speaking of the action of *Baldwin v. Robinson*, and his declaration must be regarded as referring to the antecedent immediately preceding. The rule of grammar, which is also a rule of law, is that a relative clause relates to the nearest antecedent that will make sense. The rule is as ancient as the language. Finch, in his discourse on law, (Edition 1759, bk. 1, c. 3, p. 8.) states it thus: "Words of construction must be referred to the next antecedent, where the matter itself doth not hinder;" and cites cases as far back as Edward IV. 5 Com. Dig. marg. p. 333, says the relative is referred to the last antecedent, and cites numerous cases. Broom, in his Maxims, cites Noy, to the effect that "relative words refer to the next antecedent," and says the "last antecedent" is the last word that can be made an antecedent so as to make sense. Page 680. In *Baring v. Christie*, 5 East, 398, the language under consideration was, "George G. Dominick, master or commander of the ship called the Mount Vernon, of the town of Philadelphia;" which was held to mean that not Dominick, but the ship, was of that town, and, for the reason that the clause could not be held to include Dominick, the ship's papers were adjudged illegal, as not disclosing the habitation of the master. Applying this rule to the testimony in this action, it is plain that the language of the witness, "the value of said services is fifty dollars," should be referred, not to all the services testified to, but to the services in the action of *Baldwin v. Robinson*, which in his testimony immediately preceded his valuation. Those were the services set out in the bill of particulars for which a recovery might properly be had. It follows that no error was committed, and the judgment must be affirmed, with costs.

METROPOLITAN LIFE INS. CO. v. HALL *et al.*, (seven cases.)

(Supreme Court, General Term, Second Department. May 12, 1890.)

1. CONTRACTS—BUILDING CONTRACTS—SUBSEQUENT PURCHASERS.

An agreement for a builder's loan, which provides that mortgages to be executed as security for the loan may be foreclosed if work on buildings to be erected on the mortgaged premises shall be unreasonably delayed, is valid between the parties and subsequent purchasers and mortgagees with notice of its existence.

2. SAME—MERGER.

Such an agreement does not merge in the mortgages subsequently executed, where the making of those instruments was in execution of a part only of the agreement, and there is no evidence of an intention to extinguish the agreement by the execution and delivery of the mortgages.

Appeal from judgment on report of referee.

Action by the Metropolitan Life Insurance Company against Wilson C. Hall, Asa W. Parker, and Sophie G. Parker, his wife, to foreclose a bond, mortgage, and builder's loan agreement. From a judgment entered in favor of plaintiff, the defendants Parker appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

C. D. Rusk, for appellant Sophie G. Parker. A. W. Parker, appellant, pro se. Arnoux, Ritch & Woodford, (W. H. Arnoux and C. N. Boese, Jr., of counsel,) for respondent.

DYKMAN, J. This action was commenced to foreclose a mortgage made by the defendant Hall to the plaintiff to secure the payment of \$4,000, dated September 6, 1888, payable on the 1st day of May, 1893, with interest at 6 per cent. per annum, payable semi-annually, except that \$500 of the principal was due and payable at the expiration of one year. This action was commenced in April, 1889, before any portion of the principal was due, and Asa W. Parker and his wife, Sophie G. Parker, were made parties; the latter as a subsequent purchaser, and the former as a subsequent mortgagee. They both served answers, in which they admit the incorporation of the plaintiff, and the execution and delivery of the bond and mortgage, and then they state their interests in the premises, and deny knowledge of the existence of the agreement between the mortgagor and mortgagee hereafter to be mentioned. Both defendants deny that anything was due on the bond and mortgage when this action was commenced, and there was nothing due by the terms of those instruments alone. Upon the pleadings, the bond and mortgage stand as valid instruments, and prior in point of time to the lien and title of the other defendants, whose rights are subordinate to those of the plaintiff. The only question involved, therefore, is whether the action was prematurely commenced, and that depends upon the legal effect of the agreement already mentioned, and the knowledge of the defendants of its existence. When the defendant Hall made application to the company for a loan, a written contract was entered into between them which provided for a loan to him of \$48,000, for which he was to execute and deliver 11 mortgages upon his property as security. Each mortgage was to be for a sum specified, and to be made payable on the 1st day of May, 1893, except the sum of \$500 of each mortgage was to be payable at the expiration of one year. Then the contract provided that the work on certain buildings to be erected upon the premises should be prosecuted with diligence continuously from commencement to completion, excepting delays from inclement weather, and that the plaintiff should be at liberty to foreclose the mortgages at any time if the completion of the buildings was unreasonably delayed. The mortgage now in suit was one of the instruments executed under that agreement, and more or less money was advanced upon all of them as the work progressed upon the buildings, until there was a failure to proceed with the work in accordance with the contract, and then this action, with a number of others, was commenced to foreclose the mortgages. This action is No. 1, and it was tried before a referee, who decided in favor of the plaintiff, and the Parkers have appealed from the judgment.

There is a stipulation in the case that the other actions shall abide the event of this, with some little variation and exceptions in respect to action No. 3. The referee has found, upon evidence amply sufficient to sustain the findings, that the defendant Asa W. Parker, the husband of Sophie G. Parker, was her agent in all matters relating to the conveyance of the premises in question to her by the defendant Hall, and that prior to the execution and delivery of that deed he had actual notice of the existence of the agreement between Hall and the company, and that such agreement contained a provision authorizing the plaintiff to foreclose its mortgage if work upon the buildings was unrea-

sonably delayed; and the referee further found that the defendant Asa W. Parker knew before the commencement of this action that work upon the buildings had been unreasonably delayed, and that all work upon the same had been abandoned for nearly two months before the action was commenced. The referee also found, as a conclusion of law, that the defendant Sophie A. Parker, prior to the conveyance of the premises to her, had, through her husband, actual notice of the existence of the contract, and of its provisions, and that she was not an innocent purchaser without notice, but received the conveyance in subordination to the rights of the plaintiff under its bonds and mortgages and agreement from the defendant Hall; also that the defendant Asa W. Parker was not an innocent incumbrancer, but accepted his mortgage subject to the rights of the plaintiff under its bonds and mortgages and agreement with the defendant Hall. These findings, and the evidence upon which they are based, are rendered more satisfactory and reliable by the failure of the defendants to offer any evidence in contradiction of the testimony introduced on behalf of the plaintiff. At the close of the plaintiff's proof, it became very important to the defendants to disprove knowledge of the agreement between Hall and the company. That agreement was valid and binding and effectual between the parties, and, with notice of its existence and contents before the defendants acquired any interest in the premises, it was equally binding upon them. Parker was a perfectly competent witness to deny and disprove knowledge of the agreement, and his failure to make such proof raises a strong presumption of his inability to do so.

The review thus made shows the rights of the plaintiff to be dependent upon the three instruments executed by the defendant Hall,—the agreement and the bonds and mortgages,—and hence it was that those three instruments were all set out in the complaint as the basis of the relief demanded. Unaided by the agreement, no action could be commenced for the foreclosure of the mortgages until some portions of the money became due by the terms of those instruments and their accompanying bonds. Those instruments are to be construed together, and they furnish the plaintiff with power and authority to foreclose the mortgages whenever the completion of the buildings was unreasonably delayed. The agreement was not merged in the bonds and mortgages, because the making of those instruments was in execution of part only of the agreement, and there is no evidence of an intention to extinguish the agreement by the execution and delivery of the bonds and mortgages. *Morris v. Whitchee*, 20 N. Y. 41; *Wittebeck v. Wayne*, 16 N. Y. 532. It was the purpose and design of the parties, in the execution of the written contract, to make the right of the plaintiff to foreclose the mortgages dependent upon an event different from the expiration of the time limited in those instruments, at the election of the plaintiff, and thus make it possible to enforce the collection of the money advanced, whenever it became evident that the security was becoming insufficient. Such an agreement was perfectly legal and valid between the parties, and also against all persons who deal with the property with notice of its existence. Hence the necessity for such proof which was introduced upon the trial to charge the defendants with such knowledge, and the finding of the referee upon that subject. The testimony and findings make the case plain for the plaintiff. Many objections were taken by the defendants during the trial, but they were all frivolous. The just and legal result was reached by the referee, and the record discloses no error. We fully concur with the opinion written by the referee, and print it in the case, and we consider further examination of the case, or any reference to authorities, useless and unnecessary. The judgment should be affirmed with costs. All concur.

NOWAK v. WALLER *et al.**(Supreme Court, General Term, Second Department. May 12, 1890.)*

1. FALSE IMPRISONMENT—WHO LIABLE—COMPLAINT.

One who, without malice or bad faith, makes a statement before a magistrate of what he regards as constituting a criminal charge against plaintiff, but does not ask that a warrant issue, or take any part in its service, is not liable to an action for false imprisonment on the consequent arrest of plaintiff, though such arrest is not warranted by law or the facts of the case.

2. SAME—LIABILITY OF MAGISTRATE—IRREGULARITIES.

A justice of the peace, having jurisdiction of the subject-matter, is not liable to an action of false imprisonment by a person arrested, merely because he made a mistake in failing to take an examination of the complainant, and to reduce the same to writing, as required by Code Crim. Proc. N. Y. § 148.

3. SAME—INSUFFICIENCY OF AFFIDAVIT—OPINION OF MAGISTRATE.

The fact that the affidavit was not sufficient to authorize the issuance of the warrant did not render the constable executing it, and the complainant, liable to an action for false imprisonment, where the justice deemed the affidavit sufficient.

4. CRIMINAL LAW—PRELIMINARY EXAMINATION—OBJECTIONS WAIVED.

By stipulating to appear at a future day for his own convenience, and receiving a parol, the party arrested waives the objection that he was not immediately taken before a magistrate.

Appeal from circuit court, Suffolk county.

Action for false imprisonment, brought by Anton Nowak against George F. Waller, George W. Jeffery, and Egbert Benjamin. Defendant Waller is a justice of the peace; the defendant Jeffrey, an overseer of the poor; and defendant Benjamin, a constable. The court dismissed the complaint as against all defendants. Plaintiff appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Andrew Heyman, for appellant. *Timothy M. Griffing*, for respondents Waller and Jeffrey. *Wilnot M. Smith*, for respondent Benjamin.

PRATT, J. Defendant Jeffrey went before the magistrate, Waller, and made a statement of what he regarded as constituting a criminal charge. It does not appear that he made any false statement, or that he entertained any malice against the plaintiff, or that he asked that a warrant should issue, or that he gave any direction or took any part in its service. These facts did not make him liable to an action for false imprisonment. The justice was authorized by law to receive an information or complaint, and issue a warrant, in such a case; and it is not material whether the facts sworn to were in law sufficient to establish the crime attempted to be charged. We conclude, therefore, that defendant Jeffrey was not liable, and that the warrant was a protection to the constable, Benjamin.

The question as to defendant Waller requires a short statement in explanation of the decision to which we have arrived. The justice had jurisdiction of the subject-matter presented to him, to-wit, the arrest of persons charged with a violation of the excise laws. When the matter was presented to him, he was required to decide what was his duty respecting it. The general rule is that where a judge, who has jurisdiction of the subject-matter, errs in his judgment as to whether the facts presented do or do not confer jurisdiction, he is not liable to an action of false imprisonment by a person arrested through an error of judgment. *Ayers v. Russell*, 3 N. Y. Supp. 338. The justice here simply made a mistake in failing to take an examination of the complainant and the witnesses, and reducing the same to writing, as required by the Code of Criminal Procedure, (section 148.) The test seems to be that there is no liability to civil action if the act was done "in a matter within his jurisdiction." The case of *People v. Nowak*, 5 N. Y. Supp. 240, is cited by appellant as authority for reversing this judgment. In that case it was held simply that the affidavit was not sufficient to authorize the issuance of the warrant.

It is enough to protect both Benjamin and Jeffrey that the justice so held. *Lewis v. Rose*, 6 Lans. 209; *Gardner v. Bain*, 5 Lans. 257. It was no part of the duty of either of these defendants to examine the record made by the magistrate, and it was impracticable for them to do so. The warrant was regular upon its face. The mistake in the date injured no one. If a wrong direction was given by the magistrate as to its return and the production of the prisoner, it was not obeyed, as the constable made an amicable arrangement with the prisoner that he should appear upon the 21st of September before the justice, and was thereupon paroled. A party cannot, for his own benefit, make a stipulation to appear at a future day for his own convenience, and receive a parol, and then complain that he was not immediately taken before a magistrate. Judgment affirmed. All concur.

VAN ZANDT v. VAN ZANDT *et al.*

(*Supreme Court, Special Term, New York County. July, 1889.*)

PRACTICE IN CIVIL CASES—SERVICE OF PAPERS—STIPULATIONS.

Where defendants appear, and demand a copy of the complaint, which is served accordingly, and counsel for the parties then agree that defendants have 20 days from the service of the complaint, under the demand, within which to answer, such agreement of counsel is a binding stipulation, though a copy of the complaint had theretofore been served on defendants, and they were not entitled to the second copy so demanded.

At chambers. Action by William T. Van Zandt individually, and as executor of the will of Thomas Van Zandt, against Leopold Van Zandt, Marie A. Van Zandt, and Isabel Sanford, for an interpleader as to the conflicting claims of Marie, the divorced wife of Leopold Van Zandt, and Mrs. Sanford, his grantee, to property of Leopold Van Zandt derived under the will of Thomas Van Zandt, deceased. Leopold Van Zandt and Isabel Sanford having been summoned by publication, and a copy of the complaint and summons having been sent to them by mail, they appeared by attorney, and demanded copies of the complaint, which were served accordingly. It was then agreed by the attorneys for the parties that defendants had 20 days after such service to answer. Defendants now move to compel plaintiff to accept a demurrer served by them within the 20 days, and returned on the ground that it was not served within the time limited by law. For decision on demurrer, see 7 N. Y. Supp. 706.

A. Jacobson, for plaintiff. *A. C. Frasioli*, for defendants.

O'BRIEN, J. Section 479 of the Code provides that if a copy of the complaint is not delivered to a defendant at the time of the delivery of a copy of the summons to him, either within or without the state, his attorney may, at any time within 20 days after the service of the summons is complete, serve upon plaintiff's attorney a written demand of a copy of the complaint, which must be served within 20 days thereafter. The case of *Skinner v. Skinner*, 9 N. Y. Supp. 60, decided by Mr. Justice ANDREWS, holds that where the summons and a copy of the complaint were served without the state upon the defendant personally, the defendant was not entitled to demand service of a copy of the complaint. In the case of *Mackay v. Laidlaw*, 13 How. Pr. 129, (decided under section 130 of the Old Code,) it was held, under the language of that section, that the only case in which the Code expressly authorizes a defendant to demand a copy of the complaint, and gives him 20 days after to answer it, is where there has been personal service of the summons, but no copy of the complaint has been served with it. This old section 130 was amended in 1877, and subsequently by the adoption of the new Code. It seems to me that this case of *Mackay v. Laidlaw* is inconsistent with the language of the present section 479. The view of Mr. Justice ANDREWS is

undoubtedly correct, that where a copy of the complaint is served upon the defendant, within or without the state, he is not entitled, upon appearing, to demand service of another copy. Where, however, the summons is served by publication, and a copy of the complaint is not served, within or without the state, and the defendant appears before the service was completed, he is entitled to receive a copy of the complaint; otherwise, no provision is made for a person, not personally served, who appears, and demands a copy of the complaint, by which he can obtain a copy of the same. However, so far as the motion is concerned, the affidavit of the former attorney of the plaintiff shows that the notice of appearance served on behalf of the defendant, with a written demand therein incorporated, requiring service of a copy of the complaint, were accepted by him. The defendant's time to plead was thus fixed by stipulation between the attorneys, and I do not see how the present attorney can repudiate this action. It was competent for the attorneys to stipulate, and it necessarily superseded, so far as inconsistent therewith, the service of the summons and complaint by publication. As a question of practice, therefore, I am inclined to accept the defendant's view, but for the purposes of this motion the stipulation made between the attorneys is conclusive upon the plaintiff; and the return of the demurrer, upon the ground that it was not served in time, cannot be upheld. The motion, therefore, to compel plaintiff to accept the pleading served and returned is granted. No costs.

GRANGE v. PALMER.

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

EVIDENCE—PAROL TO AFFECT WRITING—WAIVER.

Where a written contract for the sale of timber provides that, unless it is removed before a certain day, it shall revert to the seller, evidence of a subsequent parol agreement, made before the expiration of the time limited in the original contract, by which the purchaser is given further time to remove the timber, does not alter the written contract, but is admissible to show that the seller waived strict performance of the original requirement as to removal.

Appeal from judgment on report of referee.

Action by John D. Grange against Andrew L. Palmer. There was judgment for plaintiff, and defendant appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

John C. Keeler, for appellant. H. D. Ellsworth, for respondent.

MAYHAM, J. This is an appeal from a judgment entered upon the report of a referee. The action was for the recovery of a quantity of lumber or its value. The complaint alleged the wrongful taking and detention of 100,000 feet of spruce and hemlock logs, and demands judgment for the recovery of the possession, or for the value of the same if the possession cannot be obtained. The answer denies the allegations of the complaint, and sets up a special contract in writing and under seal, under which the defendant claims that the title to the logs in question, before the alleged conversion, became the property of one James R. Smith, from whom he claims to have purchased the same, and to have been the owner at the time of taking the same. The referee reported in favor of the plaintiff for the value of the lumber, and judgment was entered upon his report. The two principal questions raised on this appeal are—*First*, whether the time for the removal of the timber from the Fox tract, on which it grew, could be extended by parol; and, *second*, whether it was error for the referee on the trial to admit parol evidence of an agreement or conversation between the parties extending the time of removal of the timber.

The case discloses that on the 8th day of February, 1883, the plaintiff made a contract in writing with James R. Smith, whereby Smith sold to him all

the timber then standing or being upon a tract of land owned by Smith, known as the "Fox Tract," (except a certain small reservation specified in the contract.) The contract, among other things, contained this provision: "Provided, always, and this sale is upon the express condition, that the said part of the second part shall cut and remove all said timber on or before the first day of March, A. D. 1887, and any timber not removed by that date shall revert to and become the property of the party of the first part without abatement from the price herein agreed to be paid." The plaintiff entered upon said agreement, cut and removed logs under it, and before the first of March, 1887, all the timber in the complaint mentioned was cut and skidded, but some of it was not at that time drawn off from the Fox tract. On the trial the plaintiff proved, under the defendant's objection, that Smith, defendant's vendor, before he sold to defendant, extended the time for taking off the timber until the 1st of April, 1887, by a parol agreement made with McBane, whom the plaintiff had employed to cut and deliver the same, and also with the plaintiff; and that Smith, about the 1st of February, 1887, informed the plaintiff of such extension, and told him he need not get teams for the purpose of completing such removal by the 1st of March. It is true that Smith denies these conversations, but the referee has found as a fact that such parol extension was made, and we think the evidence is abundant to sustain that finding. *Clark v. Dales*, 20 Barb. 60; *Van Steenburgh v. Hoffman*, 15 Barb. 28.

But it is insisted by the defendant that, if it be assumed that such parol agreement were made, still it would be inoperative and void, within the statutes of fraud, (1) because it would be a parol agreement, creating an interest in land; (2) because it is a parol agreement altering, modifying, or changing the terms of a sealed instrument before breach, and therefore void. The doctrine that a specialty cannot be varied before breach by a parol executory contract, while of general and almost universal application, seems to be subject to the exception that the time fixed for its performance may be enlarged by parol, where, by the terms of such parol enlargement, the party claimed to be in default has been induced to forego a strict performance by reason of the agreement of the other party to the contract to extend the time. In *Burt v. Saxton*, 1 Hun, 558, the supreme court, MULLIN, J., says: "It is well settled in this state, whatever the rule may be elsewhere, that the time of performance of a contract under seal may be extended by parol." In this case the defendant purchased premises upon which the plaintiff had a mortgage then due upon the plaintiff's parol agreement to extend the time of payment of the principal for 20 years. The defendant failing to pay the interest annually, the plaintiff brought his action to foreclose for the whole amount of principal and interest, and the court held that the parol extension of time was valid as a waiver of the time fixed in the mortgage; citing *Clark v. Dales*, 20 Barb. 42, and *Bitzer v. Hahn*, 14 Serg. & R. 241. The court adds "that a new consideration is not necessary to give validity to an agreement to extend the time of performance; the waiver is enough for this purpose." In *Clark v. Dales*, 20 Barb. 64, BOCKES, J., in delivering the opinion of this court, says: "I was competent for the parties by a subsequent contract to agree on such extension;" and, after citing authorities, adds: "Even the time of performance of a sealed instrument may be enlarged by parol, but the enlargement of the time of performance of an agreement under seal should be regarded rather as a waiver of strict performance; that is, the parties consent to accept performance at a future day." In *Stone v. Sprague*, Id. 509, which was an action of ejectment, to recover the possession of premises contracted to be sold, for failure of the defendant to pay the contract price, two written extensions of the time of payment and delivery of deed were provided, and on the trial the defendant offered to prove that, a short time before the expiration of the last extension, the plaintiff agreed by parol with the defendant not to take any advantage of the expiration of the contract, and that he stated

to defendant that the lapse of a few days would make no difference with him. This evidence was rejected, and its rejection was held error, and ALLEN J., in discussing that question in pronouncing the opinion of the court, uses this language: "I think the learned justice erred. It has repeatedly been decided that the time of performing a written contract under seal may be enlarged by parol. * * * Such an extension is, in effect, a waiver of a strict performance of the conditions of the contract" and cites with approbation the language of the court in *Esmond v. Van Benschoten*, 12 Barb. 366. The learned counsel for the appellant relies upon the authority of the case of *Boisaubin v. Reed*, 41* N. Y. 524, as establishing that the plaintiff had no title to these logs. That case holds that, where the party had a right to enter upon land for a given time to cut and carry away timber, he cannot, after the expiration of that time, cut or remove the same; and if he cut timber during his time, and fails to remove it, he can be enjoined after the expiration of the time from its removal. The soundness of that proposition cannot be questioned. But the case does not contain any element of waiver of a strict performance. The same is true of *McIntyre v. Barnard*, 1 Sandf. Ch. 55, cited by the defendant. In *Kellam v. McKenstry*, 6 Hun, 381, the contract provided for peeling all the bark on a certain piece of land, in these words: "They further agree to have said bark all peeled by the 1st day of September, 1864, piled and measured, and settled for in full." After the time limited in the contract, the owner of the land caused the standing hemlock trees to be peeled, and sold the bark to the defendant. The purchasers of the bark under the contract, which was limited to September 1, 1864, on the 19th day of July, 1867, sold all the bark peeled on the land, including as well the bark peeled by the defendant's vendor as that peeled by themselves, to the plaintiff. The plaintiff sued for the bark, and the referee, after expressly finding that there was no extension of the time, dismissed the complaint, and the general term sustained judgment entered upon his report. It is clear from this case there was no extension of the time for peeling and piling the bark, and no pretense of a waiver of a strict performance. There was, as appears by the opinion of Justice MILLER in the court of appeals, 69 N. Y. 270, some negotiations about an extension of the time, but the minds of the parties never met on any extension, and no extension was given, and that case differs from the one at bar in that important particular. None of the cases above referred to and cited by the defendant hold that the strict performance as to time of completion could not have been waived by parol.

The referee having found from the evidence that "in the fore part of February, 1887, plaintiff made application to Smith for an extension beyond the 1st of March, in which to get the logs off, telling him at the time that, if an extension was not granted, he would send and get teams enough, with those McBane had, to draw them off before the 1st of March; and that Smith thereupon expressly told plaintiff that he need not get additional teams, but could have during the month of March to take the logs off the tract; that they belonged to the plaintiff, but he must not cut timber after the 1st of March; that Smith gave assurance similar, in substance, to McBane, and said to him, 'I will give you time; you shall not be injured; you shall have what time you want;' and that plaintiff and his employe or subcontractor McBane both relied upon such assurances, and by reason thereof did not procure teams and remove the logs from the tract before the 1st of March, as they would have done but for such extension of time by Smith," he was right in holding that Smith thereby had waived his right to a strict performance as to time, and was estopped by his own act and agreement from insisting on the 1st of March that plaintiff's right to and interest in the logs left on this tract had ceased. Assuming, as I think we must, that this finding is supported by the evidence, we have, then, the fact that on February 1st Smith admitted that the timber belonged to the plaintiff, and extended

time for its removal; and that the plaintiff, relying on that extension, relaxed the effort that he would otherwise have made, leaving some of the timber on the tract, which Smith on the 1st of March, notwithstanding his previous waiver, assumed to take possession of as his own, and sold to this defendant. The general doctrine of the law of estoppel is that "admissions or statements which have been acted upon by others are conclusive against the party making them in all cases, between him and the person whose conduct has thus been influenced; and it is of no importance whether they were made in express language to the person himself, or implied from the open and general conduct of the party." Herm. Estop. p. 336, § 322. "That no man shall take advantage of his own wrong is fully recognized in all courts of law and equity, and is one of the most essential elements in an equitable estoppel. * * * and is founded on the strictest morality." Id. § 323. "As a general rule, a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter." Id. § 323; *Titus v. Morse*, 40 Me. 348. "It makes no difference in the operation of this principle whether the thing admitted be true or false; it being the fact that it has been acted upon that renders it conclusive." Herm. Estop. p. 338, § 324; *Gillespie v. Carpentier*, 25 How. Pr. 203; *Calanan v. McClure*, 47 Barb. 206. In *Dezell v. Odell*, 3 Hill, 215, COWEN, J., says: "We then have a clear case of an admission by the defendant intended to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interest, unless the defendant be cut off from the power of retraction. This I understand to be the very definition of an estoppel in pais." And in the same case, (page 222,) BRONSON, J., gives the element of an estoppel in these words: "(1) That he has made an admission which is clearly inconsistent with the evidence he proposes to give, or the title or claim which he proposes to set up; (2) that the other party has acted upon the admission; and (3) that he will be injured by allowing the truth of the admission to be disproved." In *Ripley v. Insurance Co.*, 30 N. Y. 164, the court, in discussing the question of an equitable estoppel, uses this language by way of illustrating the rule: "If my tenant agrees to pay me rent on a day named, or his lease will be forfeited, and if before the day I agree, for a valuable consideration, to waive the condition, I am bound by the agreement. If, without consideration, I agree that he may pay after the day, and he, by reason thereof, omits to pay at the day, I am estopped from enforcing a forfeiture."

It is quite true that an estoppel cannot be created ordinarily by mere silence, so as to take away a vested right, or to divest the title of the owner of real estate, (*Rubber Co. v. Rothery*;) but in this case PECKHAM, J., says: "To constitute it, [an estoppel,] the person sought to be estopped must do some act, or make some admission, with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct." 107 N. Y. 316, 14 N. E. Rep. 271. When a party to a contract, who is entitled to a forfeiture in case of non-performance by the other party of a condition therein, by his own act induces the other party to omit strict performance within the time limited, he cannot exact the forfeiture if the party in technical default with reasonable diligence thereafter performs, or offers to perform. *Kenyon v. Knights Templars*, 48 Hun, 285; *Leslie v. Insurance Co.*, 63 N. Y. 27; *Insurance Co. v. Eggleston*, 96 U. S. 577. In the case last cited, BRADLEY, J., in delivering the opinion of the United States supreme court, says: "Any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will

not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract;" and this doctrine seems to apply to any interest in real as well as in personal property. "The fact that it is real estate that is concerned, the title to which, and the rights in which, are generally to be affected by instruments in writing formally executed, does not prevent the operation of an estoppel." *Ana Rivas De Herques v. Carlos Marti*, 85 N. Y. 611.

Assuming in this case that the referee was right in finding that the time for the removal of the timber was extended by Smith until the 1st of April, and that the plaintiff relied upon such extension, and failed to make the extra effort necessary to remove the timber before the 1st of March, which but for such extension he would have done, we are of the opinion that Smith and his vendor are estopped from taking advantage of plaintiff's failure to remove the timber. "To establish an equitable estoppel, it is not necessary to show a design to mislead. *Blair v. Wait*, 69 N. Y. 113-116." It is enough if, in reliance, the party has been led to omit what otherwise he would and might effectually have done to protect himself. *Voorhis v. Olmstead*, 66 N. Y. 113; *Beach Co. v. Harned*, 27 Fed. Rep. 484; *Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657.

It would seem to follow that the plaintiff, under the circumstances of this case, did not lose his title to the logs by reason of his failure to remove the same before the 1st of March; but that his right to the same, and the privilege to remove them, was extended until the 1st of April, and that any interference with them by the defendant and his vendor within that time was a violation of the plaintiff's rights, for which he might maintain this action, unless, as is claimed by the defendant, it was error to receive parol evidence of waiver of strict performance and of the extension of the time for that purpose. We think parol evidence was competent, and its receipt by the referee upon that point was not error. In *Mead v. Parker*, 111 N. Y. 259, 18 N. E. Rep. 727, where it was objected that parol evidence of acts and declarations of the guarantor had been received to extend a written guaranty for the payment of a mortgage, PECKHAM, J., in delivering the opinion of the court of appeals, uses this language: "This quotation shows that evidence of that nature was admissible upon the question of waiver, and that no one supposed that it was rendered inadmissible for that purpose because of the assumed alteration, by parol, of the contract required to be in writing by the statute of fraud. The evidence in this case was not of such a nature as could be said to alter the contract. It was simply of such a nature as to show that the defendant waived the strict performance of its original requirements." 111 N. Y. 264, 18 N. E. Rep. 729; *Goodwin v. Insurance Co.*, 73 N. Y. 480. We discover no such errors in the rulings of the referee in the receipt or rejection of evidence, or in his findings, or refusal to find, as would justify a reversal of this judgment.

The judgment must for the reason stated be affirmed, with costs. All concur.

SCHUYLER *et al.* v. PHOENIX INS. CO.

(Supreme Court, General Term, Third Department. May 26, 1890.)

MARINE INSURANCE—ABANDONMENT—WAIVER.

A policy of insurance on a cargo of corn provided that the acts of the insurer in recovering, saving, or disposing of the property insured should not be considered as a waiver or acceptance of an abandonment, or as affirming or denying any liability under the policy, but that such acts should be considered as done for the benefit of all concerned, without prejudice to the rights of either party. Held that, by taking possession of and selling the injured portion of the cargo, with notice

that the injury was caused by ice, the insurer did not waive a provision in the policy exempting it from liability caused by ice, or render itself liable to a charge of conversion. Distinguishing *Carr v. Insurance Co.*, 109 N. Y. 504, 17 N. E. Rep. 300.

Appeal from judgment on report of referee.

Action by Samuel Schuyler and others against the Phoenix Insurance Company of Brooklyn. There was judgment for plaintiffs, and defendant appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Worthington Frothingham, for appellant. Clinton, Clark & Ingham, for respondents.

MAYHAM, J. The plaintiff in his complaint seeks to recover in one of two causes of action set out and alleged therein: *First*, upon a policy of insurance whereby defendant insured the plaintiff in the sum of \$4,200 against such perils of navigation in the Erie canal and Hudson river, upon a cargo of corn as might arise between the 19th of November, 1887, and the conclusion of the voyage mentioned in such policy, which was being shipped on the canal-boat H. D. Taft; alleging a loss on said policy, and charging a liability upon the defendant therefor. The *second* cause of action charged, in substance, the policy as in the first count, a loss, and a conversion of the cargo by the defendant. The answer contained, substantially, the following: (1) That the policy does not insure against damage by ice, and that the damage was done by ice; (2) that the risk terminated under the policy upon the day of the official closing of the canal, which occurred on the day of the loss; (3) that, under the policy, damage occasioned by want of ordinary care and skill is excepted from the risk, and that the loss was occasioned by want of ordinary care and skill; (4) justifies taking possession of the cargo under the terms of the policy; (5) by denials, puts in issue the other allegations of the complaint. The issue was tried by a referee, who, by his report, directed judgment dismissing the plaintiff's complaint; and from the judgment entered upon that report the plaintiff appeals. The judgment roll, and the exceptions appearing thereon, constitute the appeal book in this appeal; no case and exceptions having been made herein. This court, on the appeal, must therefore assume that the facts are correctly found by the referee; and if the conclusions of law are supported by the facts found, then the judgment must be affirmed. *Gardner v. Schwab*, 110 N. Y. 650, 17 N. E. Rep. 732; *Tomlinson v. City of New York*, 44 N. Y. 601; *Burrows v. Dickinson*, 2 N. E. Rep. 569.

The referee found as facts that the plaintiff was the owner of the cargo of 8,000 bushels of corn shipped from Buffalo on the canal-boat H. D. Taft, on the Erie canal, bound from Albany; that on the 19th of November, 1887, the defendant, a duly-incorporated insurance company, wrote its policy on such cargo, insuring the plaintiff on said cargo in the sum of \$4,200 against the adventures and perils of the seas, canals, rivers, and fires, and all other perils, losses, or misfortunes that should come or happen to the hurt, detriment, or damage of the said cargo on the voyage or trip aforesaid, excepting perils, losses, and misfortunes arising from or caused by ice, or from want of ordinary care and skill (such as is common to navigation) in landing or navigating such boat. The referee further found that it was also provided in the policy that, in case of loss or misfortune, it was the duty of those having such boat in charge to use the utmost diligence to save the cargo until some agent of the defendant should arrive, and, upon his arrival, to assist him in the care and saving of the property, and that neglect to do so should render the policy void; that there could be no abandonment of the subject insured; and that the acts of the insurers or their agents in recovering, saving, or disposing of the property insured thereby should not be considered as a waiver or acceptance of an abandonment, or as affirming or denying any liability under said policy; but that such acts should be considered as done for the benefit of all concerned.

without prejudice to the rights of either party. The referee also found that the policy did not cover any damage for ice; and that, if the voyage should be suspended or interrupted in consequence of ice for three consecutive days or more, the risk should cease at and from 12 o'clock at noon of the day the boat should be stopped by ice; and that in case the navigation of the canal should, during the trip, be closed officially while the boat should be on the canal, the risk under said policy should cease on the day the canal should be closed, and three days next succeeding such stoppage and closing should be allowed to discharge cargo; but that any presumption of the voyage during the same season, or the spring following, should not revoke the risk, or restore the liability of the defendant under said policy. The referee also found that the defendant, in and by said policy, undertook and agreed to make good and satisfy unto the said insured all such loss or damage on said cargo, so laden as aforesaid, not exceeding in amount the sum insured thereon, as should happen or arise from any of the aforesaid causes or casualties not excepted as aforesaid, and to pay the same within 60 days after notice and proof of the loss and interest therein should be made by the insured. The referee also found that the canal-boat, after the issuance of the policy, proceeded on its voyage with the cargo, and on the 1st day of December, 1887, reached Hoffman's Ferry, 10 miles from Schenectady, and left that point for Schenectady about 8 P. M. of that day, not leaking, with the cargo dry; that just previous to that time the canal had been covered with ice from one and one-half to two inches thick, which had just before the starting of the boat from that point been broken to the width of twenty feet by the government ice-breaker, which had proceeded through the canal from Schenectady to the ferry, and returned to Schenectady in advance of the canal-boat Taft. The referee also found that the canal-boat was forced through the channel opened by the ice-breaker, in which the broken ice floated, the edges of which channel were jagged and uneven, and was also forced through unbroken ice over 100 yards immediately before arriving at the place where she finally stopped; that the ice through which the boat was forced, cut and gouged out portions of the outside planks, and made a hole or opening therein at about the water-line thereof, through which water from the canal leaked into the boat; that the leakage commenced before the boat reached her final stoppage, and continued to leak until about 11 o'clock in the evening of the 1st of December, when water had accumulated therein to the depth of about 16 inches. The referee also finds that the water was taken from the canal where the boat lay and the breach repaired, but that the moistened corn commenced swelling, and by reason thereof the hull of said boat was burst, making a leak, through which the water of the canal entered said boat, wetting all of the cargo except 1,289 bushels. The referee further finds that on the 2d day of December the defendant's agents and servants took possession of the boat and cargo, and removed the 1,289 bushels of dry corn, which they delivered to the plaintiff, who accepted the same; and on the 3d day of December, late in the afternoon, the defendant sold the remaining 6,761 bushels of wet corn lying in the boat at 32½ cents per bushel, which was the best price defendant could obtain for the same, and which amounted in the aggregate to \$2,197.75. The referee also finds that the defendant paid over to the plaintiff the amount realized on the sale of the damaged corn, less certain charges claimed to be deducted as prorate freight, and expenses of saving and caring for the cargo. The referee also found as a fact that whatever the defendant did in caring for, saving, and selling the cargo was assumed by it to be done under and by virtue of and in pursuance of the provisions of the policy, and for the benefit of all concerned. Upon these facts the referee found as conclusions of law: "That the defendant is not liable under the policy for the loss of the cargo; that the taking possession of the cargo after notification that said loss was caused by, and was in consequence of, ice, does not estop the defendant from availing himself of the defense that such loss

was caused by, and in consequence of, ice; that the provisions contained in the policy authorized and justified the sale of the wetted portion of said cargo by the defendant, as hereinbefore found, as the agent of the plaintiff, and for the benefit of all concerned; that the plaintiff failed to establish either cause of action set out in his complaint."

The plaintiff excepts to the findings of facts, but, as we have seen, there is no evidence before us, and we are forced to the conclusion that the evidence supports the findings of facts. The case on this appeal must therefore be disposed of upon the plaintiff's exceptions to the referee's conclusions of law upon the facts found, and the exceptions of the plaintiff to the refusals to find his proposed conclusions of law upon these facts. The plaintiff excepts to the conclusions of law found by the referee, that the defendant is not estopped from denying its liability under the policy by taking possession of the cargo after being informed and notified that such loss had been caused by ice. As this policy expressly excepts the defendant from all liability from perils, loss, and misfortunes arising from ice, and as the referee has found that the ice through which the canal-boat passed, cut and gouged out portions of the outside planking, and made a hole or opening, through which the water from the canal leaked into the boat, thereby causing the injury to the cargo, the defendant would not, under the policy, be liable for such loss or injury unless it did some act amounting to a waiver of that condition, or, by its act in taking possession and selling the cargo, is estopped from denying its liability. The plaintiff insists, by taking possession of and selling the cargo with the notice or knowledge that the damage was by ice, it waived that exception, and became liable for all loss on the cargo. The general rule seems to be that if the underwriter proceeds to sell a vessel, even with an express protest against acceptance, and with a declaration that he does it for the benefit of the owners, his acts conclusively bind him. *Peole v. Insurance Co.*, 3 Mason, 27-32; Phil. Ins. § 1693. But this rule has not, in any case to which our attention has been called, gone so far as to hold the insurers liable where, by the express terms of the policy, they were required, on authority, to take possession, as in this case. Here the policy provides: "Nor shall the acts of the insurers or their agents in recovering, saving, or disposing of the property thereby insured be considered a waiver or acceptance of an abandonment, nor as affirming or denying any liability under this policy; but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party." It is undoubtedly the duty of the court to give effect to this provision in the policy. If the contentions of the plaintiff were carried out to its legitimate sequence, it would put the insurers at their peril, if they undertook to interfere with the cargo before the alternate rights of the parties were determined; and, if they assumed to take possession of the vessel, they would thus be acknowledging their liability. Such a construction would effectually nullify this provision in the policy. We think the fair construction of this clause in the policy is to give the parties thereto the fullest opportunity to preserve the injured or imperiled property from further loss and destruction, without, by that act, fixing or settling the ultimate rights of the parties; leaving those rights to be adjusted after a full and fair examination into the circumstances of the loss. Of course, it cannot be urged, from this condition in the policy, that it makes the defendant perfectly lawless, and enables it wantonly or negligently to destroy the insured property, to the injury of the plaintiff; but the insurer may, under that clause, take possession of, and dispose of, and as in this case of perishable property, we think, sell the same, and not thereby waive the right to insist, on a further examination, that it was not liable under the policy. The plaintiff relies, in support of his contention, on *Carr v. Insurance Co.*, 109 N. Y. 504, 17 N. E. Rep. 369. The policy in that case insured against "actual total loss only." In this case the insurers took possession of a stranded vessel which was still

afloat, or it was possible to put her afloat, and contracted with a wrecking company to bring her to port, which the wrecking company did, and the underwriters refused to pay the salvage, for which she was sold under a decree in admiralty. It was held that by that act the insurers had made her an "actual total loss," and were liable on the policy. That case seems clearly distinguishable in principle from the one at bar. It was manifest in that case that the vessel was not an "actual total loss;" on the contrary, it was afloat. But the insurer taking control of her, and subjecting her to the expense of removal by the wrecking company, for which she was lost to the assured, as to him she became, by the act of the defendant, a "total loss," and the company was held liable. In *Titus v. Insurance Co.*, 81 N. Y. 419, the court lays down the rule that if the company, after knowledge of the forfeiture, by any negotiations recognize the continued validity of the policy, or require the insured to do some act or incur some expense, the forfeiture is waived. But the facts found in this case do not show any such recognition of liability by the defendant. All it did, as appears from the findings, was to take care of and dispose of the property, as provided in the policy, "for the benefit of all concerned," which was expressly declared in the policy not to be a waiver. A waiver cannot be inferred from silence. The company was not bound to do or say anything to make the forfeiture effectual. It may wait until the claim is made under the policy, and then allege the forfeiture in defense of a suit on the policy. *Titus v. Insurance Co.*, 81 N. Y. 419.

It can hardly be maintained, I think, by taking possession of the property for the benefit of all concerned, the defendant can be charged with importing into the contract a provision, in effect, insuring against damage by ice, when the policy expressly exempts the insurers from liability resulting from that cause. If there is any mistake or carelessness of the agent in holding this property, it is not available in an action to enforce this policy. We see no principle in the doctrine of estoppel which made the defendant liable for damage by ice, which is by the policy expressly exempted from the risk, simply because it took possession and disposed of this cargo for the benefit of all concerned, under the language of the policy. *Sanders v. Cooper*, 115 N. Y. 288, 22 N. E. Rep. 212.

Nor do we think the defendant, under the findings and exceptions in this case, can be charged with a conversion of this cargo, or a wrongful retention of the same, under the second cause of action set out in the plaintiff's complaint. The referee finds that it was provided in the policy of insurance that, in case of loss or misfortune, it should be the duty of the captain and crew of the boat, or those having command, to use the utmost diligence and attention to save the property until some agent of the defendant should arrive, and, upon his arrival, to assist him in the care and saving of the property, and that negligence so to do would render the policy void; that there could be no abandonment of the subject insured; and that the acts of the insurers or their agent in recovering, saving, or disposing of the property insured thereby should not be considered as a waiver or acceptance of an abandonment, or as affirming or denying any liability under said policy, but that such act should be considered as done for the benefit of all concerned, without prejudice to the rights of either party. The referee finds that the plaintiff was present when the defendant took and disposed of the cargo, and made no objections; and that whatever the defendant did in caring for, saving, and selling the cargo was assumed to be done by virtue and in pursuance of the provisions of the policy, and for the benefit of all concerned. It will be seen that the right and duty of the defendant to take and dispose of the cargo did not alone depend upon the defendant's liability, as insurers, for the value of the cargo, but that right attached in case of loss or misfortune to the cargo. Thus, while the alternate rights and liabilities of the parties under the policy remained undetermined, the defendant was charged with the duty of recover-

ing, saving, and disposing of the property insured for the benefit of all concerned. This clearly gave the defendant the right of possession, and under the exercise of that right he took possession of, and delivered to the plaintiff the uninjured part of the cargo, which was accepted. The balance of the cargo the referee finds, and we think properly, the defendant sold under authority in pursuance of the authority given in the policy of saving or disposing of the property, and that in doing that the defendant acted as the agent of the plaintiff.

We find no error committed by the learned referee in his conclusions of law from the facts found. The judgment must therefore be affirmed, with costs. All concur.

BARTLETT v. BUNN.

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

WITNESS—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

A communication by plaintiff to his attorney, for the purpose of its publication, defendant, is not privileged, under Code Civil Proc. N. Y. § 835, prohibiting an attorney to disclose a communication made by his client to him in the course of his professional employment.

Appeal from Montgomery county court.

Action by Emily B. Bartlett against T. Romeyn Bunn. Plaintiff appeals. For other litigation between the same parties, see 8 N. Y. Supp. 155.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

E. D. Maxwell, for appellant. *C. S. Nisbet*, for respondent.

MAYHAM, J. Appeal from the judgment of the Montgomery county court reversing a judgment of a justice of the peace. The action was for money had and received by defendant for the plaintiff. The answer was a denial, and a further allegation that all the money received by defendant for plaintiff was paid out by defendant at plaintiff's request, on his liabilities. On the trial the plaintiff introduced evidence tending to show that the defendant had harvested and sold hay from lands of which the plaintiff, defendant, and others were tenants in common, and that all the proceeds of the hay the defendant had paid out in taxes on the common property, and insurance on the hay except 16 cents. The plaintiff contested the defendant's authority to pay the taxes, on the ground that she had not authorized such payment. To prove authority in fact from plaintiff to defendant, the defendant called one L. J. Stevens, who was an attorney at law; was doing some of plaintiff's business in the settlement and management of this joint estate. The defendant then asked the witness, in various forms, if plaintiff had directed him to tell defendant to pay the taxes out of the proceeds of this hay. This was objected to by the plaintiff, on the ground that it was privileged; and the objection was sustained, and the answer excluded. The justice rendered judgment in favor of the plaintiff and against the defendant for \$18.57, and costs. The county court reversed that judgment, and from the judgment entered upon such reversal the plaintiff appeals to this court.

Whether the defendant was authorized to pay the taxes on this common property out of the share of the proceeds of the hay belonging to the plaintiff was a material question in this case, and, as the testimony offered bore directly upon that point, if competent, its exclusion was error for which the county court properly reversed the judgment of the justice. The rule of common law was well settled that confidential communications, made to an attorney by a client, relating to a matter in which he was employed or acting as attorney, were privileged, and could not be given in evidence. The substance of this rule was that all communications made by a client to his counsel for the purpose of professional advice or assistance are privileged, whether they relate to a suit pending or contemplated, or to any other matter prop-

for such advice and aid, (*Williams v. Fitch*, 18 N. Y. 551;) and, whenever the communication made relates to a matter so connected with the employment as to afford presumption that it was the ground of the address by the client, then it is privileged from disclosure, (*Britton v. Lorenz*, 45 N. Y. 51; *Bacon v. Frisbie*, 80 N. Y. 394.) So a conversation heard by an attorney between his client and another, relating to the business in which the attorney is engaged for his client, is privileged. *Root v. Wright*, 84 N. Y. 72. And the substance of this rule is enacted in section 835 of the Code of Civil Procedure, as follows: "An attorney or counselor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment." But this prohibition may be waived by the client, and, when the communication is made for the purpose of its publication or communication to another, it necessarily loses its privileged character, and section 836 of the Code provides expressly for such waiver. It follows, therefore, that when, from the very nature of the communication, it was designed by the author for another, and to be communicated to such other, it loses its character as privileged. In *Re Colman's Will*, 111 N. Y. 220, 19 N. E. Rep. 71, where the attorney who drew a will was requested by the testator to subscribe it as a witness, it was held to be a waiver of the privilege; for the reason that, by the very nature of the communication made by the testator, he had made it the duty of the attorney to disclose the communication made to him on the probate of the will. In the case at bar the question propounded, the answer to which was excluded by the justice, related to a communication required by the plaintiff to be made public,—at least to be communicated to the defendant; and, if we should assume that the witness was the attorney for the plaintiff in this matter, (which by the evidence is by no means certain,) still it is quite clear that, whatever obligation to secrecy might be imposed by that relation, it was expressly waived when the communication was directed to be made to the defendant. The learned county judge was right in reversing the judgment for the rejection of this offered evidence, and the judgment of the county court must for that reason be affirmed, with costs. All concur.

VOLK v. LIVINGSTON.

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where plaintiff's contention in an action for personal injuries is supported by three witnesses, whose testimony is denied by seven witnesses for defendant, a verdict for plaintiff will not be disturbed on appeal.

Appeal from circuit court, Rensselaer county.

An action by Otto Volk, an infant, by Wilhelmina Volk, his guardian *ad litem*, against Johnson Livingston, as president of the National Express Company, to recover for personal injuries received through the alleged negligence of defendant's servant. There was a verdict for plaintiff for \$150. From the judgment entered thereon defendant appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Warren, Patterson & Gambell, for appellant. Merritt & Ryan, for respondent.

MAYHAM, J. The plaintiff, while driving a team on one of the streets of Troy, was, by reason of a collision between his vehicle and one of the defendant's, thrown from his seat to the pavement, and suffered a fracture of both his arms. For that injury he brings this action against the defendant, and at the Rensselaer circuit recovers a verdict for \$150, on which judgment was entered, and the defendant appeals to this court. At the conclusion of the evidence, the defendant asked the trial judge to nonsuit the plaintiff on the

ground that the accident did not occur through the negligence of the defendant; also that the evidence showed, beyond contradiction, that the accident did occur through the plaintiff's negligence; also that the evidence shows that the accident occurred by reason of the plaintiff's neglect to obey the law of the road; also that the plaintiff has shown no cause of action. The motion was denied, and the defendant excepts.

No other exception seems to have been taken at the trial, and the defendant seeks to reverse the judgment on that exception, and on the ground that, from all the evidence in the case, the verdict is against the clear weight of evidence and wholly unsupported by it. On the trial the plaintiff introduced three witnesses, all of whom testify, in substance, that at the time of the accident the plaintiff was driving a horse attached to some kind of a delivering wagon for merchandise, and while passing down Third street, at a moderate rate of speed, near Jefferson street the defendant's team, hitched to an express wagon and driving at a rapid rate of speed, collided with the plaintiff's wagon with such violence as to precipitate the plaintiff from his seat on the wagon to the pavement, breaking both his arms. At the time of this collision the plaintiff and his witnesses claim that he was near the middle of Third street, and that a furniture wagon was on his right, and nearly opposite; that the express wagon "came along, driving fast, and drove right into the wagon in which the boy were." All the plaintiff's witnesses agree that the plaintiff was coming down Third street near Jefferson, intending to turn to the left up Jefferson street, that, just before reaching Jefferson street, plaintiff turned to the left to pass a furniture wagon which was going in the same direction; and that at the time of the collision he was at least ten feet from the curb-stone on his left. The defendant introduced seven witnesses, who speak with more or less certainty as to the occurrence, some of whom deny that the defendant's team was moving rapidly, the driver testifying that his wheel was within three feet of the curb on his right as he was passing into and up Third street at the time of the collision, and the plaintiff was driving rapidly, and the defendant's team was about stopped at the time of the injury. There is therefore a plain conflict between the testimony given by plaintiff's witnesses and that given by some of the witnesses offered by the defendant, and the court left it to the jury to determine who was correct.

It is the spirit and theory of our judicial system that in actions at law disputed questions of fact shall be determined by a jury; and when there is a clear dispute upon a question of fact, with conflicting evidence, it is the duty of the trial court to send such questions to the jury; and ordinarily, in such cases, where there has been no error of law or misdirection by the judge, the verdict of the jury will not be disturbed by the appellate court. But the rule that disputed questions of fact belong exclusively to the jury is not of universal application; and, when there is such a clear and manifest preponderance of evidence against the verdict as to evince passion or prejudice on the part of the jury, the court may set the verdict aside as clearly against the weight of evidence. In *Culhane v. Railroad Co.*, 67 Barb. 562, the court set aside the verdict, as against the weight of evidence, where five unimpeached witnesses swore to a fact positively against the verdict, and two in support of their findings. But the court, in that case, recognizes the fact that evidence must be weighed, and not counted. In other words, the jury must take into account the appearance and demeanor of the witnesses, their opportunity to know the facts to which they testify, and that the number of witnesses on one side could not necessarily control in the consideration of the jury. In reviewing the verdict of the jury on disputed questions of fact, the court, on appeal, also takes into account the superior advantage of the jury in judging of the truth of the stories of the witnesses, by reason of the inopportunities to observe the demeanor of the witness while giving testimony,—a privilege of great value in judging of the truth of the story of a witness, and one not e-

joyed by the appellate court. Hence the apparent numerical preponderance of witnesses against the verdict of the jury will not always justify the appellate court in setting aside a verdict. The rule upon this subject seems to be that the verdict will not be set aside when there is evidence to support it, unless the preponderance of proof against it is so manifest as to create a well-grounded reason to believe that it was the result of passion or prejudice, (*Godfrey v. Moser*, 66 N. Y. 250-252; *Brennan v. Railroad Co.*, 8 N. Y. Supp. 716;) and the verdict will not be set aside unless the most satisfactory reason is shown therefor, (*Probst v. Delamater*, 100 N. Y. 267, 3 N. E. Rep. 184; *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459, 11 N. E. Rep. 43; *Cahill v. Hilton*, 106 N. Y. 522, 13 N. E. Rep. 339.) In order to justify the setting aside of a verdict, there must be a clear preponderance of evidence on the side of the appellant. *Chase v. Belding*, 1 N. Y. Supp. 48. Tested by these rules, we do not see how this verdict can be set aside, or this judgment reversed, on the ground that the verdict is against the evidence. The case was fairly presented to the jury by the trial judge, the duty of the parties meeting upon the street explained, the rule of law governing actions for negligence fully stated, and the plaintiff's burden of proof clearly presented; and no exceptions were taken to the charge; and there is nothing in the amount of the verdict which indicates passion or prejudice on the part of the jury.

The judgment must be affirmed, with costs. All concur.

COX v. ALBANY BREWING CO.

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

PRINCIPAL AND AGENT—ACQUIESCENCE IN AGENT'S ACTS.

Where, pursuant to a written invitation, a laborer goes to defendant's office for service, finds there a person assuming to employ hands, is engaged by him for one year, and put to work, and the service continues for several weeks to the knowledge of the firm's general superintendent, such laborer may assume that the person who employed him was authorized to do so; and private instructions to such person not to employ labor for more than one day, unknown and uncommunicated to the laborer, will not relieve the firm from liability on the contract.

Appeal from Albany county court.

Action by Luke Cox against the Albany Brewing Company. Defendant appeals. For appeal from judgment of nonsuit, see 6 N. Y. Supp. 841.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

De Witt & Spoor, for appellant. *Chase & Delehanty*, for respondent.

MAYHAM, J. This is an appeal from a judgment of the Albany county court, rendered upon the verdict of a jury in favor of the plaintiff, and also from an order of the county court denying a motion for a new trial, upon the judge's minutes. The action is upon an alleged contract by the defendant for the labor of the plaintiff in the defendant's brewery for one year, at the rate of two dollars per day, which the plaintiff alleges the defendant broke by discharging him from its employment before the expiration of the term. The defendant denies the making of the contract; and the principal contention is, was the plaintiff employed by the defendant to work by a contract or agreement binding upon the defendant? The jury found for the plaintiff, and a judgment was entered upon their verdict, and from that judgment the defendant appeals.

The jury having found for the plaintiff upon the disputed question of fact, as to whether or not there was an agreement between the parties that the plaintiff was to work for a year, and also that there was a breach, and damages resulting therefrom, their finding should be upheld, unless there was some error committed on the trial upon questions of law. It is insisted on the part of the appellant that, as matter of law, no binding contract upon the defendant was proved, as there was no affirmative proof on the part of the

plaintiff that Gray, with whom the plaintiff claims to have contracted, was the duly-authorized agent of the defendant to employ hands for more than one day at a time; and that, therefore, if, as is claimed in this case, he employed the plaintiff for a year, he did so without the authority of the defendant, and it is not bound by that agreement. It is a well-settled and elementary rule of law that a special agent, with limited powers, cannot bind the principal, where he acts outside of the scope of his authority, but that rule is subject to this qualification: that where an agent is intrusted to do a particular kind of business he becomes, as between the principal and parties dealing with him, the general agent for the transaction of that business, and his acts, as between his principal and strangers, in that particular line, will bind the principal, although he violate some private instructions given by his principal, not known to the public. If, therefore, it be conceded or established, by the proof in the case, that Gray had authority to hire hands on this work, that authority, as between the defendant and strangers dealing with him in that line, would be general, unless the limitation or qualification of his authority was made known to persons whom he employed in the service of the defendant. In the language of this court in *Cox v. Brewing Co.*, 6 N. Y. Supp. 841, on a former appeal: "As between the parties, Gray was the ostensible agent of defendant, and clothed with all the power he assumed to exercise." The undisputed evidence in this case is that the plaintiff was invited by a written communication to come to the defendant's brewery for service; that pursuant to that request he went there, and found Gray in the office assuming to employ hands; that he was then and there set at work by Gray, and continued in that service for several weeks, to the knowledge of the general superintendent, and paid from time to time for his services. It is true he was contradicted by Gray as to the terms of the employment, but that raised a question of fact, which was disposed of by the jury; and while his continuance in service for that term might not, and would not, amount to a ratification of the special contract by the defendant, unless its terms were disclosed to it, still it was evidence bearing strongly upon the authority of Gray, and such as might be relied upon by his employees, who had no notice of any limitation upon his authority. In *Conover v. Insurance Co.*, 1 N. Y. 292, the court says: "Incorporated companies, whose business is necessarily conducted altogether by agents, should be required, at their peril, to see to it that the officers and agents whom they employ not only know what their powers and duties are, but that they do not * * * transcend their powers. How else are third persons to deal with them with any degree of safety?" As was said in this case, the public have "no means of judging in the particular instance whether the officer is or is not within the prescribed limits." *Leslie v. Insurance Co.*, 63 N. Y. 34; *Fister v. La Rue*, 15 Barb. 323; *Dilleber v. Insurance Co.*, 76 N. Y. 572.

The plaintiff had a right to assume that the person at the office, who assumed to employ laborers, had authority to act in that capacity; and it has been held that a jury may presume the authority in such a case, from an act openly done in the usual course of business, at the office of the company, without the evidence of actual knowledge on the part of the company or its directors, or of express ratification. We discover no error in the charge of the judge, or in his refusal to charge, which will justify a reversal of this judgment. As we have seen, any private instructions by the manager of the company to Gray, prior to the making of the contract, that no laborer should be hired for a longer time than for one day, not known by or communicated to the plaintiff, would not relieve the defendant from liability, so long as the defendant permitted Gray to act for it at the office in the capacity of an employer of labor. It was not, therefore, error for the judge to refuse to charge as requested upon that point. The judgment and order are affirmed, with costs. All concur.

BERLIN IRON-BRIDGE CO. v. WAGNER, Highway Commissioner.*(Supreme Court, General Term, Third Department. May 26, 1890.)***PRACTICE IN CIVIL CASES—DISMISSAL.**

The general term cannot, on the motion of the attorney general, dismiss a submission of a controversy intended to establish the right of the sole highway commissioner of a town to make a contract for the building of a bridge, on the ground that certain commissioners appointed by the supervisors, and claiming the right to make such contract, were not parties to the submission, and that such commissioners might be bound by the decision.

Case submitted on agreed statement.

Action by the Berlin Iron-Bridge Company against Joseph E. Wagner, highway commissioner. The attorney general moves to dismiss the submission.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

A. D. Wales, for plaintiff. George R. Malby, for defendant.

LEARNED, P. J. This is a submission without action. The attorney general, who is not a party to the submission, moves the court to dismiss the case on the ground that it is a collusive submission, and that it is intended to establish the right of defendant to make a contract for the building of the bridge. The attorney general alleges that certain commissioners appointed by the supervisors claim the right to make such contract, and claim that the defendant above named is not authorized to contract. The attorney general urges that these commissioners are not parties to this submission, that there is really no controversy between those who are parties thereto, and that a decision between them may be a precedent which will control the question of right whenever it may be raised by the commissioners aforesaid. It has also appeared in the course of the argument that those commissioners have made a contract with another company for the building of the bridge. The parties to this submission, on the contrary, assert that it was made in good faith, and with a desire to ascertain their own rights, and that they have offered in several ways to permit the said commissioners to take part herein.

We do not think that we can, on the motion of the attorney general, refuse to hear this case. He has no standing in court, and, so far as we see, would have none even if the said commissioners had a right to interfere. They have taken no steps to bring themselves into this controversy, directly or indirectly. The plaintiff above named could have sued the defendant on the contract, and to such an action those commissioners need not have been parties. This submission is but a substitute for an action, in order that the decision be more expeditious. As to the effect of a decision on the alleged rights of the said commissioners, we have nothing to say. They are not parties or privies, and generally none but parties and privies are bound by a decision. We decline to dismiss the submission, or to refuse to hear the argument. All concur.

JUNGE v. HAUG.*(Supreme Court, General Term, First Department. May 28, 1890.)***TRIAL—INSTRUCTIONS—CONCLUSIONS FROM EVIDENCE.**

In an action for breach of an alleged contract of hiring for a year, a charge that "the fair inference from the testimony in the case is that the bettering of his [plaintiff's] condition, in his [plaintiff's] opinion, was not so much the increase of \$2.00 a week in the salary, but was to be a contract for employment for one year," is not objectionable as stating that, as a matter of law, it must be inferred that the contract was for a year, where that part of the charge immediately following rehearses the evidence as to the employment, and leaves the question to the jury, and the judge expressly disclaims any intention of charging that such inference must be drawn.

Appeal from circuit court, New York county.

Action by Walter Junge against John Haug for an alleged breach of a contract of employment. Judgment was entered on a verdict for plaintiff, and defendant appeals.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.
George C. Comstock, for appellant. *John Frankenheimer*, for respondent.

VAN BRUNT, P. J. This action was brought to recover damages for an alleged breach of a contract of employment. The plaintiff claimed that he was hired for one year, and that he was discharged without sufficient cause. The defendant claimed that he had employed the plaintiff by the week, and therefore had the right to discharge him at the end of any week; and also that, even if he had hired him by the year, he had discharged him for a good and sufficient cause. The parties gave evidence tending to establish their various claims; and the jury, under the charge of the learned judge who presided at the trial, found a verdict for the plaintiff. The appellant claims that this result was occasioned by a portion of the judge's charge which was duly excepted to; which exception presents the sole ground of appeal. For the purpose of showing the injury occasioned to the defendant by the alleged erroneous charge, the appellant claims that there was a preponderance of evidence in favor of the defendant. This point we do not think it necessary to examine, because, upon examination of the proceedings upon the trial as the case was finally submitted to the jury, we find no error, except, perhaps, the plaintiff was held in some respects to a too stringent rule in respect to his proof. The learned judge charged that "the fair inference from the testimony in the case is that the bettering of his [respondent's] condition, in his [respondent's] opinion, was not so much the increase of \$2.00 a week in the salary, but was to be a contract for employment for one year." It is claimed by the appellant that this was an instruction to the jury that, as matter of law, this inference must be drawn. That this was not so intended by the judge is evidenced by that part of the charge immediately succeeding, where the court rehearses the evidence upon the subject of employment, and leaves the question for the jury to decide upon the evidence; and, when his attention is called to this language at the close of the charge by the appellant's counsel, it is distinctly stated that all that was intended to be stated was that it was so claimed. This remedied any difficulty, if there was any, and the jury could not have possibly had any other idea than that the question was one for them to decide upon the evidence. We do not think, therefore, that any error appears upon this record calling for a reversal of the judgment. Judgment and order appealed from affirmed, with costs. All concur.

STERN *et al.* v. MEIKLEHAM.

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

INFANCY—VOIDABLE CONTRACT.

A purchase of goods by an infant for the purposes of his business, not being clearly to his disadvantage, is not void, but only voidable.

Appeal from Albany county court.

The defendant, an infant, carried on for three years a store in Cohoes, for the sale of hats and caps. In June, 1883, he purchased hats and caps of the plaintiffs, amounting, at the agreed price, to \$194.25, and placed them with his stock in his store. He did not pay the plaintiffs. In December, 1883, he made a general assignment of his stock in trade, including a considerable portion of the hats and caps bought of the plaintiffs, for the benefit of creditors. The plaintiffs commenced this action before a justice of the peace, and, alleging fraud, procured an attachment, and levied upon the stock. The defendant appeared by guardian upon the trial, and alleged and proved his infancy.

The plaintiffs recovered, and this appeal is from an affirmance of the judgment by the county court.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Henry A. Strong, for appellant. *Doyle & Fitts*, for respondents.

LANDON, J. This action was prematurely brought. The contract was not for necessities, and therefore was not obligatory. It was not clearly to the disadvantage of the infant, and therefore was not void. It was of an uncertain nature as to benefit or prejudice, and therefore was voidable. 2 Kent, Comm. 236; *Chapin v. Shafer*, 49 N. Y. 407; *Henry v. Root*, 33 N. Y. 526; *Sparman v. Keim*, 83 N. Y. 245. But, while the defendant's infancy continued, he was incapable of affirming or disaffirming it. He has his election after becoming of age. *Beardsley v. Hotchkiss*, 96 N. Y. 201, 211; *Walsh v. Powers*, 43 N. Y. 23, and cases *supra*. The defendant was still an infant when this action was tried. Judgment reversed, with costs. All concur.

PEOPLE *ex rel.* McCORMACK *v.* FRENCH *et al.*, Police Commissioners.

(*Supreme Court, General Term, First Department. May 23, 1890.*)

MUNICIPAL CORPORATIONS—DISCHARGE OF POLICEMAN.

The action of the police commissioners in discharging relator will not be disturbed on *certiorari* where the intoxication charged is proved by several witnesses, and relator's defense that his condition resulted from taking medicine prescribed by a physician is supported only by a certificate of the physician that he prescribed for relator "a mixture containing chloroform," the prescription not being produced.

Certiorari by Patrick McCormack to review the action of Stephen B. French and others, constituting the board of police commissioners, discharging relator from the police force.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

Edward Mackinley, for relator. *Alexander D. Keyes*, for respondents.

BARRETT, J. This case comes directly within the principle of *People v. French*, 110 N. Y. 494, 18 N. E. Rep. 183. The relator's intoxication was clearly proved by a large number of witnesses. His defense was that his condition resulted from the taking of medicine prescribed by a physician. The prescription was not produced, but the physician certified that, "several days" before the relator's trial, he had prescribed "for the bearer, Mr. McCormack, a mixture containing chloroform." It seems that the physician had never seen McCormack, but that the prescription and certificate were given to one McGuire, who was an acquaintance of McCormack's, and who undertook to procure medical assistance for him. The entire story about the prescription, and the proof with regard to the administration of a mixture containing chloroform, were too vague, and even suspicious, to carry conviction, and we think the commissioners were entirely justified in disregarding the attempted explanation on that head. They were also justified in rejecting the relator's testimony in view of its evident incorrectness with regard to matters of detail, as to which the accusing witnesses could not have been mistaken. These witnesses all testified that when McCormack was brought to the station-house his clothing was dirty and dusty, and that he presented the appearance of a man who had been engaged in a fight. Yet the relator declared that all this was untrue, and that his clothing was then as clean as it was at the time of his trial. The preponderance of testimony was decidedly against the relator, and the proceedings should be affirmed. All concur.

IN RE BISHOP'S WILL.

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

WILLS—UNDUE INFLUENCE—SUBMISSION TO JURY.

On an issue whether a will was the result of undue influence on the part of testator's daughter, there was evidence that, at the time of its execution, testator

was 67 years old, and feeble in mind and body; that his relations with his daughter were such that he would avoid and hide from her, and had described her as being "one of the most cold-hearted daughters;" that testator had six months previously executed a will making a fair distribution of his property among his wife and children; that this will came to the possession of the daughter, who wrote testator, imploring him to see her, so that he might "look at things in a different light;" that, after repeatedly avoiding her, testator had frequent interviews with her, some of which irritated him, while others moved him to tears; and that the will in question was then executed upon the model of the old one, with important amendments in favor of the daughter and her children, and to the probable exclusion of testator's favorite son and his children. There was also evidence that testator had remarked upon the importunity of his daughter, and had stated that he had to make three wills before he could satisfy her. *Held*, that the question as to undue influence should have been submitted to a jury.

Appeal from surrogate's court, Rensselaer county.

Charles B. Bishop and Percy J. T. Bishop appeal from a decree admitting to probate the will of their deceased father, Charles B. Bishop.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.
Mathew Hale, for appellants. *R. H. McClellan*, for respondents.

LANDON, J. So far as the testimony of the subscribing witnesses extends, the instrument proposed for probate was executed and published in due form, and is the genuine last will and testament of the decedent. Its probate was contested upon the ground that it was made and executed under the undue influence of Frances Cluett, the daughter of the decedent. Mrs. Cluett and her children are the chief beneficiaries under the will. The allegation of undue influence is sought to be supported by circumstantial evidence. The charge, in substance, is that Mrs. Cluett had the motive, the opportunity, and an easy victim, and by the practice of her arts and irresistible importunities accomplished her purposes. The instrument in question was executed in November, 1886, and Mr. Bishop, the decedent, died in June, 1889. Mr. Bishop was about 70 years of age at the time of his death. He left an estate worth from \$50,000 to \$75,000. He left a widow and three adult children surviving him. Mrs. Cluett, his daughter, had four children, the eldest 23 and the youngest 12 years of age. His son Charles was 40 years of age, unmarried, and resided with him. His son Percy had a wife and child. All lived in the city of Troy. The surrogate found that the decedent had, for many years before the execution of the alleged will, been addicted to the periodical excessive use of intoxicating liquors; also to the use of morphine in various forms. The testimony tended to show that the decedent, prior to the date of the execution of the will, was much broken in mental strength and vigor. Always somewhat eccentric, his eccentricities increased. The decay of his mental powers was indicated by his frequent repetition to the same persons, in the same interview, of the same incidents of his early life. It is not contended that he did not have sufficient mental strength to amount to testamentary capacity.

The surrogate found that the decedent's son Percy Bishop had been lame from his infancy, and was upon that account the object of his father's special affection and solicitude; and that there is no evidence other than the alleged will that there was ever any estrangement between them, or between the decedent and Percy's child, or that there was any change in his feelings after the execution of the alleged will; and that the decedent had expressed affection for Percy, and had expressed his intention to provide for Percy's child as he did for his other grandchildren. In May, 1886, about six months before the execution of the alleged will, the decedent executed a will. This will was drawn by Mr. King, who had long been his legal adviser. This will was much more favorable to Percy and his child than that under consideration.

The relations between Mrs. Cluett and her father deserve notice. In a letter addressed to her husband, the decedent, speaking of Mrs. Cluett, says "I think she is one of the most cold-hearted daughters and sisters that I ever

knew. I have sometimes thought I would never go into your house again. I would not, was it not for the children. * * * Fanny [Mrs. Cluett] drove me out of the church, and wants to drive Charlie [the decedent's son] out of the city. If he goes, I go too, sure. I think he has more honor and honesty than all your clerks put together." The testimony shows that the testator was usually irritable after having had a conversation with Mrs. Cluett, and sometimes in tears; that sometimes when he heard her voice, he would get up quickly, and try to go away. He would sometimes hide from her in the closet, sometimes go out the back door, and at other times would meet her. Mrs. Bishop, the widow of the decedent, and mother of Mrs. Cluett, was very deaf. She testifies to frequent interviews between the decedent and Mrs. Cluett in 1886, and that she asked Mrs. Cluett what the conversations were about, and Mrs. Cluett replied that it was none of her business; that she had no right to know. A letter written by Mrs. Cluett to her father, without date, was read in evidence. It earnestly solicited an interview, and contained these expressions: "If I could see you and talk with you where I would not feel afraid the very walls were listening, I could relieve my mind, and show you in figures what I cannot explain any other way. So wout you do this favor for me, by just coming up here [they lived in separate houses] to see me? I do not wish to take a penny from a living being that does not belong to me. Have I complained of not having as much as others? I feel sure this is the time to put things in good shape, and, when I see you, I can tell you some things I could not say at the house or before Fred [her husband] on account of his feelings, but could talk better with you alone, and you may look at things in a different light after seeing me,—not for my sake alone, but for the children. This is the time to look well into the matter." Some explanation was made to the effect that this letter had reference to another matter than the will, but the explanation is not satisfactory, and does not command our confidence. We have no doubt the letter did refer to will-making.

It appears from the evidence that the will of June, 1886, came into the hands of Mrs. Cluett in August of that year. She exhibited it to her friend Mrs. Avery, and to a lawyer of Baltimore, whom she met at Rehoboth Beach. She suggested doubts to her father about its interpretation. She knew that Mr. King was her father's legal adviser, but she arranged to have Mr. Peck, a comparative stranger to her father, supersede Mr. King. Twice she saw Mr. Peck. At one interview, at least six weeks before her father conferred with him, she handed him the will of June, or a copy of it, for his examination. Mr. Peck had no suspicion that the decedent was under the influence of Mrs. Cluett. After the will of November was executed, the decedent asked Mr. Peck to communicate the contents of it to Mrs. Cluett. The decedent remarked to Mrs. Sullivan, his domestic servant for 25 years, that Mrs. Cluett had consulted a lawyer about his will. Mrs. Sullivan told him that it was very queer that Mrs. Cluett should know all about his will business, and that Mrs. Bishop, his wife, should not know anything; to which he replied that if Mrs. Bishop should know what was going on between him and Mrs. Cluett she would go crazy. He had made a will as early as 1848. He said to others that he had to make three wills before he could satisfy Fanny, (Mrs. Cluett.) The decedent by his alleged will, after making provision for debts, a monument, and bequeathing to his widow certain policies of life insurance and his household goods and furniture, and certain articles to two of the children of Mrs. Cluett, devises and bequeaths the rest and residue of the property to his executors in trust during the lives of his son and daughter Charles and Frances, and the survivor of them, to pay to his widow and three children each one-fourth part of the income. Then various contingencies are specified and directions given upon the event of their occurrence. The ultimate probable effect will be that, upon the termination of the trust, Percy, if living, will receive \$500, and no more. If he shall have previously died,

his child or children will have received \$300 each from the income, and will receive no more, and Mrs. Cluett's children will receive the entire remainder of the estate. Under the former will, which, like this, gave practically the same rest and residue to the same executors in trust to continue for the same lives, Percy during the continuance of the trust would receive one-fourth of the income during his mother's life, one-third upon her death, and one-half if both his mother and Charles should die during the life of himself and Frances. Upon the termination of the trust, he would, if living, share equally with all the grandchildren, his own children being reckoned among them, and ultimately his child or children would share equally with all the other grandchildren. This change in testamentary disposition is manifestly unjust to Percy and his child or children. It seems to be, in view of the evidence in the case, unaccountable upon any reasonable hypothesis, except that which the case suggests, namely, the influence of Mrs. Cluett. Her activity and effort appear, independently of her letter to her father. The letter, if, as we think it is, a step in the case, is confirmatory, and indicates her anxiety and zeal. A jury might well assume that she omitted none of the influences at which the letter hints. She had much to say, and she implored her father to see and hear her, to the end that he "may look at things in a different light,—not for my sake alone, but for the children." He repeatedly avoided her, but he yielded at last, and did see and hear her, not once only, but repeatedly. Sometimes she irritated him, and sometimes moved him to tears. Finally she obtained the custody of his existing will, and then apparently became his confidential adviser. Of course, she could then proceed intelligently. She selected and conferred with a new legal adviser, but her father, broken as he was, lagged for six weeks behind her urgency. Possibly he sought relief by temporizing with her; if so, he did not thus escape. The new will was finally made upon the model of the old one, with the important amendments in favor of Mrs. Cluett's children. It is not improbable that, after all, her father yielded more to her entreaties for her children than to those for herself; for when the new will was made he desired the draughtsman to perform the service, unpleasant to him, of informing Mrs. Cluett, and explaining to her its provisions. His statements to his domestic and others indicate that the importunity of Mrs. Cluett was so much upon his mind that he could not refrain from remarking upon it.

Undue influence must be proved. It is not enough that it is suspected. But in such cases it is usually proved by circumstances. We have recounted some of the leading circumstances which we think deserve careful scrutiny,—a scrutiny which, taking notice of the fact that this apparently unjust will was made, must solve the question whether it was the free act of the testator, or an act done by him under the undue influence of Mrs. Cluett. She had the right to request him to make his will in her favor, and in favor of her children, but she had no right to importune, annoy, and distress him to the extent of inducing him, in order to make his peace, or pacify her, or for any other purpose inspired by her, to suppress or abandon his own wishes and intention respecting his testamentary disposition of his property, or any part of it, and substitute in his will her disposition or her wishes or her will in place of his own, and in consequence leave his own unexpressed in part or in whole. This is but another form of stating that the will must be the free act of the testator, and not an act done under the constraint of another. We are not satisfied that the surrogate gave to the circumstances of this case the weight and effect which they reasonably and naturally ought to have. We must therefore refer the main issues to a jury for their determination. The decree is accordingly reversed, and the issues respecting the capacity of the testator, and his freedom from undue influence, sent to be tried by a jury at the Rensselaer circuit. The costs of this appeal allowed the appellant out of the estate. Other costs to abide the final award of costs. All concur.

LA MANNA v. NATIONAL SECURITY LIFE & ACCIDENT CO.

(Supreme Court, General Term, Second Department. May 12, 1890.)

INSURANCE—MUTUAL BENEFIT—INTERPRETATION OF POLICY.

An assessment life insurance association issued a certificate to the insured, covenanting to pay his estate \$5,000 upon his death, "as provided in the constitution." That instrument provided that "the company shall not be liable, in case of the death of a member, for more than one-fifth the net amount of the bi-monthly premiums next following said death on all the members of the department to which such deceased member belongs, for each \$1,000 of death benefit named in his policy. This, however, does not prohibit the board of directors from paying a loss in full, but the amount paid shall in no case exceed the amount stated in policy." *Held*, that the amount stated in the policy was *prima facie* the amount due thereon, and that, in the absence of evidence showing the department to which deceased belonged, and the amount of the bi-monthly premiums next after his death, a verdict for the full amount of the policy was properly ordered.

Appeal from circuit court, Kings county.

Action by Maggie La Manna, as administratrix of John B. La Manna, against the National Security Life & Accident Company, a co-operative or assessment association formed under Laws N. Y. 1883, c. 175. A verdict was directed for plaintiff, and from the judgment entered thereon defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

D. W. Northup, for appellant. W. Allan, for respondent.

BARNARD, P. J. The defendant issued a certificate or policy of insurance constituting John B. La Manna a member of the defendant company, and covenanted to pay his estate \$5,000 upon his death, "as provided in the constitution." Whether designed or not, the contract is made blind and uncertain by the words limiting the risk to an instrument made by the defendant, and one which would not usually be received by an assured person. The constitution referred to contains this section: "Sec. 2. The company shall not be liable in case of the death of a member for more than one-fifth the net amount of the bi-monthly premiums next following said death on all the members of the department to which said deceased member belongs, for each \$1,000 of death benefit named in his policy. This, however, does not prohibit the board of directors from paying a loss in full, but the amount paid shall in no case exceed the amount stated in policy." The contract is not plain with this addition. The death fund is stated in the constitution to be 80 per cent. of the net amount of bi-monthly premiums. The department to which the deceased member belongs is not given, and, so far as the case shows, has never been fixed. This action is based upon the policy. It avers the contract of insurance; the death of the assured; that he kept all the conditions of the policy; and that the company had failed to pay, on due proof of death, at the time provided for payment in the contract. The defendant admits its corporative existence, admits the death of the assured, and non-payment, and denies all other allegations. Upon these pleadings the parties entered upon the trial.

The first objection taken is to the complaint,—that the plaintiff should have averred what was due, as provided in the constitution. The objection was overruled on the ground that the contract was for the amount stated in it, unless the same was reduced by the company. This was the correct view of the contract. The agreement to pay was absolute. The reference to the constitution did not reduce the claim unless one-fifth of the bi-monthly assessment or premium next after the death was insufficient to pay the whole amount, or unless the directors did not elect to pay in full from what they had, or from bi-monthly dues. The application and the constitution use all these several terms. The rule of construction is to be favorable to the assured. *Dilleber v. Insurance Co.*, 69 N. Y. 256. The constitution fails to show

any contract which calls for the payment of a sum less than the amount of the policy. Reading it all together, there is a general death fund, which can only be used to pay death claims, and a reserve fund, which can only be used to make good a deficiency in the death fund. The policy cannot be read by an applicant for insurance, and the result be reached that little or nothing may be payable under it, and that the assured undertakes to make averments and proof, which he has full power by the constitution to do. No proof was given or offered to show to which department the deceased was a member, nor the amount of the bi-monthly premium next after his death. If the word "department" is designed to express a class of policies, to which does this one belong, and how many life-members are there in it, and does section 3 of title 8 of the constitution make the reserve fund liable to pay the loss?

The constitution does not show that the defendant is entitled to any reduction, nor does it give facts from which such a result can be determined. The directors have power to increase the bi-monthly payments. As appears from the policy in question, the bi-monthly premium has been increased threefold. If a bi-monthly premium is something different from a bi-monthly expense premium, what would show this, in an action to recover upon it?

There was proof given tending to show a waiver of the preliminary loss papers, and the death of the assured is admitted by the owner. This company sent no blanks, and in fact it was proven to have adopted loss papers served, although informal, and the refusal to pay was not put on the ground of defective loss papers. There was no question of fact to go to the jury, and the verdict for the full amount was properly ordered. Judgment affirmed, with costs. All concur.

MARX v. MANHATTAN RY. CO.

(*Supreme Court, Special Term, New York County. November, 1888.*)

PRACTICE IN CIVIL CASES—DISMISSAL—FAILURE TO PROSECUTE.

Where plaintiff refuses to proceed with the trial of a case, and submits to a nonsuit on the denial of his motion to amend the complaint, made after the trial had commenced, there is not a dismissal for neglect to prosecute within Code Civil Proc. N. Y. § 405, providing that where an action is not thus terminated plaintiff may bring another action within one year after such termination.

Action by Pierce Marx against the Manhattan Railway Company, for personal injuries. The action was formerly tried in the court of common pleas, where, on the denial of plaintiff's motion for leave to amend the complaint, he refused to proceed with the case. Defendant now moves to dismiss the complaint, alleging that the claim is barred by limitation. Code Civil Proc. N. Y. § 405, provides that if an action is terminated otherwise than by voluntary discontinuance, dismissal for neglect to prosecute, or final judgment, plaintiff may bring another action within one year after such termination. For other reports, see 3 N. Y. Supp. 118; *ante*, 159.

Aaron Kahn, (*Christopher Fine*, of counsel,) for plaintiff. *Davies & Rapallo*, (*Edward C. James*, of counsel,) for defendant.

BARRETT, J. The question is whether the effect of what transpired in the court of the common pleas was equivalent to submitting to a nonsuit. It seems to me it was. It was not a dismissal of the complaint for neglect to prosecute the action within the meaning of section 405 of the Code of Civil Procedure. That refers to an order made on motion to dismiss for such neglect to prosecute, and is a well-understood proceeding. In the case at bar the trial was actually commenced. A motion was made to amend, which the court denied. The plaintiff then declined to proceed further with the trial, for the reason that success was hopeless because of such denial. It was quite the same as though he had proceeded and given evidence in support of his complaint as originally formulated. He knew that the proofs would have

failed to establish his cause of action as thus formulated, and, consequently, that a nonsuit must follow. It was simply a saving of time to acknowledge that this must be the result, in view of the inability to amend. The nonsuit was inevitable because the proofs would not support the complaint. He had proofs to support the complaint, as it would have read in case the amendment had been permitted. The moment, however, the amendment was refused, he was necessarily defeated, and it was as well to acknowledge the situation. In effect, he tried the case, and because of a judicial ruling acknowledged defeat, and in substance submitted to a nonsuit. It was not a neglect to prosecute. He prosecuted and failed. That was the gist of the matter. I must therefore deny the motion, and permit the case to proceed.

HALL v. HALL.

(*Supreme Court, Special Term, New York County. September 7, 1889.*)

DIVORCE—SUMMONS—SERVICE BY PUBLICATION.

In an action for divorce, an order of publication will not be granted on the affidavit of plaintiff alone, without other proof of defendant's non-residence.

At chambers. Action for divorce.

VAN BRUNT, P. J. The application for order of reference must be denied. The service by publication is entirely insufficient. The order was granted upon the affidavit of the plaintiff alone, with no other proof of non-residence, or removal from the state. As the plaintiff would not be permitted to serve the summons personally, certainly an order of publication should not be granted solely upon his affidavits. Such a procedure would open the door to the grossest fraud. The papers are defective in other particulars, which, however, it is not necessary to notice.

CANTOR v. GRANT.

(*Supreme Court, Special Term, New York County. October, 1889.*)

SHERIFFS AND CONSTABLES—ACTION FOR WRONGFUL LEVY—INDEMNITORS.

Under Code Civil Proc. N. Y. § 1421, as amended by Laws N. Y. 1887, c. 182, providing that, in an action against an officer to recover chattels levied on under one or more executions, or to recover damages for their detention, if a bond or bonds have been given to indemnify the officer against the levy or levies, the person or persons who gave it may apply to the court to be substituted as defendants in place of the officer, it is not within the discretion of the court to refuse the application of the officer to substitute his indemnitors in the action.

At chambers. Action by Herman Cantor against Hugh J. Grant, sheriff of the city and county of New York, for the wrongful levy of executions on property of the estate of one Isaac Sickie, which had theretofore been assigned to plaintiff for the benefit of said Sickie's creditors. Defendant, having taken an indemnifying bond from the attaching creditors before making the levy, now moves to substitute the obligors in said bond as defendants in his stead. Code Civil Proc. N. Y. § 1421, as amended by Laws 1887, c. 182, reads as follows: "Where an action to recover a chattel or chattels hereafter levied upon by virtue of an execution or several executions, or a warrant of attachment or several warrants of attachment, or to recover damages by reason of a levy or levies upon, detention, sale, or sales of, personal property, hereafter made, by virtue of an execution or several executions, or a warrant of attachment or several warrants of attachment, is brought against an officer, or against a person who acted by his command or in his aid, if a bond or bonds, or written undertaking or undertakings, indemnifying the officer against the levy or levies, or other act or acts, was given in behalf of the judgment creditor or the several judgment creditors, or the plaintiff in the warrant or the plaintiffs in the several warrants, before the action was commenced, the persons or person, or the several persons, who gave it to them, or the survivors,

if one or more are dead, may apply to the court for an order to substitute the applicant or several applicants as defendants in the action in place of the officer, or of the person so acting by his command or in his aid."

Blumenstiel & Hirsch, for plaintiff. *Cockran & Clark*, for defendant. *Moses R. Crow*, for attaching creditors.

INGRAHAM, J. The provisions of section 1421 of the Code, as amended in 1887, apply to this case, and required the court to grant the order substituting the indemnitors as defendants in the action in place of the defendant. The section provides for the case of one or more levies, one or more judgment creditors, and one or more bonds of indemnity, and I am inclined to think, by the modification of the section in 1887, it was the intention of the legislature to take away the discretion vested in the court by the provision of the Code in force prior to the amendment. No other construction of the section can give effect to the language used. Applying the decision of the court of appeals in *Hein v. Davidson*, 96 N. Y. 175, I do not see how this section can be said to be unconstitutional. By section 1423 of the Code, the court is authorized, in its discretion, to require the indemnitors to furnish additional security to the plaintiff; and I think, in this case, the indemnitors should execute and file a bond to the plaintiff conditioned for the payment of any judgment that the plaintiff may obtain in this action, the penalty of the bond to be the amount claimed by the plaintiff in the complaint. It does not appear, however, that any levies were actually made under any of the executions, except the execution of the creditors, who realized some portion of the proceeds of the property levied upon; and the only persons who should be made defendants to this action are the five judgment creditors and their indemnitors, to whom the proceeds of the property levied upon were subsequently paid. The motion will therefore be granted, and the five judgment creditors who received the proceeds of the property, and their indemnitors, be made defendants in this action in the place of the sheriff, and such indemnitors be required to give a bond as before specified. Order to be settled on notice.

BAILLY v. NASHAWANNUOK MANUF'G CO.

(*Supreme Court, Special Term, New York County. April 15, 1890.*)

TRADE-MARKS—DESCRIPTIVE WORDS—"HYGIENIQUES."

The word "hygieniques," as applied to suspenders, is not descriptive, in the ordinary sense, and may become the subject of a valid trade-mark.

Action by Paul Bailly against the Nashawannuck Manufacturing Company, arising out of the use by defendant of certain marks and devices on suspenders, and on the boxes in which the suspenders were packed, and to which plaintiff claimed the right.

Lee & Lee, for plaintiff. *Wetmore & Jenner*, for defendant.

BARRETT, J. The word "hygieniques," as applied to suspenders, is not descriptive, in the ordinary sense. The word "elastic" would be. The word "hygieniques" is suggestive of the good quality of the suspenders, and of its usefulness; but it does not directly characterize the article, nor the methods which tend to make it healthful. At the outside, such word is descriptive only in a modified or indirect sense, and, as it does not monopolize a part of the language essential or appropriate to describe the article, it may become the subject of a valid trade-mark. Words which are but inferentially or remotely descriptive, indicating neither origin nor ownership, but merely some special quality or peculiarity of the article itself, may properly be regarded as fanciful or arbitrary in the legal sense. The case on this head is within the principles enunciated in *Selchow v. Baker*, 93 N. Y. 59, and the injunction should run against the defendant. Upon the facts, it is a barefaced attempt to defraud the plaintiff, and to palm off the defendant's goods as his.

FITCH v. BROADWAY & S. A. R. Co.

(Superior Court of New York City, General Term. June 27, 1890.)

DAMAGES—EXCESSIVE.

The injury to plaintiff, 68 years old, consisted in a fracture of the neck of the *femur*, causing her the most intense pain. At the time of the trial she was not able to attend to her household duties, or to dress herself without the assistance of others. The evidence went to show that the injury resulted in a shortening of the leg, that plaintiff would never be free from pain, and that she would never recover the full use of her leg. *Held*, that a verdict of \$7,000 was not excessive.

Appeal from jury term.

Action by Emeline L. Fitch against the Broadway & Seventh-Avenue Railroad Company, for personal injuries sustained by falling from defendant's car. The injury sustained was a fracture of some kind of the neck of the *femur*, which resulted, as the evidence tended to show, in the shortening of the leg, and caused plaintiff the most intense suffering. At the time of the trial plaintiff was unable to attend to her household duties, or to dress herself without the assistance of others, and the evidence went to show that she would never be free from pain, nor recover the full use of her leg. Plaintiff was 68 years old at the time of the accident. Judgment was given for plaintiff, and defendant appeals.

Argued before FREEDMAN and INGRAHAM, JJ.

Root & Clarke, for appellant. *Lexow & Haldane*, for respondent.

FREEDMAN, J. The only point presented by the appellant is that upon the whole case the judgment should be reversed because the damages awarded by the jury were excessive. The action is for personal injuries. I have examined the evidence with care, and I fail to see how, considering the nature of the injuries, and the amount of pain and suffering endured by the plaintiff, the verdict, which is for \$7,000, can be held to be excessive. Cases are to be found in large numbers in which larger recoveries have been sustained for similar injuries. The judgment and order should be affirmed, with costs.

BOGARDUS v. CARAGHER.

(Superior Court of New York City, General Term. June 27, 1890.)

VENDOR AND VENDEE—DEFECTIVE TITLE.

Covenants in a deed by which the grantee, for himself, his representatives, and assigns, agrees to erect and maintain certain streets and wharves along and opposite the granted premises, and extending into a river in front thereof, and by which the grantor reserves the right to open one or more other streets through the premises, form no cloud or incumbrance on the title of a subsequent grantee, where the original grantor has made a second conveyance of land in the river to the original grantee, who fills it in and erects and maintains thereon the streets and wharves covenanted for in the first deed, and the streets which the grantor reserved the right to open through the granted premises have been opened and maintained for many years.

Case submitted on agreed statement.

Action by Ruthelle Bogardus against Francis Caragher. Following is the agreed statement: The above-named parties hereby agree upon the following facts to be submitted to the court for the determination of their controversy thereon: *First*. That on the 5th day of January, 1889, the said plaintiff was the owner of the lot of land and the building thereon erected, situate on the northerly side of Broome street, in said city of New York, commencing at a point distant 25 feet westerly from the westerly line or side of Mangin street, known as "No. 20 Broome Street," 25 feet wide, front and rear, by 40 feet in depth. *Second*. That on said 5th day of January, 1889, the said plaintiff entered into a written contract with the said defendant in and by which she contracted to sell to him, the said defendant, the said house, lot, and premises

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above mentioned and described, free and clear from all incumbrances, by usual full covenant and warranty deed, at and for the agreed price of \$5,000 in manner in said contract mentioned and specified; the deed to be delivered on the 2d day of February, 1889, at 10 o'clock A. M., at the office of George W. McAdam, Esq., No. 51 Chambers street, in the city of New York. *Third.* That afterwards, and on the 9th day of March, 1889, plaintiff delivered to said defendant her certain deed of said premises, which contained the usual full covenants and warranty; the time of closing said contract having been from time to time extended by the parties to this action until said 9th day of March, 1889. *Fourth.* That, notwithstanding plaintiff so executed and delivered to defendant her full covenant and warranty deed to convey the said premises, as she had contracted to do, defendant refused to pay her the consideration money so agreed to be paid by him therefor, in the manner in said contract mentioned and specified, and only paid her the sum of \$4,800, but retained the sum of \$200, claiming the plaintiff's title was not in fact free and clear from incumbrances, but that the same was incumbered as herein stated. *Fifth.* That the premises herein mentioned and described formed a part of the premises which were conveyed to one Marinus Willett, by the mayor, aldermen, and commonalty of the city of New York, by a grant or lease dated the 1st day of May, 1787, which was duly recorded in the office of the register of the city of New York on the 25th day of June, 1825, in Liber 191 of Conveyances, at page 261, upon the consideration of 5s., and an agreement upon the part of said Willett that he, his legal representatives or assigns, should pay unto the said mayor, aldermen, and commonalty of the city of New York the rent of £22 10s. lawful money of the state of New York on the 1st day of May, 1829, and a like sum of £22 10s. on every 1st day of May thereafter in full satisfaction of all rents, services, dues, duties, and demands whatsoever for said premises, without any deduction, defalcation, or abatement for or in respect to any manner of taxes, rents, charges, assessments, impositions, or duties whatsoever. The said grant covered premises extending in a southerly direction from the northerly line or side of Delancey street to the southerly line or side of Bullock (now Broome) street, and extended from what is now the westerly side of Goerck street, in an easterly direction, 200 feet into the East river; the westerly line or edge of the East river being at what is now Goerck street. That said grant contained this provision: "And whereas it is the intention of the said parties to these presents that there shall be and remain for the use of said party of the first part, [the mayor, aldermen, and commonalty, etc.,] their successors, etc., forever, a slip in front of the said street called 'Delancey Street,' and also one other slip in front of the said street called 'Bullock [now Broome] Street,' of the breadth of 100 feet, for the use and accommodation of merchant vessels, boats, and such craft as usually use, occupy, and resort to the public slips in the said city. * * * Said party of the second part covenants, grants, promises, and agrees with party of the first part, their successors, etc., that he, his heirs, executors, administrators and assigns shall and will, whenever he or they, or any of them or either of them, shall be therewith required by party of the first part, their successors, etc., to build, erect, and make or cause to be built, erected, and made a good and sufficient street or wharf, of the breadth of 25 feet, along the side of the said slip in front or opposite to Delancey street, and also one other street or wharf similar to the said last-mentioned street or wharf, along the side of the new slip in front or opposite to Bullock [now Broome] street, the whole extent of the said 200 feet, into the said river, in such a manner as the said party of the first part, their successors, etc., shall instruct or direct." And also that said Willett, his legal representatives and assigns, should, at all times thereafter, maintain and keep in repair in good and sufficient manner the said streets or wharfs along and into the East river; that is to say, out into the East river, upon and in the premises which he, the said Willett, was to fill in

and make, between what was then Goerck street and the present Mangin street; and also a provision to the effect that the city reserved the right to open one or more streets from the southerly to the northerly boundary of the land so granted; that is, from Delancey to Bullock [now Broome] streets, without any obligation to make compensation for the land which should be taken for that purpose. *Sixth.* That subsequently thereto, and on the 3d day of August, 1844, the said mayor, aldermen, and commonalty released and discharged the said Marinus Willett, his legal representatives, etc., from the payment of said annual rent in said grant or lease reserved, £22 10s., in consideration of the payment by said Willett, at that time, of the gross sum of \$927.50, which said sum was then and there paid by said Willett to the said mayor, aldermen, and commonalty in consideration of such release of said premises from the payment of said rent. And the said mayor, aldermen, and commonalty also subsequently exercised the right to open one or more streets from the southerly to the northerly boundary of the premises so granted; that is to say, Mangin and Goerck streets, which streets (Goerck and Mangin streets) were so opened and laid out on or about the 1st day of January, 1830, through the land first granted by said mayor, aldermen, and commonalty to said Willett, and both of them have been used and maintained as public streets ever since that time. It is only 200 feet from Mangin street on the east to Goerck street on the west, the block in which premises in question are located. That subsequently to said first-mentioned grant,—that is to say, on the 28th day of February, 1825,—the mayor, aldermen, and commonalty of the city of New York made another grant to said Marinus Willett, which was on the same day duly recorded in the office of the comptroller of the city of New York in Book G of Water Grants, at page 362, in and by which the said mayor, aldermen, and commonalty granted to said Willett the lands under and extending 600 feet further easterly into the East river, to the westerly line or side of what is now East street, on the westerly line or side of the East river. That said last-mentioned grant contained the same provision in relation to opening and maintaining piers, wharfs, and slips at the foot of Delancy and Bullock (now Broome) streets that was contained in the first grant hereinbefore mentioned and referred to. That subsequently thereto the said Willett did fill in and make the land or soil upon the said last-mentioned grant; that is to say, from Mangin street (which was so opened on the first grant) to the present westerly line of East street. Tompkins and East streets were afterwards laid out, opened, and constructed upon the land so made by said Willett upon and over the water grant last mentioned and referred to. *Seventh.* That Goerck, Mangin, Tompkins, and East streets were so opened, and docks and piers or slips were constructed by said Willett from and at the foot of Delancy street and Bullock (now Broome) street, and the said piers, slips, or wharfs along the westerly edge or side of the East river, at the end or foot of Delancy and Bullock (now Broome) streets, where they are now located and maintained; that is to say, at a distance of more than 600 feet easterly from said first-mentioned grant, covering the premises in question, and have been maintained for about 60 years. None of these admissions herein contained are to affect either party, nor be regarded as made except for the purpose of the submission of this controversy upon the foregoing statement. That defendant declines and refuses to pay plaintiff said sum of \$200, for the following reasons: (1) That plaintiff has failed to comply with her contract to convey said premises free and clear from all incumbrances. (2) That the covenants and conditions contained in the grant from the mayor, etc., to Marinus Willett, first above mentioned, are not only binding upon said Marinus Willett, but they run with the land, and bind his grantees and assigns. (3) That the same form, and are now, an incumbrance, restriction, and cloud upon such premises, and could be enforced by the grantor, the mayor, aldermen, and commonalty of the city of New York as against the grantees of Marinus Willett, and

that the title is thus rendered clouded and unmerchantable. (4) If said title of plaintiff be held to be good, and free from incumbrances, this defendant will pay plaintiff said sum of \$200. The plaintiff demands judgment that it be adjudged that her title to said premises is in fee-simple, free and clear from incumbrances, and that the said covenants and restrictions are not incumbrances and clouds upon her title, and that the deed so tendered was in conformity and full compliance with her contract with said defendant; and that the defendant pay her the sum of \$200. Defendant prays (1) that it may be adjudged that said covenants and conditions are incumbrances upon said premises; and (2) that plaintiff is not entitled to recover said sum of \$200.

Argued before FREEDMAN and TRUAX, JJ.

J. E. Ludden, for plaintiff. *Geo. W. McAdam*, for defendant.

PER CURIAM. Upon the facts agreed upon and submitted the plaintiff is entitled to judgment that her title to the premises in question is in fee-simple free and clear from incumbrances; that the covenants and restrictions in question are not incumbrances and clouds upon her title; that the deed tendered was in conformity and full compliance with her contract with the defendant; and that the defendant pay her the sum of \$200.

BLOOM v. PATTEN *et al.*

(*Superior Court of New York City, General Term. June 27, 1890.*)

DISCOVERY—EXAMINATION OF PARTY BEFORE TRIAL.

An order for the examination of defendants before trial, asked for on the ground that such examination is necessary to enable plaintiff to amend his complaint, will be reversed where the affidavits on both sides show that plaintiff has sufficient knowledge of the facts constituting his alleged cause of action, and seeks information concerning an anticipated defense, and to ascertain whether the cause of action cannot be extended to other parties.

Appeal from special term.

Action by Jacob E. Bloom against Francis Jarvis Patten and others. Defendants appeal from an order requiring their examination before trial.

Argued before FREEDMAN and TRUAX, JJ.

Semple & Cahill, for appellants. *Jacob E. Bloom*, *pro se*.

FREEDMAN, J. The papers on which the defendants were ordered to appear and submit to an examination before trial, and to make a discovery of their books and papers, claimed that such examination and discovery were necessary to enable the plaintiff to amend his complaint. The test, therefore, is whether a necessity was shown for the purpose stated. The process fails to show such a necessity. From all that appears by the affidavits of both sides, it is evident that the plaintiff has sufficient knowledge of the facts constituting his alleged cause of action, and that his object is to obtain information concerning an anticipated defense, and to find out whether the cause of action cannot be extended to other parties. The order should be reversed, with \$10 costs and disbursements.

MORIARTY v. MORIARTY.

(*Superior Court of New York City, General Term. June 27, 1890.*)

DIVORCE—ALIMONY PENDENTE LITE.

Alimony *pendente lite* will not be granted in a suit for divorce on the ground of adultery where all the charges of adultery are made on information, and it does not appear that plaintiff believes the charges, and defendant positively denies them.

Appeal from special term.

Action for divorce by Doretta R. Moriarty against Jeremiah J. Moriarty. Defendant appeals from an order directing the payment of alimony *pendente lite* and counsel fees.

Argued before FREEDMAN and TRUAX, JJ.

Peter Michell, for appellant. George F. Martins, for respondent.

TRUAX, J. The action is brought to obtain an absolute divorce on the ground of the adultery of the defendant. Alimony will not be granted in every action for divorce *a vinculo* brought by a wife against her husband. The plaintiff is bound, said the court of appeals in *Collins v. Collins*, 71 N. Y. 275, to present a case to the court showing that she has a fair prospect of success in the action. In the action at bar, no such case was presented. The moving papers do not contain a single allegation relating to the adultery of the defendant worthy a moment's consideration by a court of justice. There are many vague statements in the moving papers to the effect that plaintiff had learned that defendant was living with a woman who claimed to be his wife; that other affiants had ascertained that defendant was keeping house with a woman who was known in the house, and who was reputed to be the wife of the defendant; that on one occasion one of the affiants was informed by this woman that she had been living with defendant for two years, and had occupied the same bed with him the night before. But we are not told from whom plaintiff obtained this information, and the statement that plaintiff had learned that defendant was keeping house with a woman is not an allegation that defendant was in fact keeping house with a woman. This court has lately held, in the case of *Martin v. Gross*, 4 N. Y. Supp. 337, that a general assertion of a fact upon information and belief proves nothing. In the case before us, it does not even appear that plaintiff believed what she "ascertained" or was "informed" about the defendant; and the defendant and his alleged paramour deny that they are living together as husband and wife, or that they occupied a bed, as above stated. I think that the rule to be followed in a case of this kind is well stated in *Monk v. Monk*, 7 Rob. (N. Y.) 153,—that alimony will not be granted in an action of this kind where all the charges of adultery on the part of the husband are made on information and belief, if the defendant positively denies the charges. Order appealed from reversed, and the motion for alimony denied, without costs, with leave to plaintiff to renew motion.

BAMBERGER *et al.* v. FIRE ASS'N OF NEW YORK. SAME v. MUTUAL FIRE INS. CO. SAME v. ARMSTRONG FIRE INS. CO.

(Superior Court of New York City, General Term. June 27, 1890.)

REFERENCE—WHEN DENIED.

In actions on insurance policies, where each defendant charges fraud on the part of insured, defendants' motions for a compulsory reference are properly denied.

Appeal from special term.

Action by Jacob F. Bamberger and others against the Fire Association of New York, the Mutual Fire Insurance Company, and the Armstrong Fire Insurance Company. From an order denying their motions for a reference, defendants appeal.

Argued before FREEDMAN and INGRAHAM, JJ.

Stine & Calman, (Joseph H. Choate, of counsel,) for appellants. Hoadley, Lauterbach & Johnson, (Edgar M. Johnson, of counsel,) for respondent.

FREEDMAN, J. These three actions have been brought to recover moneys due on account of three policies of insurance covering plaintiffs' stock of merchandise at their store in Louisville, Ky. These policies form part of a

total number of 144 policies upon the whole stock of said merchandise. In each of these actions the defendant has set up a charge of fraud on the part of the insured. For this reason the motion made by each defendant for compulsory reference was properly denied. True, the character of the action is to be determined from the complaint. But, in exercising its discretion upon the question whether a reference shall or shall not be compelled, the court will look at the papers submitted by both sides; and, if it should appear that a charge of serious fraud is involved in the issues, the motion may well be denied, even if the action be referable. With the exercise of that discretion the general term will not interfere. The views already expressed render it unnecessary to determine the question of power. In each case the order appealed from should be affirmed, but there should be only one bill of costs. All concur.

MAYO v. KNOWLTON.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

FACTORS AND BROKERS—STOCK OWNED BY BROKERS—RESCISSIION.

Plaintiff ordered defendant, as a broker, to buy for him a number of shares in mining company, and the shares were delivered to him by defendant. Afterwards the mine was bought by another company, and the shares made convertible in shares of the new company, and plaintiff so converted his shares. Subsequently he claimed to have discovered that defendant did not buy the shares, but simply turned over some which he himself owned, and thereupon sought to repudiate the purchase, and for that purpose borrowed the requisite number of shares in the original company, and tendered them to defendant. *Held* that, in order to rescind the sale, plaintiff should have tendered the shares which he received in the new company, as he could not retain the subject of his purchase, and at the same time maintain an action for the wrongful act of the broker in delivering stock owned by himself.

Appeal from trial term.

Action by Sylvanus Mayo against Delorme Knowlton. Verdict and judgment for defendant, from which plaintiff appeals.

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.

Charles N. Morgan and Robert H. Worthington, for appellant. John L. Tresidder, for respondent.

LARREMORE, C. J. This action was tried before Judge VAN HONSEN and a jury in May, 1887, resulting in a verdict for the defendant. The complaint sets up two grounds of action. It appears that at different times in the year 1882 the plaintiff, at the suggestion of defendant, purchased in the aggregate 4,000 shares of the stock of the Silver King Mining Company. It is alleged that, although the defendant assumed to act as an agent and broker in these transactions, the stock which he delivered to the plaintiff, upon receiving the purchase price thereof, was in reality stock owned by himself, which he had merely transferred to the purchaser, himself retaining the same purchase price. It is also averred that certain intentionally false and fraudulent representations were made to the plaintiff by the defendant as an inducement to such purchase. The prayer for relief demands damages for the amount of such purchase price.

As to the first ground of action, I am of opinion that the learned trial judge correctly instructed the jury that they should "leave out of view the fact that Mr. Knowlton is charged with having been the owner of the stock that was delivered to Mr. Mayo. Mr. Knowlton denies that such was the case; but, though it had been so, it would not, in view of what the evidence discloses, have given Mr. Mayo a right of action." The general principle for which the appellant contends on this subject is undoubtedly well settled. If an agent, instead of purchasing stock for his principal from a third person or in the market, simply makes over stock of his own, the principal may r

scind the transaction, tender back the stock, and demand a return of the consideration paid for it. A question of public policy is involved in this rule, and it applies, although perfect good faith was intended, and no loss has been sustained. *Conkey v. Bond*, 36 N. Y. 427; *Taussig v. Hart*, 58 N. Y. 425. The peculiar facts proved on the trial, however, take this case out of the operation of such principle. The transfers of stock to plaintiff were made before the month of September, 1882. In the latter part of 1883 the property and assets of the Silver King Mining Company were conveyed to the Silver King Mining & Tunnel Company, and the shares of the former mining company were made freely convertible into shares of the tunnel company, in all respects equivalent. Plaintiff having previously procured the shares in question to be registered in his name on the books of the mining company, thereupon exchanged them for shares in the tunnel company, which he still retains. He did not attempt to rescind the purchase until 1886, claiming that not until that time did he discover the alleged fraud. He went to defendant, and tendered, not the shares of the tunnel company which he had received in exchange, but he borrowed from different persons 4,000 shares of the mining company's stock, which had never been transferred, for the purpose of making such tender. Plaintiff admits that he was not the owner of the shares so offered to defendant, and that he borrowed them simply for the purpose of the formal tender. The fact whether or not defendant delivered to plaintiff stock owned by himself, and not secured by *bona fide* purchase, is immaterial, because the only right which could be conferred thereby would be that of repudiating the transaction and rescinding the sale. In order to do this, a party must always tender back the stock which he has received under such voidable sale. Here the plaintiff has not made any attempt to do this. He still holds the stock he received in exchange for the original stock, and presumably is gaining the benefit of such holding. If immediately after the discovery of the true nature of the purchase plaintiff had gone to defendant, and offered to restore as far as was within his power the property he had purchased, a different question would have arisen. The shares in the tunnel company were the equivalent of and in all respects stood for the surrendered shares of the mining company. A tender of those shares would have been the nearest plaintiff could have come to offering restitution. In my judgment, the so-called tender of 4,000 shares of mining stock which he did not own was merely an idle ceremony. Plaintiff's real position on this point is that he is authorized to retain the stock, but sue for damages. This position is untenable. A principal, under such circumstances, may either repudiate the transaction and demand back his money, or, if he so elect, may ratify the sale, retain the property, and reap its possible benefit. But he cannot hold on to the stock, presumably taking the chance of making gain thereby, and at the same time treat the wrongful act in delivering stock the agent himself owned as an independent cause of action for damages. The learned trial judge sent the case to the jury upon the question whether false representations were made as to the stock as an inducement to the purchase. Under the facts disclosed, this was the most that plaintiff could claim. We find no errors either in the charge or in the rulings upon the trial, and the judgment appealed from should be affirmed, with costs.

GOMMERSALL v. CREW *et al.*

(Common Pleas of New York City and County, General Term. June 2, 1890.)

EVIDENCE—DECLARATIONS AND ADMISSIONS—OFFER OF COMPROMISE.

An offer of compromise made is inadmissible in evidence against the party making it.

Appeal from second district court.

Action by William H. Gommersall against Henry Crew and others to recover his commissions as broker.

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

W. P. Taylor, for appellant. *Mr. McCarthy*, for respondents.

PER CURIAM. The evidence in this case, as to the employment of the plaintiff as a broker by the defendants, is very conflicting, while the plaintiff admits that he was employed by the party of whom the property was procured, as a broker, although he claims that the defendants knew of such employment, which they deny. The judgment being on conflicting evidence, and especially as there is a doubt as to whether or not the defendants knew of plaintiff's employment by the other party to the transaction, the judgment was properly rendered in favor of the defendants. It is contended on the part of the appellant that the testimony of Mr. Toler, a witness for the plaintiff, was improperly stricken out. He was the attorney for the plaintiff, and Mr. Crew, one of the defendants, had an interview with him. From Mr. Toler's testimony, it does not appear whether or not what was then said by Mr. Crew related to an effort to compromise the matter. But that it had relation to such an effort is distinctly testified to by Mr. Crew, who said that he made plaintiff's attorney an offer, to save trouble. A party has a right to purchase his peace, and to make an offer of compromise for that purpose, but such offers are not evidence. We think the evidence, in the light of Mr. Crew's testimony, was properly stricken out. The judgment should therefore be affirmed, with costs.

ROSENFELD v. NEW.

(*Common Pleas of New York City and County, General Term. June 2, 1890.*)

1. MASTER AND SERVANT—CONTRACT OF HIRING—COMPENSATION.

Plaintiff admitted that, before starting on his first business trip for defendant, he told the latter that he could not travel on \$50 per week, but would try to do so. On that trip he charged and was allowed \$60 per week for traveling expenses, but admitted that he subsequently submitted to a deduction from his salary for having charged more than \$50 per week. He claimed that he did not acquiesce in the deduction, denied that he ever contracted to fix his traveling expenses at \$50 per week, and testified that he actually expended \$60 per week therefor. *Held*, that the question whether he had agreed to receive \$50 per week for his traveling expenses was for the jury.

2. ACCORD AND SATISFACTION—EVIDENCE.

The fact that, on leaving defendant's employ, plaintiff consented to receive the amount appearing by defendant's books to be due him, does not show an accord and satisfaction, where plaintiff refused to sign a receipt in full, and gave no receipt at all.

3. SAME—BURDEN OF PROOF.

Where defendant alleges an accord and satisfaction, he has the burden of proving it.

Appeal from city court, general term.

Action by Louis Rosenfeld against Jacob New, for moneys deducted from the salary of plaintiff while he was in defendant's employ, for alleged overcharges in his traveling expenses. A judgment entered on a verdict for plaintiff was affirmed by the general term of the city court, and defendant again appeals.

Argued before LARREMORE, C. J., and BOOKSTAYER, J.

Edward Browne, for appellant. *Joseph C. Rosenbaum*, for respondent.

LARREMORE, C. J. I am of opinion that there was evidence to go to the jury on all the disputed points, and that the submission of the whole issue to them was fair, and free from error. The court could not have charged as matter of law that plaintiff entered into an actual agreement that his traveling expenses should not exceed \$50 per week. He admits that he said, before starting on his first business trip, that he could not travel on any such

money, but that he would try to. Upon this trip he charged his traveling expenses at \$60 per week, and they were allowed by defendant at that rate, without objection. Plaintiff admits that, upon subsequent trips, he submitted to a reduction of his salary of \$100 in installments, because of his having charged \$60, instead of \$50, per week. But this he claims was without any final acquiescence in defendant's authority to make such deduction, and therefore without releasing any existing legal rights; and he denies that he ever made any contract fixing his expenses at \$50. He testifies that he actually expended \$60 per week for traveling expenses during the period he was employed. The question whether or not such alleged \$50 agreement existed was properly sent to the jury.

There is also evidence to support the verdict in plaintiff's favor on the question of the alleged accord and satisfaction. Although he consented to receive, at the time of leaving defendant's employ, the amount which appeared due by the defendant's books, he refused to sign a receipt in full for the same, although requested to do so, and in fact gave no receipt at all. Certainly the court would not have been justified in directing a verdict for defendant on this point, and I think the trial judge correctly charged that the burden of proof to establish the alleged accord and satisfaction was on the defendant. The judgment appealed from should be affirmed, with costs. All concur.

WILSON *et al.* v. RYDER.

(Common Pleas of New York City and County, General Term. June 3, 1890.)

Docket—Sale—Representation of Solvency.

An action for procuring goods by defendant's false representation that he owned \$30,000 worth of property, free and clear of liabilities, is properly dismissed when the complaint contains no allegation of damages arising out of this representation, and the plaintiffs' own proof shows that defendant owned property to the amount stated by him, and that he is amply responsible for the debt, though it also appears that he owed debts aggregating about \$3,500 when the representation was made.

Appeal from city court, general term.

Action by Henry Wilson and George D. Wilson against Stephen Ryder, for procuring goods by a false representation that defendant owned property worth \$20,000, free and clear of incumbrances. The action was referred to a referee. As appears by plaintiff's evidence, they sold defendant a bill of goods amounting to \$252.98 on the faith of his representation as to his property. Defendant paid \$52.98 in cash, and gave his note for the balance, \$200, which he failed to pay at maturity. Plaintiffs further showed that when defendant made the representation he was owing about \$3,500, including a mortgage of \$2,000 on a tract of land. It also appeared from plaintiffs' evidence that defendant now owns about \$40,000 worth of property. Defendant introduced no evidence, and moved to dismiss the complaint at the close of plaintiffs' evidence. The referee granted the motion. From a judgment affirming the judgment in the referee's report plaintiffs appeal.

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.

P. C. Talman, (John Fennel, of counsel,) for appellants. Geo. C. Dutcher, for respondent.

BOOKSTAVEN, J. This action was brought by the plaintiffs to recover the sum of \$200, and the plaintiffs allege, among other things, that false and fraudulent representations were made by the defendant at the time of the purchase of the goods in question, which led to their sale. There is no allegation in the complaint of any damage arising out of these representations. The action was referred to a referee appointed by the city court, for trial, and upon such trial no proof was offered on behalf of the defendant. The plaintiffs' testimony showed that the defendant owned more than \$20,000 above his

debts and liabilities at the time that the representations were made, and that the representations made by him at the time of the purchase were substantially true. The most that could be said is that the representations were false in one respect only; but this can give no cause of action, for it does not appear that the plaintiff acted on that false representation, or that any damage arose by reason thereof. It also appears from the evidence that the defendant was amply responsible to pay the debt incurred by him, notwithstanding the incumbrance upon his property, and there was no proof offered as to his actual insolvency. There was therefore no question of fact in the case to have been submitted to a jury, had the case been tried before it, and therefore the referee was right in dismissing the complaint. The judgment should be affirmed, with costs.

FLANAGAN v. MITCHELL *et al.*

(Common Pleas of New York City and County, General Term. June 2, 1890.)

1. ORDERS—CONDITIONAL ACCEPTANCE.

Where defendants accept an order on them for the payment of money by writing thereon "Accepted, payable out of" a certain payment, the acceptance is conditional, and becomes absolute when the specified payment is made to defendants.

2. SAME—CONSIDERATION.

Where plaintiff testifies that he took the order in payment for plastering, in reliance on defendants' promise to accept it, and forebore to file a lien for the amount due him, it is immaterial whether or not defendants received any consideration for their acceptance, as plaintiff's forbearance is sufficient to bind them.

3. APPEAL—HARMLESS ERROR.

Where defendant is allowed as a witness to refer to and refresh his memory from a certain instrument which is excluded from evidence, and plaintiff subsequently withdraws all objections to the admission of the instrument, but defendant declines to introduce it, any error in its original exclusion is cured.

Appeal from trial term.

Action by Richard Flanagan against Peter and David Mitchell. Judgment for plaintiff, and defendants appeal.

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.

Chauncy S. Truax, for appellants. Thomas C. Ennecor, for respondent.

LARREMORE, C. J. The plaintiff is a plasterer by trade, and prior to September 4, 1886, was engaged in plastering a row of buildings, in Seventy-First street, near West-End avenue, under a subcontract with Messrs. Fonner & Lowther, the builders. It is undisputed that upon said day the following instrument was executed by said builders, delivered to the plaintiff, and accepted as therein stated by the defendants: "September 4, 1886.

"GENTLEMEN: Please pay to Richard Flanagan the sum of \$500, and charge the same to our account, and oblige, very respectfully,

"FONNER & LOWTHER.

"To P. & D. Mitchell.

"Accepted, payable out of standing trim payment.

"P. & D. MITCHELL, Attorneys for Loan."

This action is to enforce payment of such instrument. The learned trial judge correctly instructed the jury that the words "attorneys for loan" were mere surplusage, to be disregarded, and, further, that the instrument was not to be taken as an ordinary bill of exchange absolutely accepted; but that defendants' action in the premises constituted a conditional acceptance. The obligation thereunder consequently could not become absolute until the condition therein named was fulfilled. It appears, however, that the complaint contains an allegation that there came into the hands and possession of defendants a sum exceeding \$500 on account of said standing trim payment, and that they retained and kept the amount from the said Fonner & Lowther on account of the order or draft above mentioned. This allegation is not de-

nied or referred to in the answer, and must therefore be taken as admitted for the purposes of the trial. This is, of course, the strict legal effect of allowing an allegation to go undenied in the pleading, and, furthermore, it hardly seems that the omission could have resulted from inadvertence, because the defendant who testified on the trial on this subject would only say that the standing trim payment was never due, and that he did not think it was made as a matter of fact. This witness further states the conclusion of law that money was never advanced to Fonner & Lowther that ought to have gone to Mr. Flanagan, and adds that the money that Fonner & Lowther got after all these liens and judgments were put on was a matter of grace. The question attempted to be raised in such evidence with regard to the falling due of the standing trim payment relates to the construction of the building loan contract to Fonner & Lowther. We should be obliged to hold the defendants to their admission in the answer under any circumstances, and a perusal of Mr. Mitchell's testimony convinces us that no actual injustice results from the application of such technical rule.

But, although the condition of the acceptance must be held to have been fulfilled, the appellant further argues that there was no consideration to support the obligation undertaken by the Messrs. Mitchell. One ground of error assigned is the exclusion of the question to one of the defendants: "Did you ever receive any consideration, or did you, as attorneys for the parties making the loan, receive any consideration for this acceptance?" We think this question was immaterial. As between these parties it was not of the slightest consequence whether the defendants gained any advantage for the obligation they incurred. The real consideration here was forbearance on the part of the plaintiff. He testifies that, before the draft was signed, there was a request made upon Mr. Mitchell to pay him the money. "Mr. Mitchell said he did not owe them money just then; that he could not advance me [him] any money, because there was not enough security for the same. Then I said, 'Mr. Mitchell, I will have to put a lien on the job if you don't.' He said, 'No, I would not do that. * * * If they give you an order I will accept the order on the standing trim payment.'" Plaintiff's theory of this action is that, relying on Mr. Mitchell's acceptance, he did not take immediate steps to secure himself by a lien. This is certainly ample consideration in law to hold the defendants, and the question whether or not they received anything by way of indemnity or direct profit for their acceptance would be collateral to the issues of the present case.

The defense was also raised that the amount of this draft was intended to be merged into a mortgage subsequently given by the builders to the plaintiff. Plaintiff on his part denied that the amount of said draft was included in said mortgage, and that it ever was intended that the same should be extinguished. The evidence was conflicting on this point, and the question was fairly submitted to the jury, and their verdict in plaintiff's favor must stand. The answer does not allege whether a bond, or note, or any other instrument, accompanied the mortgage. Even if this mortgage had been given as collateral security for the draft and other indebtedness, said draft, and the right to sue upon it independently, would not have been extinguished.

Counsel for appellant contends that the exclusion of the contract between Andrew J. Skinner and Sarah E. Lowther and James S. Fonner was error, necessitating a reversal. But this contention cannot prevail. The defendant referred to such contract, and refreshed his memory from it in giving his evidence; and subsequently counsel for plaintiff withdrew all objection, and the defendants were given an opportunity of introducing such contract in evidence at a later stage in the case, if they so desired. This offer they then refused, and we think that any error that might have existed by reason of the original exclusion was thereby cured.

The judgment appealed from should be affirmed, with costs.

WEIL v. KAHN.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

LANDLORD AND TENANT—REPAIRS—EVIDENCE.

In an action by a lessee to recover money paid for repairing the roof of the leased house, a collateral agreement, binding the lessor to make such external repairs, is admissible in evidence, where the only provision of the lease relating to that subject is that the lessee shall make all repairs, except those to the exterior of the building.

Appeal from fifth district court.

Action by Samuel Weil against Joseph Kahn to recover money paid for repairing roof of defendant's house, of which plaintiff was tenant. Judgment for defendant. Plaintiff appeals.

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.
A. W. Benick, for appellant. Lewis Hurst, for respondent.

PER CURIAM. The action was brought to recover \$18 for money laid out and expended by plaintiff for the defendant in repairing the roof of a house leased by the defendant to the plaintiff. The lease expressly provided that all the repairs were to be made by the lessee, except those to the exterior of the building, but there was no provision in the lease that the landlord should make those repairs. Had this been the only contract between the parties, the views expressed by the justice in his opinion would have been entirely correct, and decisive of this case. But upon the trial plaintiff offered evidence tending to show that there was a collateral agreement made between the parties, by which the landlord agreed to keep the exterior in repairs, and the provisions of the lease respecting the repairs are interlined. There could have been no object for making this interlineation restricting the tenant's obligation to keep in repair the interior, for he was bound to do this without any covenants, and therefore the interlineation adds nothing whatever to the lease; and, as it is entirely silent as to who is to make the repairs to the outside of the building, we think the evidence offered in respect thereto should have been admitted. *Ward v. Cowdrey*, 5 N. Y. Supp. 282; *Bean v. Carleton*, 6 N. Y. St. Rep. 641. The judgment should therefore be reversed, and a new trial ordered, with costs to abide the event. All concur.

STONE v. THADEN.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

VENDOR AND VENDEE—DEFECTIVE TITLE—RECOVERY OF PRICE.

Plaintiff paid \$25, taking a receipt reciting that it was in part payment for house 508 West Forty-Seventh street; price \$21,000. It transpired that the house stood on a leasehold, so that defendant could not convey the fee, which plaintiff intended to purchase. *Held*, that plaintiff was entitled to recover back the part payment.

Appeal from seventh district court.

Action by Aaron Stone against John W. Thaden, to recover a part payment made on a contract to purchase land. Judgment for defendant. Plaintiff appeals.

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

Benno Loewy, for appellant. Langbein Bros. & Langbein, for respondent.

PER CURIAM. The basis of this action rests upon the following receipt: "Rec'd from Aaron Stone twenty-five dollars, (\$25.) The same is part payment for house 508 West 47th street; the price to be \$21,000, (twenty-one thousand dollars.) Subject to mortgage. L. W. THADEN. L. THADEN,"—and signed only by the defendant. It may be premised that in this case, at

least, it was understood to be a contract. The parties subsequently met to execute the contract of the sale of the premises in dispute, when it was first discovered that their minds had not met upon the transaction involved. It is an elementary principle of law that a receipt may be explained. This rule was sought to be applied in the present litigation. Is it reasonable to suppose that the plaintiff only intended to purchase the "bricks and mortar" of this structure, which, upon its removal from the soil, according to the testimony upon the trial, was absolutely worthless? An issue was raised upon the fact as to the cost of the building, but the evidence upon this point, if material for any purpose, should have been restricted to its actual market value, and the exception upon this point was well taken. It is claimed that the disputed question of fact, as to what was intended to be sold, having been decided adversely to the defendant, is not reviewable upon appeal. In ordinary cases this principle is always upheld, but when it appears from the whole evidence that the intention of the parties to the contract is in doubt, or misunderstood, a review of the facts is not only allowable, but justified. There was nothing in the receipt to apprise the plaintiff that the house stood upon leasehold ground for the period of its duration. For aught that appears, the lease might have expired the day after his purchase. A contract for the sale of real estate should be specified in terms. No supposed general knowledge of a purchaser as to the character and restrictions of any locality can be legally presumed. A house affixed to the freehold is a part of and passes with it. *Ward v. Kilpatrick*, 85 N. Y. 413. The receipt was but a preliminary to the contract, and the provisions of the statute of frauds are applicable. *Cagger v. Lansing*, 43 N. Y. 550; *Baldwin v. Palmer*, 10 N. Y. 232. The plaintiff upon the evidence was entitled to recover the amount paid on account of the purchase. It is possible, however, that the defendant, on a retrial, may be able to make a stronger case. The judgment should be reversed, and a new trial ordered, with costs to abide the event. All concur.

LYONS v. BROADWAY & S. A. R. CO.

(City Court of New York, General Term. May 23, 1890.)

CARRIERS—INJURY TO PASSENGER—ASSAULT BY EMPLOYE.

A street railway company is liable for the acts of one of its drivers in wrongfully throwing a passenger off a car; the rule relieving a master from liability for a malicious injury inflicted by his servant not applying as between a common carrier and a passenger where the servant is performing duties which the master owes to its passengers.

Appeal from trial term.

Action by John J. Lyons against the Broadway & Seventh Avenue Railroad Company. There was a verdict and judgment for plaintiff. Defendant appeals.

Argued before McADAM, C. J., and McGOWN and FITZSIMMONS, JJ.

Root & Clarke, for appellant. John Klein, for respondent.

PER CURIAM. The case was fairly tried, and the exceptions taken to the admission of evidence seem to be without force. The complaint, as amended, claims damages for loss of service arising from inability to work, and charges that the injuries were of a permanent character, so that the testimony upon these subjects was within the issue. The only exception to the charge is that part wherein the court said: "The company is liable for the willful acts of its servants while performing duties which it owes to its passengers." The plaintiff was riding upon the front platform of the car. Neither the conductor nor driver objected to his presence there. He gave the conductor a 25-cent piece in payment of the fares of the plaintiff, and a friend who was with him. The conductor handed him 15 cents in change. The plaintiff found fault with the 10-cent piece he received, and the conductor gave him

another instead. The driver took offense at the passenger ringing the conductor up, and threw the plaintiff off the car. We think the defendant is liable for the consequences of this act. The driver was in charge of the front platform of the car, had the power to keep any improper person from it, and had the right to put any disorderly person off it. He was not bound to ask the conductor to do this, or consult him about doing it. If he put the wrong person off, it was a mistake for which the master was liable. Having the power, as servant of the corporation, to expel improper persons from the platform, and the master being liable for his mistakes committed in the exercise of this authority, the defendant is answerable, though the act was willfully done. *Railroad Co. v. Gastka*, 21 N. E. Rep. 522; *Mott v. Ice Co.*, 73 N. Y. 543; *Dwinelle v. Railroad Co.*, 24 N. E. Rep. 319. The trial judge was careful not to hold that the master was liable for acts outside of the servant's duty and his master's business, or for things done maliciously for the servant's own purposes; for he confined the liability to willful acts of the servant "while performing duties which the corporation owed to its passengers." One of these duties, we apprehend, was to protect, rather than endanger, the lives and limbs of passengers. In *Stewart v. Railroad Co.*, 90 N. Y. 588, the court of appeals declared that a carrier undertakes to protect the passenger against any injury arising from the negligence or willful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger, and held that the rule relieving a master from liability for a malicious injury inflicted by his servant does not apply as between a common carrier of passengers and a passenger. The plaintiff was severely injured, and the verdict for \$1,500 is not excessive. Upon the entire case the judgment must be affirmed, with costs.

HILDRETH v. LERCHE *et al.*

(City Court of New York, Special Term. November 7, 1889.)

APPEAL—FROM SURROGATE'S COURT—ACTION ON BOND.

Code Civil Proc. N. Y. c. 18, tit. 3, art. 4, §§ 2568-2589, provide that an appeal from a surrogate's court may be taken to the general term of the supreme court, and prescribes the procedure. Section 2581 provides that the surrogate may at any time authorize any person aggrieved to sue on an undertaking given on appeal from an order or decree in his court. *Held*, that section 1809, contained in chapter 13, tit. 1, relating to "appeals generally," which declares that no action shall be maintained on an undertaking given on an appeal to the supreme court, "as prescribed in * * * this chapter," until after 10 days from the service of notice of the entry of a judgment, or order affirming the judgment or order appealed from, or dismissing the appeal, does not apply to appeals from surrogates' courts.

At chambers. Action by J. Homer Hildreth against Albrecht J. Lerche and Joseph Ludwig, as sureties in an undertaking given on appeal, by Elise Bethune, testator's widow, from the decree of the surrogate's court of New York county, admitting to probate the will of John G. Bethune, deceased, the decree appealed from having been affirmed. 48 Hun, 614, *mem.* Plaintiff now moves that defendants' demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action be overruled as frivolous. Code Civil Proc. N. Y. § 1309, is contained in chapter 12, tit. 1, relating to "appeals generally," and provides that "an action shall not be maintained upon an undertaking given upon an appeal taken, as prescribed in title third, fourth, or fifth of this chapter, until ten days have expired since the service upon the attorney for the appellant of a written notice of the entry of a judgment, or order affirming the judgment or order appealed from, or dismissing the appeal." The appeals "prescribed in titles third, fourth, and fifth of this chapter [12]" are as follows: Title 3. Appeals "to the supreme court from a final judgment rendered by a county court, or by any other court of record

possessing original jurisdiction, where an appeal therefrom to a court other than the supreme court is not expressly given by statute." Title 4. Appeals "to the general term of the supreme court, or of a superior city court, from a final judgment rendered in the same court." Title 5. Appeals "to the general term of the supreme court, or of a superior city court, from an order affecting a substantial right, made in a special proceeding," at a special term, etc., of the same court.

J. Homer Hildreth, pro se. Albrecht J. Lerche, pro se.

HOLME, J. I do not think the notice required by section 1809 applies to appeals taken from orders or decrees made by the surrogate. Article 4, tit. 2, c. 18, of the Code provides a complete system of appeals from orders or decrees made in the surrogate's court, altogether distinct from the provisions in reference to appeals from other courts. Section 2581 provides that the surrogate may at any time, in his discretion, authorize any person aggrieved to bring an action upon an undertaking given on appeal from an order or decree in his court, and this seems to be the only prerequisite to the cause of action provided for in the article of the Code relating to such appeals. The plaintiff in this case having been thus authorized to bring this action, I think the demurrer bad. Motion granted, with costs, and judgment may be entered by plaintiff.

IN RE VANDERBILT'S ESTATE.

(Surrogate's Court, New York County. April 21, 1890.)

1. DESCENT AND DISTRIBUTION—LEGACY TAXES—NOTICE OF APPRAISEMENT.

Laws N. Y. 1885, c. 483, relating to the legacy tax, requires (section 17) the county comptroller, whenever he has reason to believe that any tax is due and unpaid, to notify the district attorney, who shall then institute proceedings to collect it. Section 13 provides that the surrogate shall appoint an appraiser, and order him to give notice, to such persons as may be designated by the surrogate, of the time and place at which he will appraise the property. *Held*, that it is the surrogate's duty to order the appraiser to notify all persons interested in the imposition of the tax, including the legatees, district attorney, and comptroller.

2. SAME—LIMITATIONS.

Laws N. Y. 1885, c. 483, entitled "An act to tax gifts, legacies," etc., imposes a tax on the devolution of property; and hence Code Civil Proc. N. Y. § 884, requiring all actions to recover a statutory penalty or forfeiture to be brought within two years after the cause of action accrues, has no application to a proceeding to enforce such a tax.

3. SAME—PERSONAL LIABILITY OF EXECUTORS.

Laws N. Y. 1885, c. 483, § 1, provides that the executors shall be liable for legacy taxes until they have been paid. Section 6 requires the executor to deduct the tax from any money in his possession before paying legacies therewith, and provides that he shall not be compelled to deliver any specific legacy until he has collected the tax thereon. Section 8 provides that the executor shall not be discharged from liability for the tax until he shall produce the comptroller's receipt therefor. *Held*, that the executor is personally liable for the payment of the tax, and that he must account therefor on the final settlement and adjustment of the estate.

4. SAME—RES ADJUDICATA.

On the application of executors, an appraiser was appointed to appraise the property of an estate subject to the legacy tax; and, after notice of the time and place of appraisement, he made his report. *Held*, that a confirmation of the report by the surrogate, after due notice to the comptroller, is such an adjudication of the question as will relieve the executors from personal liability for taxes on other legacies which the appraiser had without authority considered as exempt, and which he had not included in his report, and that the state could look only to the omitted legatees for these taxes.

5. SAME—EXEMPTIONS—ALMSHOUSE.

A charitable institution which maintains a home and provides lodgings and meals free, but which also maintains a day nursery for which it makes a small charge, is not a pure charity, and hence is not exempt from the legacy tax as an almshouse.

6. SAME—CHRISTIAN HOME FOR INTEMPERATE MEN.

Laws N. Y. 1881, c. 546, as amended by Laws N. Y. 1888, c. 523, § 7, which exempt the Christian Home for Intemperate Men from "local taxation or other purposes," does not exempt it from state taxation, and hence a bequest to it is subject to the legacy tax.

7. SAME—MUSEUM OF ARTS AND NATURAL HISTORY.

The Metropolitan Museum of Art and the American Museum of Natural History which derive an income from membership and admission fees, from the sale of books, specimens, etc., and from investments of property left by will, are subject to taxation, under Rev. St. c. 18, tit. 4, § 1, which provides for the taxation of moneyed corporations deriving an income from their "capital or otherwise;" and hence legacies to them are not exempt from taxation under Rev. St. c. 18, tit. 4, subd. 7, exempting the personal property of every incorporated company not made liable to taxation by title 4.

Application to assess taxes on legacies given by the will of William H. Vanderbilt, deceased.

Laws N. Y. 1885, c. 488, entitled "An act to tax gifts, legacies," etc., provides (section 13) that, in order to fix the value of property of persons whose estates are subject to the payment of the tax, the surrogate, on the application of any interested party or on his own motion, shall appoint some competent person as appraiser as often as and when occasion may require, whose duty it shall be forthwith to give such notice by mail, and to such person the surrogate may by order direct, of the time and place he will appraise such property, and at such time and place to appraise the same at its fair market value, and make a report thereof to the surrogate. Code Civil Proc. N. Y. 1884, provides: "An action upon a statute, for a forfeiture or penalty to the people of the state," must be brought within two years after the cause of action accrues.

Evarts, Choate & Beaman, for the Metropolitan Museum of Art and American Museum of Natural History. *Cephas Brainerd* and *Timothy Davidson*, for the Young Men's Christian Association. *Edmund A. Baylies*, for the Protestant Episcopal Missionary Society for Seamen. *Miller, Peckham & Dixon*, for St. Luke's Hospital. *Davies & Rapallo*, for the Domestic Foreign Missionary Society of the Protestant Episcopal Church. *Anderson & Howland*, for the executors. *William Ives Washburn*, for the New York Christian Home for Intemperate Men. *G. R. Schieffelin*, for the New York Protestant Episcopal City Mission Society. *Stearns & Curtis*, for the Home for Incurables. *Benjamin F. Dos Passos*, for the District Attorney.

RANSOM, S. This is a proceeding brought by the district attorney to have the tax assessed and fixed upon certain cash legacies given to various charitable institutions by the will of William H. Vanderbilt, deceased. The said decedent also left legacies to certain individuals, upon which the tax was assessed and fixed by an order of the surrogate entered in June, 1888, confirming the report of the appraiser, filed in December, 1887. No notice of the appraisement was ever given to the comptroller or district attorney, or to the institutions now sought to be subjected to the tax. It is clear that each was entitled to such notice. Judge EARL, in *Re McPherson*, 104 N. Y. 306, 1 N. E. Rep. 685, says: "When the section provides that he shall designate by order to whom the notice is to be given, it is necessarily implied that he shall designate all the persons entitled to notice. If he should omit to do so, it would be an error, on account of which any tax imposed upon the persons not notified or heard would be invalid as having been imposed without jurisdiction." It has been the uniform practice in this court for the district attorney to make the application himself on behalf of the state, and the statute seems to be clear upon that point. By section 17 of the act the comptroller is required, whenever he has reason to believe that any tax is due and unpaid, to notify the district attorney; and the district attorney, so notified, if he has

probable cause to believe a tax is due and unpaid, shall prosecute the proceeding, etc. He is a public official, and in these proceedings is directly representing the state. *In re Arnett*, 2 N. Y. Supp. 428.

There is nothing to show that the question of liability of these institutions was ever considered, except a statement by the appraiser in his report, that, with the exception of two legacies, "and certain other legacies to corporations, which are by law exempted from tax, the only bequests * * * consist of annuities," etc. This assumption of the exemption of these corporations is declared by the appraiser in his affidavit to be based upon the idea that the former surrogate considered that all corporations, religious and charitable, were exempt, but there is nothing to show that this question was ever really considered by the surrogate. The appraiser has no right to declare exemptions. See *In re Astor*, 2 N. Y. Supp. 680. That is the duty of the surrogate.

It is settled law that this tax is upon the passing of property, upon the privilege of receiving it, and not upon the property itself. See *In re Howard*, 5 Dem. Sur. 483; *Wallace v. Myers*, 38 Fed. Rep. 184. This being a tax upon the devolution of property, section 384 of the Code of Civil Procedure does not apply.

The liability of executors for the tax seems to be certain. Section 1 of the act provides that they shall be liable for any and all such taxes until the same shall have been paid. Section 6 requires an executor, having in charge or trust any legacy or property for distribution subject to said tax, to deduct the tax therefrom if it be money; and further provides that he shall not be compelled to deliver any specific legacy or property subject to tax until he has collected the tax thereon. Section 8 requires the payment to the comptroller, within 30 days, of any such sum retained for the tax; and further provides that the executor shall not be entitled to credit in his account, nor discharged from liability for such tax, until he shall produce a receipt sealed and countersigned by the comptroller. In was held in *Re McPherson*, *supra*, that the imposition and collection of this tax are simply incidents in the final settlement and adjustment of estates. That being so, the surrogate has power to compel the payment of the tax, as he has power to compel the payment of the legacy. I have already so held in *Re Prout*, 3 N. Y. Supp. 831.

It appears that on the 10th day of November, 1887, the executors instituted appropriate proceedings before my predecessor for the ascertainment of the tax, if any, upon all the property passing by this will. An appraiser was appointed by Surrogate ROLLINS, on the 10th day of November, 1887, "to appraise all the property which shall pass by the will of the said William H. Vanderbilt, deceased, and is subject to taxation pursuant to chapter 483 of the Laws of New York of 1885. It is further ordered that the said appraiser make a report thereof, in writing, to the surrogate, of the value of the property passing under each legacy contained in said will, which is subject to taxation as aforesaid; together with a statement of the name of parties whose interests are subject to the said tax, the amount thereof, and of the tax thereon, and of the facts upon which such appraisal and report shall be founded; and that he give at least five days' notice by mail to the said executors, and to each person who is a legatee as aforesaid, of the time and place he will appraise the property in which the persons so notified shall be interested." The appraiser filed his report on the 23d day of December, 1887, and the same came regularly before me for confirmation. No objection was made by the comptroller, (to whom due notice of the motion to confirm was given,) and the report was confirmed by order entered June 12, 1888, which order is as follows: "On reading and filing the report of Thomas Harland, the appraiser herein, and after hearing Mr. Henry H. Anderson, of counsel for the executors of William H. Vanderbilt, in support of said report, and no one appearing in opposition thereto, it is ordered, first, that said report is, in all re-

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spects, confirmed. * * * The appraiser reported the names of persons to whom property had passed by the will, and also reported that such was the property taxable under the act. The confirmation of his report was an adjudication of that question as to protect the executors, and they are personally liable for the tax. The state must look to the legatees.

I now consider the claims to exemption presented by these institutions separately. By chapter 253, Laws 1870, the property of St. Luke's Hospital declared to be exempt from taxation or assessment. Under the authority of *Catlin v. Trustees*, 113 N. Y. 133, 20 N. E. Rep. 864, I find that the said Luke's Hospital is exempt from this tax.

The Protestant Episcopal Church Missionary Society for Seamen claims exemption under the general act exempting the real and personal property of every poorhouse, almshouse, and every house belonging to a company incorporated to improve the moral condition of seamen. I find this claim good, and declare it exempt.

The New York Protestant Episcopal City Mission Society claims exemption as an almshouse. It maintains a home and reading-rooms, etc., and provides lodgings and meals free. It also maintains a day nursery, for which it makes a small charge. This takes it out of the domain of pure charity, and makes it a house wholly appropriated to the poor. I have already decided in several cases that a society, to be exempt from this tax as an almshouse, must be absolutely free,—all benefits given gratuitously. I must therefore hold the society subject to the tax.

The Young Men's Christian Association has, by the court of appeals, (*Association v. Mayor, etc.*, 113 N. Y. 187, 21 N. E. Rep. 86,) been declared not to be entitled to exemption under any special act. Only its real property on the corner of Twenty-Third street and Fourth avenue is exempt; and, as the court expressly held that portion known as the "Bowery Institute" not entitled to exemption from taxation, the claim of exemption in this case cannot be maintained.

The Domestic & Foreign Missionary Society of the Protestant Episcopal Church was a party in a suit similar to the case of *Catlin v. Trustees*, supra, and the court of appeals declared it subject to this tax. *Catlin v. Society*, 113 N. Y. 625, 20 N. E. Rep. 867.

The Christian Home for Intemperate Men claims exemption under a special act, (Laws 1881, c. 546, as amended by Laws 1888, c. 523, § 7,) which exempts from local taxation or other purposes all the real and personal property of this corporation so long as it or its income is used for the purpose for which it was incorporated. Judge ANDREWS, in *Catlin v. Trustees*, supra, says: "It has never been the general policy of the state to wholly exempt the property, either real or personal, of incorporated churches, colleges or charitable institutions from taxation. * * * The policy of complete exemption, where adopted, has been accomplished through special acts applicable to particular and specified corporations." The special act relied upon here simply exempts from local taxation or other purposes, those purposes being evidently local purposes, such as assessments, etc., and could not have been intended to extend to taxation by the state. This institution makes a charge for patients committed to its home, and that takes it out of the almshouse class. It is liable.

The real estate owned by the Home for Incurables is declared to be exempt from all taxation by section 824 of the consolidation act, (subdivision 5, L. 1882.) That exemption does not include personal property. Nor can this institution claim exemption as an almshouse, as it charges for the board of patients it receives. It is liable.

The General Theological Seminary, New York Bible & Common Prayer Book Society, the Moravian Church of Staten Island, and the Board of Trustees of the Vanderbilt University of Nashville, Tenn., have submitted

claim to exemption. Under the ruling in *Catlin v. Trustees, supra*, they are subject to the tax.

The Metropolitan Museum of Art and the American Museum of Natural History each claims exemption under the Revised Statutes (Banks' 8th Ed. vol. 2, p. 1088, subd. 7, § 4,) which exempts "the personal estate of every incorporated company not made liable to taxation on its capital in the fourth title of this chapter." Section 1 of that title reads as follows: "All moneyed or stock corporations deriving an income or profit from the capital or otherwise shall be liable to taxation on their capital in the manner hereinafter prescribed." These institutions plead no special act of exemption, but only the general provision. In *Catlin v. Trustees, supra*, Judge ANDREWS lays down the general rule on the question of exemption: "When, therefore, a corporation not exempted from taxation by its charter or some special enactment, but governed by the general law, claims exemption, it must be able to point to some provision in chapter 13, or to some amendment, which takes it out of the general rule declared by section 1, above quoted, or else its claim must be disallowed."

If, as was held in that case, the words "incorporated company" were intended to designate only business and stock companies, and if the definition of the Revised Statutes that "moneyed corporations" applies solely to banking or loan institutions and insurance companies, then these two institutions do not come under that head, and are not exempt. But should they come within the definition of the term "incorporated company," and are therefore moneyed or stock corporations, they would be equally subject; for section 1, tit. 4, c. 13, of the Revised Statutes, declares that all such corporations, deriving an income or profit from their capital or otherwise, shall be subject to taxation. These institutions derive an income from membership of various degrees and dues; from admission fees charged on certain days of each week; from the sale of books, specimens, etc.; and from the investments of property left them by will, etc. If this is not income or profit derived from capital, it is certainly profit or income derived otherwise, and therefore they are not exempt. These two institutions come clearly within the class subject to the tax, under the ruling in *Catlin v. Trustees, supra*. Submit order assessing and fixing the tax in accordance with this decision, notice of settlement of order to be given.

PEOPLE v. SULLIVAN *et al.*

(Court of Over and Termtnr, Albany County. January, 1888.)

ELECTIONS AND VOTERS—FALSE RETURNS—INDICTMENT.

Under Laws N. Y. 1880, c. 56, § 18, (Election Code, § 244,) declaring it an offense for an inspector of election to make or attempt to make a false canvass of the ballots cast at an election, or any false statement of the result of any canvass, an indictment against inspectors of election for attempting to make a false statement of the returns several days after the election, charges an offense, though they made a statement of the returns on the election day, as required by law, and though section 304 of the Election Code provides that, on making up such return on election day, the board of inspectors shall be dissolved.

Indictment against John B. Sullivan and Arthur Main, inspectors of election of the town of Watervliet, in the county of Albany, for attempting to make false returns. Defendants demur to the indictment.

Asst. Dist. Atty. Hamilton, for the People. *John H. Gleason*, for defendants.

MAYHAM, J. This indictment charges the defendants with attempting to make, and making, a false statement of the result of the count of the votes cast at the eleventh election district of the town of Watervliet, in the county of Albany, at a general election held therein on November 8, 1887, and deliver-

ing it to the supervisors as and for the regular returns of said district, in violation of the provisions of section 18, c. 56, of the Laws of 1880. The indictment also charges that these defendants, with one James Moffatt, all acting as such inspectors of election, duly proceeded to and did canvass the votes cast in and for said election district at such election for the office of senator, and did duly declare and announce the result of said canvass so made as aforesaid by them; that on November 14, 1887, these defendants, assuming to act and acting as such inspectors as aforesaid, and being such inspectors as aforesaid, and in disregard of their duties as such inspectors, willfully, maliciously, and intentionally attempted to make and made a statement of the result of the canvass so made, announced, and declared by them as aforesaid, and which they then and there signed as such inspectors as aforesaid, which they then and there delivered to one Richard Scully, who was the supervisor of the town of Watervliet, duly qualified and acting as such, as a certificate, which statement so delivered as aforesaid, at the end thereof, was a certificate, duly made and subscribed by the defendants as inspectors as aforesaid, that such statement is correct in all respects, which defendants delivered said Scully as and in performance of their duties as such inspectors, and received by said Scully as and in the performance of his duty as supervisor. The indictment also avers that said certificate was so delivered to the supervisor within 24 hours after it was signed by the defendants, and set out a copy of the certificate. The indictment then charges that such certificate was not a true and correct statement of the result of the canvass as made and declared by the inspectors of election at the time of the canvass of said votes, but was a false statement of the result of said canvass, and the same was intentionally, willfully, and wrongfully attempted to be made, subscribed, signed and certified by the defendants as and for a false statement of the result. The indictment further charges that the statement and certificate made by the defendants on November 14th, was, as each of the defendants well knew, false, and that it declared that Norton Chase received 231 votes for senator, whereas, as they each well knew, said Chase did not, as the result of said canvass, receive 231 votes, but received 186 votes, and no more, and that said statement and certificate so made by the defendants is and is false, as the defendants each well knew, in that it declares as the result of such canvass that Henry Russell received 237 votes for senator, when in fact, as each of the defendants well knew, said Russell, as a result of such canvass, received 282 votes.

The above statement contains enough of the substance of the charges and allegations in the indictment to present the question raised by the defendants' demurrer to this indictment. But defendants demur to this indictment on the ground that the whole indictment, read together, does not charge the commission of a crime under the statute under which the same is made. The argument is that, as the canvassers were charged with the duty of canvassing the votes on November 8th, the day on which the election was held, and the indictment shows upon its face that the board of canvassers performed that duty on that day, and declared the result, their powers as canvassers were on that day all spent, and that they, as canvassers, on the completion of that duty, became and were *functus officio*, and any acts of them, or of any of them, at that time, relating to said canvass or certificates, were but the acts of private citizens, and should not constitute a crime committed by inspectors of election.

The language of the section of the statute under which this indictment is found is as follows: "Every inspector of election or clerk of the poll, who shall intentionally make, or attempt to make, any false canvass of the votes cast at an election, or shall intentionally make, or attempt to make, any false statement of the result of any canvass, though not signed by a majority of the inspectors of election, shall be guilty," etc. The learned counsel for the

defendants relies chiefly upon the decision of the special term of this court, which was affirmed by the general term, in the case of *People v. Canvassers*, 20 Abb. N. C. 19. In that case the learned justice who delivered the opinion at the special term, which was affirmed by the general term on appeal, states the question before him as follows: "The simple question is whether the return of November 14th is to be considered by the board of canvassers in making up their result." He then proceeds, in a very clear, logical, and conclusive argument, to demonstrate that, for the purpose of canvassing the votes cast at the election, the powers of the canvassers were spent when they declared the result on the day of the election. That was the only question before him for adjudication, and that was all he assumed to decide. The question discussed in that case was whether the return made under any other circumstances than that provided for statute could be taken and regarded by the board of county canvassers, except the certificates of the count as made by the board of canvassers of an election district at the time of the canvass, under the forms of law, and, as evidence that they cannot be, refers to their statutory duty, after the count is completed, to destroy the ballots. That duty performed, he holds that the office, for the purpose of a canvass, is *functus officio*. But it will be seen by an examination of the statute that, for other purposes than those of the counting the votes and declaring the result, the official functions of those officers continue. Section 801 of the Election Code provides for preparing and signing a certificate of the result of the canvass. Section 802 of the same Code provides for making copies of the certificates. Section 808 provides for the inspectors, or some one of them, filing the poll-list in the town-clerk's office. Section 304 provides that the remaining ballots not pasted on the returns shall be destroyed. Section 305 provides that the original certificate shall be delivered by the inspectors, or one of their number, within 24 hours after it shall have been subscribed, to the supervisor, or some other officer designated therein. It is true that section 304 provides that after the ballots shall be destroyed the board of inspectors shall be dissolved. But I think it does not follow from that provision that the office of inspector held by the incumbent ceases. The office of inspector of election is an elective office created by statute, and elected at annual town-meetings; and, while they are ministerial officers, and must act strictly within the limits prescribed by statute, I do not think it can be maintained that, because they have no power to make false or fictitious returns, they can claim immunity from punishment for such an act simply because the act was illegal or unauthorized. Suppose one or all of the inspectors, after the canvass, changed the declared result, and substituted, fraudulently, another and different one from the county canvassers', can it be said that they are not liable under section 18, c. 56, Laws 1880, (section 244 of the Election Code,) simply because the unlawful act was done after they adjourned or dissolved as a board of inspectors? It seems to me not. Again, the board of county canvassers frequently find the returns of inspectors defective, and return them for correction. Suppose on such occasion the inspectors, although days have elapsed since the canvass was made, fraudulently change the canvass or result, could it be said that they were out of office, and therefore not amenable to the provisions of section 244 of the Election Code? I think not. If I am right in my conclusions, then the indictment in this case charges a crime under the statute referred to. The demurrer must be overruled, and the defendants must plead to the indictment upon the merits.

MCGILL v. WEIL.

(Erie County Court. April 14, 1890.)

1. WRITS—AMENDMENT OF SUMMONS—DEFENDANT'S NAME.

Code Civil Proc. N. Y. § 723, which provides that, in pursuance of justice, a court may, at any stage of the action, amend any process by correcting a mistake in the name of a party, does not authorize the court to correct a mistake as to defendant's name in the summons, unless it has in some way obtained jurisdiction of his person; and where a summons issues from justice's court against defendant by a wrong name, and he does not appear, the judgment against him is void, though before rendition the summons was so amended as to give his true name.

2. JUDGMENT—COLLATERAL ATTACK—JURISDICTION.

A defendant who was served with summons under a wrong name, and did not appear, may raise the question of jurisdiction in supplementary proceedings, though he has not appealed from the judgment.

Action by William D. McGill against Gustavus Weil. Plaintiff had judgment, and now moves to punish defendant for not obeying an order in supplementary proceedings.

John T. Gardner, for plaintiff. *Ullman & Ullman*, for defendant.

SEEVER, J. A summons was issued out of a justice's court in favor of plaintiff, and against the defendant, by the name of Augustus Weil, and the same was personally served on defendant, Gustavus Weil. On the return the defendant did not appear, nor did any person in his behalf. Upon plaintiff's motion, the justice amended the summons by changing the name of Augustus to that of defendant's true name, Gustavus J. Weil. Judgment thereupon entered in favor of plaintiff against the defendant in his proper name. A transcript was filed in the county clerk's office, and execution issued, and returned unsatisfied, and an order in supplementary proceedings was granted, and defendant required to appear for examination before a referee. The defendant appeared in person and by attorney before said referee and refused to be sworn, on the ground that the judgment was void, as justice had no jurisdiction to change the name of the defendant in the summons from Augustus to Gustavus. An order was thereupon obtained for judgment against defendant to show cause why he should not be punished. Upon the foregoing facts, I am of the opinion that the defendant cannot be punished. The justice had no jurisdiction over the defendant. He, having been sued under a wrong name, was not bound to appear. *Gardner v. Kraft*, 52 How. Pr. 177; *Hoffman v. Fish*, 18 Abb. Pr. 76; *Farnham v. Hildreth*, 32 Barb. 277; *v. Hindson*, 6 Term R. 284; *Wilks v. Lorck*, 2 Taunt. 400.

The plaintiff relies upon the case of *Brace v. Benson*, 10 Wend. 214, and cases therein cited. I do not see that this case decides anything more than that the name of a plaintiff can be changed in the process. Of course, a judgment can be done for the justice has jurisdiction by the presence of the plaintiff. I can find no case where, in the absence of the defendant, the name of the defendant was changed in the process. The plaintiff also relies upon section 723 of the Code of Civil Procedure, which states: "The court may, upon motion, at any stage of the action, before or after judgment, in furtherance of justice, * * * amend any process * * * by correcting a mistake in the name of a party." Justices' courts possess the same power in amending their proceedings that courts of record have, but section 2884, however, in my judgment, does not permit any court to amend its proceedings by correcting a mistake in the name of a defendant, unless it has obtained in some way jurisdiction over the person of the defendant.

Section 2884 of the Code of Civil Procedure provides a way to sue a person whose true name is unknown, to-wit: "Where the plaintiff is ignorant of the name, or part of the name, of a defendant, that defendant may be designated in the summons, * * * by a fictitious name, or by so much of his

as is known, adding a description, identifying the person intended. * * * When his name, or the remainder of his name, becomes known, the justice, before whom the action is pending, must amend," etc. In *Crandall v. Beach*, 7 How. Pr. 271, Justice STRONG says: "It is not allowable to a plaintiff to use a fictitious name at his discretion, but only where he is ignorant of the true name." In *Aaron v. Lee*, 11 Wkly. Dig. 528, the court says: "That where a person is sued by a fictitious name, it must appear in the summons that the name is fictitious." Service of a summons upon a party by a wrong name does not give the court jurisdiction over his person, and his appearance cannot be compelled. *Cole v. Hindson*, 6 Term R. 234.

The plaintiff also claims that the defendant should have appealed from the judgment; that he cannot now raise the question in these proceedings. I cannot agree with the plaintiff upon this proposition. The justice had no jurisdiction to render a judgment against the defendant, and the defendant is always at liberty to show a want of jurisdiction. *Craig v. Town of Andes*, 93 N. Y. 405; *Kamp v. Kamp*, 59 N. Y. 215; *Ferguson v. Crawford*, 70 N. Y. 259; *Broadhead v. McConnell*, 3 Barb. 175. The motion to punish the defendant must be denied.

In re DUNSCOMB'S WILL.

(Supreme Court, General Term, Second Department. May 5, 1890.)

WILLS—PAYMENT OF LEGACIES.

An affidavit which fully states the facts, filed with a notice of a motion to require the administrator to pay a legacy, is a sufficient "petition" to authorize a citation, as prescribed by Code Civil Proc. N. Y. §§ 2717, 2718, prescribing the procedure to compel payment of legacies.

Appeal from surrogate's court, Kings county.

The application of Alexander T. Cole, as administrator of Eva Cole, to compel the executors under the will of Eliza Dunscomb to pay to him a legacy bequeathed to his intestate by said Eliza Dunscomb, was dismissed with \$10 costs, and he appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Martin E. Halpin, for appellants. *H. Hendrickson*, for respondent.

BARNARD, P. J. Alexander T. Cole, as administrator of the estate of Eva Cole, made a motion in the surrogate's court based upon an affidavit stating that Eliza Dunscomb by her will made a bequest of \$200 to Eva Cole; that the Dunscomb will had been proven on the 5th day of February, 1887, and that the estate had the money with which to pay the legacy; that the executors of the Dunscomb will refused to pay the same on a personal request made to them by the Cole administrator. There was no opposing affidavit. The court denied the motion upon the ground, apparently, that the application should have been by petition and citation. This is the correct method of procedure. Code Civil Proc. §§ 2717, 2718. The affidavit which accompanied the notice of motion was sufficient as a petition to authorize a citation. The notice of motion did no harm. The affidavit, after stating the facts, asked for such relief as the affiant was entitled to upon the facts stated. The order should therefore be reversed, and the proceeding remitted to the surrogate for further action, without costs on this appeal. All concur.

PEOPLE *ex rel.* CROWLEY v. SUPREME COUNCIL, CATHOLIC BENEVOLENT LEGION.

(*Supreme Court, Special Term, New York County. June, 1889.*)

INSURANCE—MUTUAL BENEFIT—SUSPENSION OF MEMBERS.

The constitution of a benevolent association provided that notice of assessments should be sent by the supreme council to the assessment collectors of subordinate councils, who should notify the members; that the notice to the members should bear the date of the notice to the assessment collector; and that, unless a member paid the assessment within 40 days from the date of the notice, he should "stand suspended from the council." *Held*, that an order suspending a subordinate council on the ground that its members "stood suspended" because of their failure to pay assessments within 40 days from the date of the notice from the supreme council is void where it appears that, through the negligence of the assessment collector, the members never received the notice.

Application by Dennis Crowley for *mandamus* to the supreme council, Catholic Benevolent Legion, to reinstate him as a member of a subordinate council of respondent. The subordinate council of which relator was a member was suspended by the supreme council on the ground that its members stood suspended for failure to pay various assessments which had been levied. The assessment collector of the subordinate council neglected to give to the members of his council notices of assessments made by the supreme council. When an assessment was made, a notice was sent from the supreme council to the collectors of the subordinate councils, who were thereupon required to give notice to the members of their several councils. The constitution, after prescribing the form of the notice, and that its date should be the same as the date of the notice received from the supreme council, provided that "each member shall pay the amount due within forty days from the date of said notice. Any member failing to pay such assessment within forty days shall stand suspended from the council." The supreme council required the members of the suspended council to be re-examined before it would reinstate the council, and relator failed to pass the examination.

George C. Lay, for relator. *John C. McGuire*, for respondent.

BARRETT, J. The question here is whether the relator was suspended from membership, *ipso facto*, because of the non-payment of an assessment within 40 days from the date of the call. In my judgment, he was not. Under the laws governing the respondent, the relator was entitled to notice of the assessment; and, upon well-settled principles, there should be no forfeiture without such notice. It is contended that the respondent, the supreme council, was only bound to notify the subordinate council of which the relator was a member of the calling of the assessment, and that the member is thereupon bound, under pain of forfeiture, to pay his share within the specified time, whether he receives notice from the collector of his subordinate council or not. This is not a fair or just construction of the section in question. The notice provided for in this section to be given by the collector of the subordinate council to the member is part of the respondent's original law. The member has a right to rely upon the due execution of the provision therein incorporated, and upon the performance by the designated official of the duty thus imposed upon him. Even the form of the notice is prescribed by the supreme council, and the member is to pay his share of the assessment within 40 days from the date of this notice. The latter provision plainly implies the actual possession of the notice by the member. Else how is he to know the date? By the wording of the section, the member must pay within 40 days from the date of the notice to be given by the collector. The respondent claims that the member must so pay, or stand suspended, even if the collector, after preparing and dating the notice, should put it in his pocket, and lock it up. The 40 days, on this theory, run from the date of the undelivered paper.

Of course, this will not answer. The contention that the 40 days run from the date of the original notice given by the supreme to the subordinate council is equally untenable. That notice has no bearing upon the relations of the individual member to the subordinate council, nor, indeed, upon his relations to the supreme council, further than as he is component part of this subordinate council. It bears only upon the relations of the subordinate council to the supreme council; and provision is expressly made in section 9, subdivision 2, for the consequences to such subordinate council of non-compliance with the call. It is conceded that the subordinate council was not suspended because of the non-payment by it of the assessment called by the supreme council. Nor could it have been so suspended, in view of the receipt by the supreme council of the \$66 ascertained upon full investigation to be the entire amount due. The subordinate council was therefore, in the view above taken of the rights of members, illegally suspended; for the members complained of were not in bad standing. They never "stood suspended," under the constitution and laws of the respondent, and the requirement with regard to a further medical examination was authorized. It follows that the relator is, and has been throughout, a member in good standing, and that he is entitled to the peremptory *mandamus* asked. Judgment for the relator accordingly, with costs.

BAKER *et al.* v. ZIEGLER.

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

EQUITY—RESCISSON—PLEADING.

A complaint to rescind an agreement for fraud and for damages, which offers to reassign and deliver the property acquired, should be upheld even though complete restoration is impossible.

Appeal from special term, Kings county.

Action by James H. G. Baker and William F. Baker against Louis Ziegler. From a judgment dismissing their complaint the plaintiffs appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Poor & Duffy, (Walter S. Poor, of counsel,) for appellants. *Charles J. Patterson*, for respondent.

BARNARD, P. J. The merits of this action were not tried. The action was brought to rescind an agreement for fraud, and for damages. On the 1st December, 1888, the plaintiffs entered into an agreement with the defendant whereby the plaintiffs purchased a kindling-wood business, with the stock of wood on hand, and the lease of the premises, with the good-will of the business, for \$9,000. Three thousand dollars was paid in cash, and notes given for \$6,000, with a chattel mortgage as security. The plaintiffs aver that the defendant falsely, and with intent to deceive them, misrepresented the extent of the business, the amount of the profits, the quantity of bundles of kindling-wood a cord would make, and the capacity of drying room to dry wood; that the representation was made to defraud, and did defraud, the plaintiffs into making an agreement. The plaintiffs on the trial gave evidence tending to deny the same. As it appears that the plaintiffs had used up the stock of wood on hand, and continued the business down to the time of the trial, in February, 1889, the court dismissed the complaint because the plaintiffs had put it out of their power to make restoration, and therefore this action could not be maintained.

The appeal presents simply the question of the accuracy of this ruling. The plaintiffs were entitled to recover their damages for the fraud, even if they were not entitled to rescind because it was out of their power to restore. All the facts showing a cause of action were given; and, if the facts stated in the complaint entitled the plaintiffs to relief, they would be entitled to it without regard to the names in the complaint. *Getty v. Deolin*, 54 N. Y. 408. The

complaint was one to rescind, and offered to reassign and deliver the property acquired, and such a complaint was upheld even where complete restoration was impossible. The court of appeals, in *Gould v. Bank*, 99 N. Y. 333, 2 N. E. Rep. 16, use this language: "But that one guilty of a fraud obtained complete immunity because time or circumstance had made impossible a restoration of the parties to their original condition seemed such a reproach to the law that we added a statement of the settled and undoubted rule that though one situated like the plaintiff may not be able to rescind, he still has ample remedies. 'He may keep what he has received, and sue to recover damages for the fraud, or he may commence an action in equity to rescind and for equitable relief, offering in his complaint to restore in case he is not entitled to retain what he has received.' " Under this decision, the plaintiffs were right in their action in equity. They could not of their own act rescind for that requires restoration; but they may offer to restore, and have the complaint to rescind, when the whole controversy will be before the court. Whatever it is right that plaintiffs restore will be decreed in that action. The judgment should therefore be reversed, and a new trial granted, with costs abide event.

PEOPLE v. O'DONNELL.

(Supreme Court, General Term, Fourth Department. November, 1887.)

1. INDICTMENT AND INFORMATION—DUPLICITY.

An indictment in several counts for the illegal sale of intoxicating liquors, each count of which avers a sale to a different person and at a different time, though in the same place, violates Code Crim. Proc. N. Y. § 278, providing that an "indictment must charge but one crime and in one form, except as in the next section provided," which section (279) declares that "the crime may be charged in separate counts to have been committed in a different manner or by different means; and where the acts complained of may constitute different crimes, such crimes may be charged in separate counts." FOLLETT, J., dissenting.

2. CRIMINAL LAW—APPEAL—JUDGMENT ROLL.

Where the appeal-book in a prosecution for unlawfully selling intoxicating liquors shows that defendant withdrew his plea of not guilty, and interposed a demurrer, which was overruled, and that he was convicted, and sentenced to pay a fine, there is a sufficient judgment, within Code Crim. Proc. N. Y. § 485, which provides what the judgment roll shall contain.

Appeal from court of general sessions, Chenango county.

Martin O'Donnell was convicted of selling, without a license, intoxicating liquors in quantities less than five gallons at a time, to be drunk on the premises where sold, and he now appeals.

Argued before HARDIN, P. J., and FOLLETT and MARTIN, JJ.

John W. Church, for appellant. George P. Pudney, Dist. Atty., for the People.

MARTIN, J. The question involved in this action arises upon a demurrer to an indictment against the defendant for selling strong and spirituous liquors in quantities less than five gallons at a time, to be drunk on the premises, without having license therefor. The demurrer was on the ground that more than one crime was charged in the indictment. The indictment alleges sales by the defendant on March 1, 1885, at the town of McDonough, Chenango county, N. Y., to several persons named; also sales at the same place August 26, 1885, to certain other persons named; and sales made on the 12th day of September, and on the 28th day of July, 1885, at the same place, still other persons named in the indictment. Before the enactment of the Code of Criminal Procedure, an indictment was not bad because of the joinder of separate and distinct misdemeanors, although of different penalties, and a general judgment upon it was good where the sentence was single, and appropriate to either of the counts upon which a conviction was had. *People*

v. *Dunn*, 90 N. Y. 107. But the Code of Criminal Procedure provides that the indictment "must charge but one crime and in one form," except the crime may be charged, in separate counts, to have been committed in a different manner or by different means; and, if the acts complained of may constitute different crimes, such crime may be charged in separate counts. Code Crim. Proc. §§ 278, 279. Even since the adoption of the Code, when the act complained of may constitute different offenses, such offenses may be charged in separate counts of the indictment. *People v. Infield*, 1 N. Y. Crim. R. 146; *People v. Kelly*, 8 N. Y. Crim. R. 272. So an indictment containing varying allegations in different counts as to the manner and means of the commission of the crime, but which shows upon its face that those counts relate to but one and the same transaction, is good. *People v. Cole*, 2 N. Y. Crim. R. 108. The indictment may also state the acts constituting the crime in different counts, appropriate to meet the evidence which may be presented on the trial. *People v. Menken*, 8 N. Y. Crim. R. 233. In the case at bar the indictment charged the legal sale of spirituous liquors on at least four different occasions, and upon each occasion to entirely different persons. Each of these charges is made as an independent charge or count in the indictment. The indictment not only does not show upon its face that these separate counts related to the same transaction, but does show conclusively that each was a separate and distinct transaction. This indictment was, we think, obnoxious to the objection that it charged more than one crime. This view is sustained by the case of *People v. Upton*, 4 N. Y. Crim. R. 455. In that case the indictment, in separate counts, charged the defendant, an officer of a bank, with the offenses of overdrawng his account in different amounts and upon different dates. It was there held that the indictment was subject to the objection that it charged more than one offense, and was in violation of the prohibition of section 278, and for that reason was demurrable. It is true, it was held in that case that the defendant had waived the misjoinder of his appearance and plea of not guilty. In this case the plea of not guilty was withdrawn, and the objection was raised by demurrer, as provided by section 823, subd. 3, Code Crim. Proc. The indictment in that case was for a misdemeanor. Pen. Code, § 600. The crimes charged in the indictment in this case are also misdemeanors. We are of the opinion that the indictment in this case charged more than one crime, that it was demurrable on that ground, and that the court erred in overruling such demurrer.

The people, however, contend that no judgment has been entered in this action, and therefore that an appeal will not lie, and cite the case of *People v. Beman*, 22 Hun, 283, to sustain the contention. The appeal-book in this case shows that the defendant was permitted to withdraw his plea of not guilty, and that he demurred to the indictment; that his demurrer was overruled; that he was convicted, and sentenced to pay a fine of \$75 and stand committed to the county jail not exceeding 75 days until paid. This was, we think, a sufficient judgment, within the provisions of section 485, Code Crim. Proc., which provides what the judgment roll shall contain. The *Beman Case* was quite unlike this. In that case the demurrer was overruled, and judgment directed to be given for the people, unless the defendant should plead over; and it was there held that, there being no judgment, the decision overruling the demurrer could not be reviewed. For the error above pointed out the judgment and conviction should be reversed, and the prisoner discharged.

HARDIN, P. J., concurs.

FOLLETT, J. I cannot concur in holding that this indictment is demurrable because it charges that defendant made divers sales to divers persons on different occasions, in violation of section 14 of chapter 628 of the Laws of 1857. In that respect the indictment charges but one misdemeanor, to-wit,

the selling of liquor to be drank on defendant's premises without a license. *People v. Adams*, 17 Wend. 475; *Osgood v. People*, 39 N. Y. 449. Under such an indictment, if it be established that defendant violated section 14 by selling to divers persons on different occasions, but a single punishment can be imposed. *People v. Liscomb*, 60 N. Y. 559. But for another reason the demurrer must be sustained. It is a misdemeanor to sell strong spirituous liquors or wines, in quantitles less than five gallons at a time, without having a license therefor. Laws 1857, § 13, c. 628; *Foot v. People*, 56 N. Y. 321. It is also a misdemeanor to sell strong or spirituous liquors to be drank in the vendor's house or shop, or any outhouse, yard, or garden appertaining thereto, without having a license therefor. Laws 1857, c. 628, § 14; *Jefferson v. People*, 101 N. Y. 19, 3 N. E. Rep. 797. These sections describe different acts,—the thirteenth, selling; the fourteenth, selling for a special purpose,—and the acts constitute distinct misdemeanors. *Huffstater v. People*, 5 Hun, 23. The indictment contains five counts. The fourth count charges that July 28, 1885, the defendant violated the thirteenth section of chapter 628 of the Laws of 1857 by selling to divers persons spirituous liquors by the small measure. The other counts charge that March 1, 1885, July 28, 1885, August 26, 1885, and September 12, 1885, the defendant violated the fourteenth section of said chapter by selling to divers persons on each day spirituous liquors to be drank on his premises. Sections 278 and 279 of the Code of Criminal Procedure provide that (section 278) the "indictment must charge but one crime and in one form, except as in the next section provided." Section 279: "The crime may be charged in separate counts to have been committed in a different manner or by different means; and, where the acts complained of may constitute different crimes, such crimes may be charged in separate counts." These sections are not limited in their application to indictments for felonies; and the rule existing before the Code, that several misdemeanors might be joined in the same indictment when the same judgment was appropriate for all, was abrogated by the section above quoted. *People v. Upton*, 38 Hun, 107. The demurrer must be sustained, because the indictment charges a violation of the thirteenth section, and violations of the fourteenth section, which are clearly distinct misdemeanors. The judgment of the court of sessions should be reversed, and the demurrer allowed. More than two years having elapsed since the commission of the alleged misdemeanors, the defendant cannot be reindicted, (Code Crim. Proc. § 142, as amended by chapter 412, Laws 1887,) and he must be discharged, and his bail exonerated. Code Crim. Proc. § 328. Judgment reversed, and prisoner discharged.

HUGHES v. ORANGE COUNTY MILK ASSN. *et al.*

(Supreme Court, General Term, Second Department. May 12, 1890.)

1. NEGLIGENCE—DANGEROUS PREMISES.

Where a hole in the pavement in front of a stable occupied by defendant as lessee is left open by a person who was removing manure from the pit under the pavement, for which he had a yearly contract with defendant, defendant is liable to persons injured thereby.

2. DAMAGES—MEASURE FOR PERSONAL INJURIES.

In an action for personal injuries, a verdict for \$4,680 is not excessive where it is shown that before the accident plaintiff was a strong man, earning \$3.50 a day; that, in consequence of the injury, he is unable to work; that his condition is growing constantly worse; and that his breathing and heart action are affected, and his physician fixes eight years as the limit of his life.

Appeal from circuit court, Kings county.

Action for personal injuries, brought by Michael Hughes against the Orange County Milk Association and Michael McGirr. There was a verdict for plaintiff for \$4,680, and from the judgment entered thereon defendant association appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Glover, Sweezy & Glover, (Richard L. Sweezy, of counsel,) for appellant.
Charles J. Patterson, for respondent.

BARNARD, P. J. The defendant the Orange County Milk Association occupied premises in New York city as a stable. The defendant McGirr was under a yearly contract with the association to remove the manure therefrom. There was a pit under the sidewalk of the street, and the manure was taken from this pit, and carried away. The covering over the mouth of the pit was necessarily removed while the manure was being taken out. The hole was of considerable size, being three or four and one-half feet by three feet; the longer side being parallel with the street. The hole was seven or eight feet deep. On the morning of the 29th of December, 1887, the plaintiff was passing along this sidewalk. There was a strong wind blowing in his face, and it was quite dark, being about half past 6 o'clock. It was very cold. The sidewalk was very narrow, sufficient for only two men to walk abreast. The hole is some three feet from the curb-stone. The smoke from the manure was dense, and the wind blew it in the face of the plaintiff. The plaintiff saw the smoke, but did not know it came from an open hole, as there was manure outside. The plaintiff fell into the hole, and fell clear to the bottom of the pit, and was injured.

Assuming a cause of action, does it exist against the Orange County Milk Association, under these facts? The association was the lessee and in possession of the premises, and had entire control of the use, and mode of use, of them. The pit was not of itself a nuisance, but became so when it was left unguarded. The cases cited to show that a landlord who has hired premises with a coal-hole under the sidewalk, excavated by permission of the city, and well made, is not responsible for the neglect of a tenant who has entire possession, have no application to this case. *Wolf v. Kilpatrick*, 101 N. Y. 146, 4 N. E. Rep. 188, was a case where a stranger wrongfully broke the stone supporting the covering of the hole. The case of *Jennings v. Van Schaick*, 108 N. Y. 530, 15 N. E. Rep. 424, was a case where a house was rented in flats. A janitor lived in the basement. There was a coal-hole under the sidewalk, built by legal permission. The owner hired the janitor. He left the coal-hole open, and the court of appeals held the owner liable. This case is really much stronger against the defendant company, for it had the premises, and hired the man to remove the manure. This man was not a tenant, but a servant, of the company. The company was bound to see to it that the sidewalk was made safe while the hole was open. *Clifford v. Dam*, 81 N. Y. 52. If this is the correct view, the question of the accuracy of the rulings in respect to the admission of the New York city ordinances as to pits under sidewalks becomes immaterial. The ordinances merely provide for the safety of the open hole, and the defendants were bound to see to that without them.

If the evidence in support of the extent of the injury was credited by the jury, the verdict is fully supported. The plaintiff was a strong man before the accident, and was earning \$8.50 a day as a journeyman cooper. In consequence of his injury, his flesh has wasted away. He has no strength to go up-stairs without the aid of the banister. He cannot even walk the street for over a few minutes. He has been "laid off" from his employment because he cannot do the work, and his condition is growing constantly, but slowly, worse. He has trouble with his breathing, and his heart action is affected. The physician who attends him fixes eight years as his limit of life. It would be impossible for an appellate court to weaken this testimony, even if the rule in respect to appeals from verdicts on questions of fact permitted a review. The jury, on questions of fact, are only to be subject to review in extreme cases. This is not such a case, and the judgment should therefore be affirmed, with costs. All concur.

BUHLER *et al.* v. HUBBELL *et al.*

(Supreme Court, General Term, Second Department. May 12, 1890.)

1. JUDGMENT—*RES JUDICATA*.

Where judgments in actions involving the rights of the parties under a certain agreement are modified so as to leave open the question whether a certain clause in the agreement was abrogated, and neither party appeals therefrom, an objection that such judgments are a bar to a subsequent proceeding to determine whether the clause was abrogated is without merit.

2. APPEAL—FINAL ORDER.

After entry of judgment, an order was entered to the effect that the judgment was not to be deemed to determine whether a clause in the agreement between the parties involved in the action had been abrogated. The parties agreed to a reference to determine the question. The referee found that the clause was abrogated, and an order was entered to that effect. *Held*, that such order was in terms a final judgment, and appealable.

Appeal from special term, Kings county.

Action by Daniel Buhler and Elbert Stannard against Charles E. Hubbell, George A. Porter, Daniel W. Richards, and Morton B. Smith to enforce an agreement between all the parties to the action for the disposition and sale of certain vessels owned by the parties as tenants in common. There was judgment for plaintiffs, and the vessels were ordered sold. Subsequent to the entry thereof an order was entered to the effect that the judgment was not to be deemed to determine whether a clause requiring defendants Hubbell and Porter to pay plaintiff Stannard \$1,500 for taking charge of the breaking up of the ships had been abrogated. The parties agreed to a reference to determine that question. The referee reported that the clause had been abrogated, and plaintiff Stannard now appeals from an order overruling his exceptions to the report.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Townsend, Dyett & Einstein, for appellant. *Tracy, McLennan & Ayling* and *Payon Merrill*, for respondents.

BARNARD, P. J. The agreement between the parties contained this clause: "Hubbell and Porter are to pay fifteen hundred dollars as a bonus to Captain Stannard for taking charge of the breaking up of the ships." It was claimed by Hubbell and Porter that this clause was abrogated. The original judgment for distribution of fund, and settling rights of parties in other respects, left this question open, and it was referred by agreement to hear and determine. The referee found the clause abrogated, and the report was confirmed, and final judgment entered thereon. It appears that Hubbell and Porter commenced an action in Onondaga county, against the present plaintiffs and others, in respect to the same property referred to in this agreement, and their complaint was dismissed on the merits. This clause was not actually litigated, and the judgment as amended provided that the question of the abrogation of this clause be left open, and neither party be prejudiced by the judgment given. The original judgment was rendered in September, 1885, and the modification made in June, 1887. Both the judgment in Kings county and the Onondaga judgment left open this question, and neither party appealed from the order of reference in Kings county. The question is not *res adjudicata*. The parties were not the same. The adjudication of the \$1,500 clause was not actually litigated in either action. Neither party appealed from either judgment as modified by leaving open this clause for future debate and contest. No case, I think, holds that pleadings in an action are enough to permit a litigation on a certain question which was not made, and, when the judgment leaves the question open, is subject to the rule of law that a judgment binds parties and privies not only as to facts actuating litigation, but also as to those facts which might have been litigated in the action. The case is not one where the special term arrested a judgment pending appeal.

as was the case in *Genet v. Canal Co.*, 113 N. Y. 472, 21 N. E. Rep. 330; nor like *Bostwick v. Abbott*, 16 Abb. Pr. 419, where a judgment was a bar to a new action on the merits, but the court ordered that the judgment should not prejudice a new action. Here the judgments are so drawn as to leave out the very subject involved in the present proceeding. The judgment cannot be *res adjudicata* as to those matters it refuses to decide, and neither party appeal from the determination. The evidence supports the finding as one of fact. The consideration for the abrogation of the clause was that Hubbell and Porter should induce one Cleary, who had a joint interest with the parties, to sell out the same to the plaintiff Sherwood. Hubbell so testifies: "They were willing to abrogate or cancel the clause * * * if we should go to work in good faith, and help them out of their trouble with Cleary." The witness Porter stated that "the \$1,500 clause was not thoroughly understood to be abrogated." A witness, Smith, testifies that he heard Buhler say to Sherwood that the \$1,500 clause had been abrogated. Another witness, one Richards, testifies that he heard Sherwood claim that the agreement, except the \$1,500 clause, was still in force. There is direct proof going to sustain the clause, and a strong inference for the unreasonableness of the agreement, which was the consideration of the new agreement destroying the clause. The case on appeal is subject to the rule as to findings of fact. The dispute, when the testimony is so conflicting as it is in this case, must be decreed settled by the finding of the trial court therein. The order appealed from should therefore be affirmed, with costs. All concur.

MOTION TO DISMISS APPEAL.

BARNARD, P. J. There is no ground for dismissing the appeal shown in the moving papers. This case was tried, and judgment rendered thereon, on the merits, in March, 1887. In September following, an order was made to the effect that the judgment was not to be deemed to determine whether a certain clause in the agreement between the parties involved in this action was abrogated. In April, 1888, the parties agreed to a reference to determine this question. The referee found that the clause was abrogated. In January, 1889, the referee's report was confirmed, and an order made that the clause was abrogated, and that distribution of the fund involved be made on that basis. This order was appealed from by one of the plaintiffs. The motion to dismiss the appeal is based upon the fact that this order was not the final judgment. This is not well founded. The preceding judgment left this question to be determined in the action, and it was so determined. The order, in terms, granted a final judgment of distribution on the basis of this report. The question is merely technical. The judgment first entered settled rights which none of the parties question. The original evidence and judgment have no place on the appeal from this one subject, which was decided upon the reference. The order appealed from requires only the evidence given on this reference, and an appeal from this final order presents the only subject of controversy left. It was the final judgment so far as respects this appeal. Motion denied, without costs. All concur.

BALL et ux. v. BURLESON.

(Supreme Court, Special Term, Monroe County. June, 1889.)

HUSBAND AND WIFE—ACTIONS—JOINDER OF HUSBAND.

Laws N. Y. 1860, c. 90, as amended by Laws 1862, c. 172, authorizing a married woman to sue, in all matters relating to her separate property and for injury to her person or character, as if she were a *feme sole*, was repealed by Laws 1880, c. 245, § 1, subds. 30, 33. Code Civil Proc. § 450, provides that "in an action or special proceeding a married woman appears, prosecutes, or defends alone, or joined with other parties, as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate

property." Section 1906, relating to actions for slander, imputing unchastity to a woman, provides that, if plaintiff is married, the damages recovered are her separate property. *Held*, that an action against a physician for negligent and unsafe treatment of a married woman is properly brought in the names of the husband and wife jointly.

Action by H. C. Ball and Rose E. Ball, his wife, against Dr. Burleson, for alleged negligence and want of skill in setting said Rose E. Ball's broken leg whereby she was caused great suffering and was permanently injured. Defendant demurred on the ground that it was improper to join husband and wife as plaintiffs in such case, because the complaint showed a cause of action that was the separate property of said Rose E. Ball, and also on the ground that two causes of action were improperly joined.

J. F. Parkhurst, for plaintiffs. *John F. Little*, for defendant.

DAVY, J. The principal question raised by this demurrer is whether this action was properly brought by the husband and wife jointly to recover damages for personal injuries to the wife. Under the common law the husband was a necessary party, for the reason that the alleged control of interest in the claim was in him and the recovery was for his benefit, if he chose to reduce it to possession during his life-time. The marriage operated as an absolute gift in law to the husband of the goods and chattels and personal property of the wife. The husband and wife were treated as one person, as having but one will between them, and that will was moved and controlled by the husband. She could not make any contract or maintain an action in her individual name. Her husband must be a party in every action which she prosecuted or defended, and, when a judgment was recovered against them, an execution could be issued against the property of both. *Schouler, Husband & Wife*, §§ 141, 142; *Bertles v. Neuman*, 92 N. Y. 152; *Mann v. Marsh*, 10 How. Pr. 372, 375. This was the general rule of the common law in this state before the first enactment in 1848, known as "The Married Woman's Act," which removed the disability so far as to enable them to acquire, own and dispose of property the same as if unmarried; but that act did not give her the power to sue or be sued without joining her husband. Then followed the Acts of 1860, c. 90, as amended by chapter 172 of the Laws of 1862, which authorized and permitted a married woman to sue and be sued in all matters relating to her separate property, and to bring and maintain an action in her own name for damages against any person or body corporate, for an injury to her person or character, the same as if she were a *feme sole*. In no case prior to the statute of 1860 could a wife, in this state, sue alone for injuries to her person or character. At common law it was often necessary, however, to bring separate actions for recovery of the entire damage resulting from an injury to the person of the wife, in one of which the husband alone was plaintiff, and in the other the wife was joined. The husband, for example, was entitled to the loss of service of his wife, and for the expenses incurred in doctors and nurses in curing her of injuries; but, when damages were sought to be recovered for bodily pain suffered by the wife from such injuries to her person, she had to be joined with her husband as plaintiff in the action. By the provisions of that act the rule of the common law, so far as it related to actions for direct injuries to the wife, was changed so that the right to damages in such cases was transferred from the husband to the wife. And in cases arising between 1860 and 1880, the court held that a married woman might sue alone to recover damages for injuries to her person or character the same as if she were unmarried. The legislature in 1880 (chapter 245, § 3, subds. 36, 38, Laws 1880) repealed that part of the married woman's act authorizing her to bring and to maintain actions in her own name for injuries to her person and character, and I have not been able to find that any substitute was provided, except to a limited extent by section 1906 of the Code of Civil Pro-

cedure, which relates to actions of slander, imputing unchastity to a woman, and provides that if the plaintiff is married the damages recovered are her separate property. So that, with this exception, the law concerning actions for direct injuries to the person or character of a woman is left as it was prior to 1860.

It is claimed, however, by the learned counsel for the defendant, that section 450 of the Code of Civil Procedure, taken in connection with section 1206, changes the rule. Section 450 reads: "In an action or special proceeding a married woman appears, prosecutes, or defends alone, or joined with other parties, as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property." The second sentence of the above section was added in 1879. It is a rule of law well settled that the statutes changing the common law must be strictly construed, and the common law must be held no further abrogated than the clear import of the language used in the statute absolutely requires. The common-law relations, therefore, between husband and wife are swept away only by the express enactment of the legislature. Statutes are not presumed to make any alterations in the common law further than the act expressly requires. The courts in this state have held, in construing that provision of the married woman's act authorizing her to bring and maintain an action in her own name for damages to her person, that the services of the wife in the discharge of her domestic duties still belong to the husband, and in rendering such services she still bears to him the common-law relation, and, if injured or disabled from performing such services for her husband, the loss is his and not hers. But when she is carrying on a separate business, or is laboring for another person, the value of her services belongs to her, and not to her husband. *Filer v. Railroad Co.*, 49 N. Y. 47; *Coleman v. Burr*, 93 N. Y. 17, 28. In the case of *Fitzgerald v. Quann*, 109 N. Y. 441, 447, 17 N. E. Rep. 354, PECKHAM, J., in referring to section 450 of the Code of Civil Procedure, says: "The section, as it stood before the amendment, certainly rendered it unnecessary to join the husband with the wife, in cases affecting her separate property; and, unless the effect of the amendment be to state those cases where such joining is unnecessary, leaving it necessary in all other cases, it is difficult, if not impossible, to give any sense or meaning to the amendment. In our opinion such is and was intended to be the effect of the amendment, and, unless in cases affecting her separate property, a married woman should be sued with her husband." *Mangam v. Peck*, 111 N. Y. 401, 18 N. E. Rep. 617. The section of the Code referred to does not create a right of property, but simply provides for the enforcement of such rights as already exist. It does not give a married woman the property right of a *feme sole*, but merely enables her to enforce those property rights which she has as a married woman in the same way as if she was unmarried. Section 450 of the Code has not transferred this or any other property of the husband to the wife. This position is made still clearer by the fact that, where any one slanders a woman by imputing unchastity, the legislature made an express provision that, in case the plaintiff was married, the damages recovered shall be her separate property. The common law did the wife such great wrong that, as civilization advanced, it became so repugnant to common sense and justice that a wonderful revolution in public opinion took place in favor of the rights of married women. Mississippi, in 1839, was the pioneer state which passed the first American statute on the subject. This was followed by the Acts of 1846 and 1848 in this state, and since that period statutes have been passed in nearly every state in the Union, conferring upon the wife the power to acquire and hold in her own right property, both real and personal. While the acts in different states are by no means uniform in their provisions, yet they all have for their object the accomplishment of the same general purpose,—the protection of the married woman in her

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property rights from the control of an unfortunate and profligate husband and his creditors. The simplicity and good sense of these laws has had a powerful influence in moulding public opinion, not only in this country, but in England, in their favor; so much so, that in 1870 the English parliament forced by public opinion to break the unyielding common-law fetters which had impeded the liberties and rights of the married woman in that country centuries, and to pass an act pertaining to the powers and rights of married women very similar to ours. It is to be regretted that our own state after having been one of the pioneers in legislating in the interest of married women, should have, either intentionally or by mistake, repealed the provision of the married woman's act which gave her sole right to sue for injuries to her person or character. The legislature in this respect has taken long step backwards into the old fossil foot-prints of feudalism. It has stored that discrimination between husband and wife that originated in dark ages of the feudal system, when the husband maintained his authority by force, and when married women were treated by their husbands more as slaves than companions. In the most enlightened and polished ages of Roman jurisprudence the husband and wife were regarded as distinct persons, capable of holding distinct and separate estates. The wife was comparatively free from all civil disabilities. She was alone responsible for her own debts. She was competent to sue and be sued on her own contracts. The repealed portion of chapter 172, Laws 1862, which I have referred to, is retrograde, and in my judgment it does not commend itself to the people of the state. I trust that this error may be remedied in time by subsequent legislation, but until that is done, we must acquiesce in the law as it now exists. The statute law is the will of the legislature, and not the courts, and courts cannot interpret the intent of the legislature by the language expressed in the statute.

I have therefore come to the conclusion that the husband in this case was proper party to the action, and the defendant's demurrer must be overruled and judgment thereon ordered for the plaintiffs, with leave, however, to the defendant, upon the payment of \$10 costs, to withdraw his demurrer and answer the complaint.

WEBER v. LESTER et al.

(Supreme Court, General Term, Fifth Department. April 11, 1890.)

TESTAMENTARY POWERS—OPTION OF DONEE.

A devise of 20 acres of certain specified land, "or such other twenty (20) acres of any land of which I may die seised or may be agreed upon between" the devisee and the executors, leaves it to the option of the executors to agree on other land and where the land specified has been sold under a mortgage during the lifetime of the testatrix, the executors cannot be compelled to exercise the power. *LETT, J.*, dissenting.

Appeal from special term, Erie county.

Action by Elizabeth J. Weber against John N. Lester and others to construe the will of Christiana Farthing, deceased. The opinion delivered on special term was as follows:

"*DANIELS, J.* By that part of the will of Christiana Farthing that now been made the subject of controversy, she devised to her nephew, defendant John N. Lester, 'for and during his natural life, but no longer than twenty (20) acres of land, situate, lying, and being in said town of V. Seneca, at the south-west corner of Abbott road and Wells road, so called, to be divided and set off to him as soon after my death as the same can well be done, in as nearly the form of a square as may be, or such other twenty acres of any land of which I may die seised as may be agreed upon between my said nephew and the executors of this, my last will and testament; I hereby will and direct that said executors shall execute and make, at the expense of my estate, and deliver to said John N. Lester, a proper and sufficient

instrument in writing, under their hands and seals, and by them duly acknowledged, so as to entitle the same to be recorded, in and by which they shall designate and describe, by metes and bounds, the twenty (20) acres of land so set off and allowed to said John N. Lester.' The testatrix further directed that the twenty acres in this manner mentioned should become and be disposed of as part of her residuary estate, in case her nephew, John N. Lester, should die before or after her own decease without lawful issue; but, in case he died leaving lawful issue, then the twenty (20) acres were devised in remainder to such issue. He has survived the executrix, and also has lawful issue, who are defendants in this action.

"But, after the making of her will, she made and executed a mortgage upon the land, which included the twenty acres at the south-west corner of the Abbott and Wells roads; and, default having been made in the payment of the debt secured by the mortgage, it was foreclosed, and the land described in it was sold under the judgment in the foreclosure action to a person other than the testatrix. This sale was made in 1879, near two years before her own decease. It is entirely clear that this incumbrance, foreclosure, and sale deprived the devisee, John N. Lester, and his issue, of the twenty acres referred to at the south-west corner of Abbott and Wells roads. As to that there can be no possible question, and no absolute right was devised to him or them to any other twenty acres of land owned by her. Neither did she devise to him or them any other twenty acres in case her title to the land at the corner of these streets should be for any cause extinguished. But what she did direct was that he should have any other twenty acres of land than those in this manner mentioned, which he and her executors might agree upon, of which she might die seised. She gave no positive or mandatory directions to substitute any other twenty acres for those first mentioned by her. Neither did she direct her executors to set off any other twenty acres in case her title to those at the corner of these roads should for any cause fail. If she had done either, then the direction could be carried into effect by the decree of a court of equity. That would have created an imperative power in trust, and such powers the statute has empowered this court to maintain and enforce. But all that the testatrix has done by way of substituting another for the twenty acres by her described has been to empower the executors and her nephew to agree to make that substitution. She has provided the power, without directing its execution. Whether it shall be executed or not has been left to the mere volition of these parties. It is the power to agree only, and the court has no authority to adjudge that they shall agree as long as the testatrix has not directed that they must, or in any other manner created the obligation that they shall agree. Whether they should agree has been left optional. That is the extent of the power created, and the court has received no authority whatever to extend it, but its duty consists wholly in maintaining and carrying into effect the intention as it has been disclosed; for a power whose execution or non-execution has been expressly made to depend upon the will of the grantee has been excepted from the compulsory interference of the court. 3 Rev. St. (7th Ed.) p. 2191, § 96. It is the other classes of powers that are mandatory, and the court has been empowered to enforce.

"This conclusion is more in harmony with the probable intention of the testatrix than any other that can be placed either upon her language or conduct, for she must have been aware of the sale in the foreclosure suit of the twenty acres at the corner of the two roads under the mortgage placed by herself upon it; and, if she had intended that her nephew should certainly have twenty acres of her other land in place of these, she would probably have indicated the existence of that intention by some subsequent and equivalent testamentary act. That she did not do, and the omission confirms the conclusion that it was not her intention that this devisee should surely, in the

event that occurred, still become entitled to any other twenty acres. The executors having declined to make this agreement, the court has not been invested with authority compulsorily obliging them to enter into it. This is in harmony with the manner in which the testatrix has expressed and defined the power which might be exercised, and conforms to the statute, as well as decided authorities. *Vandemark v. Vandemark*, 26 Barb. 416; *McNaughton v. McNaughton*, 34 N. Y. 201; *Hull v. Hull*, 24 N. Y. 647. Judgment will therefore be directed to the effect that neither John N. Lester nor his children have any title or interest in the land to be affected by this action. The form and findings will be settled on notice to the attorneys for the defendants."

Judgment was entered in accordance with this opinion, and defendants appeal.

Argued before DWIGHT, P. J., and CORLETT and MACOMBER, JJ.

Tracy C. Becker, for appellants. Wadsworth & Loveridge, for respondent.

PER CURIAM. Judgment affirmed on opinion of DANIELS, J., at special term.

CORLETT, J., (*dissenting*.) Christiana Farthing made her will in June, 1871. She died in September, 1881. The will was admitted to probate. In 1888 the plaintiff brought an action for the construction of the will. The case was tried at special term in July, 1889. The decision was in accordance with the respondent's contention, and the defendants moved for a new trial under section 1001 of the Code of Civil Procedure. The provisions of the will in controversy are: "*Second*. I give and devise to my nephew, John N. Lester, for and during his natural life, but no longer, twenty (20) acres of land situate, lying, and being in the town of West Seneca, and the south-west corner of Abbott road and Wells road, so-called, to be divided and set off to him, as soon after my death as the same can be done, in as nearly the form of a square as may be, or such other twenty (20) acres of any lands of which I may die seised as may be agreed upon by and between my said nephew and the executors of this, my last will and testament; and I hereby will and direct that said executors shall make and execute, at the expense of my estate, and deliver to said John N. Lester, a proper and sufficient instrument in writing, under their hands and seals, by them duly acknowledged so as to entitle the same to be recorded, in and by which they shall designate and describe by metes and bounds the twenty (20) acres of land as set off and allotted to said John N. Lester. In case said John N. Lester shall die before I do, leaving no lawful issue or descendant him surviving, then and in such case I will and direct the said twenty (20) acres of land which he will take if living, at the time of my death under and by virtue hereof, shall be, and be considered, a part of my residuary estate, and shall be disposed of and pass as such under and by virtue of the fourth clause of this, my last will and testament. In case said John N. Lester survives me, and dies without lawful issue, him surviving, then and in such case I will and direct that said twenty acres of land upon his death shall be, and be considered, a part of my residuary estate, and as such shall be disposed of and pass as such under and by virtue of the fourth clause of this, my last will and testament. In case said John N. Lester shall die leaving lawful issue, descendant or descendants, him surviving, then and in such case I give and devise said twenty acres of land to his lawful issue, descendant or descendants, equally, if there be more than one, share and share alike; but, if there be but one, he or she shall have and take the whole of said twenty acres of land." John B. Weber and William W. Lawson were appointed executors of the will. Lawson died in January, 1888, leaving Weber the sole executor. The 20 acres on the Abbott road were sold on the foreclosure of a mortgage about two years

before the death of the testatrix, but she left other real estate. The question here is whether Lester can obtain the 20 acres out of the other lands owned by the testatrix at the time of her death.

The rule is familiar that where, upon examination of a will as a whole, the intention of the testator appears clear, but its plain and definite purposes are endangered by inapt or incorrect modes of expression, the court may, and it is its duty to, subordinate its language to the intention. It may reject words and limitations; supply or transpose them to get at the correct meaning. *Phillips v. Davies*, 92 N. Y. 199; *Wager v. Wager*, 96 N. Y. 164. The testatrix, at the time of making her will, owned considerable real estate and personal property, all of which she disposed of by will. It is obvious that she intended to give Lester the use of 20 acres of land during his life-time. Her primary purpose was to devise to him the 20 acres on the Abbott road, but she authorized an equal amount to be agreed upon by her executors and him out of other lands of which she might die seised. There is no room for claim that the testatrix intended that Lester, in any event, should have the use of 40 acres. Every clause in the will limits the amount to 20. Under such circumstances, if, for any reason, the Abbott road land was not available, it was the express intention of the testatrix to substitute another 20 acres in its place. It is entirely immaterial whether, at the time of her death, she owned the Abbott road land or not. Power was given, in the way directed, to agree upon another 20 acres, which would involve an abandonment of the first. If she did not own the Abbott road land, then her purpose was to devise another 20 acres out of the lands of which she died seised. If he cannot insist upon an allotment of another 20 acres, then he gets nothing. It was obviously not her intention that, in any contingency, he should lose the use of 20 acres of land during his life-time. The suggestion of the special term that the executors could not be compelled to agree with Lester as to another 20 acres must depend upon the construction of the will. If the use of 20 acres was devised by the testatrix, the court has inherent power to direct a conveyance. *Williams v. Williams*, 8 N. Y. 528; *Owens v. Society*, 14 N. Y. 880-408. The purpose of the testatrix cannot be defeated by a refusal on the part of the executor to agree with Lester as to the particular 20 acres which should be set off or assigned to him. If necessary, the court will compel him to agree. If not, it could adjudge an allotment without his intervention, and against his protest, either of the land or its proceeds in event of a sale. It is the duty of the court to give full effect to the intent of the testatrix. The respondent's contention, and the decision at special term, would utterly defeat such intention. The decision at special term should be set aside, and a decree entered in accordance with the views stated.

FIRST NAT. BANK OF JERSEY CITY v. LENK *et al.*

(*Supreme Court, General Term, First Department. June 6, 1890.*)

ABATEMENT AND REVIVAL—DEATH OF PARTY—JOINT CONTRACTORS.

The rule that, where one of several joint debtors dies, the personal representative cannot be joined in an action with the survivors except on the allegation of the insolvency of the survivors, applies to the case of the death of a joint debtor pending the action, and is not changed by Code Civil Proc. N. Y. § 758, which provides that "the estate of a person or party jointly liable upon contract with others shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent when it is necessary so to do for the proper disposition of the matter."

Appeal from special term, New York county.

Action by the First National Bank of Jersey City against Peter Lenk and others, constituting the general partners, and Otto Huber and another, constituting the special partners, in the limited partnership of Peter Lenk & Co. Plaintiff sought to hold the special partners liable as general partners on the

ground that their contributions to the capital of the firm were not in "actual cash payments," as required by 4 Rev. St. N. Y. (8th Ed.) p. 2492, § 2. Pending this action, defendant Huber died, and on plaintiff's motion the action was revived against the executors of decedent's will. The following opinion was filed at special term:

"BARRETT, J. I do not agree with the counsel for Huber's estate that an action against a special partner seeking to make him liable as a general partner for failure to pay in, in cash, the amount certified to have been contributed is an action to recover a penalty. The action is against him upon contract treating him from the beginning as a general partner, and liable as such. That is the normal condition of things, and it is for the special partner to limit his ordinary partnership liability by a strict compliance with the statute. Failure to so strictly comply does not give a right of action as for a penalty. It simply prevents the partner from setting up the statute against the ordinary partnership liability which he has assumed. In this view of the matter, the action is plainly upon contract, and it survived. The other objection, namely, that insolvency of the surviving partners must be averred before the representatives of the deceased partner can be brought in, is met by section 758 of the Code. Certainly, 'the proper disposition of the matter,' to quote the language of this section, requires that the representatives of the deceased special partner, who was sought to be charged, should be brought in. Thus the real question involved in the action can be directly determined. This becomes entirely apparent when we consider that the persons who were avowedly general partners have not defended; and, so far as the other special partner also sought to be charged is concerned, it is entirely appropriate that his liability should be determined at the same time as that of Huber. I think that the learned counsel for the Huber estate is also in error in supposing that section 758 is confined to cases where the contract liability is in terms several as well as joint. The language is, 'the estate of a person or party jointly liable upon contract with others shall not be discharged by his death,' etc. The matter of several liability is only referred to in connection with a severance of the action. But the liability here, if there is any, would seem to be joint and several. The question is therefore reasonably free from doubt, and the motion should be granted."

Defendants appeal.

Code Civil Proc. N. Y. § 758, is as follows: "In case of the death of one of two or more plaintiffs, or one of two or more defendants, if the entire cause of action survives to or against the others, the action may proceed in favor of or against the survivors. But the estate of a person or party jointly liable upon contract with others shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent where it is necessary so to do for the proper disposition of the matter, and, where the liability is several as well as joint, may order a severance of the action so that it may proceed separately against the representative of the decedent, and against the surviving defendant or defendants."

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Hamilton Wallis, for appellants. *S. Untermeyer*, for respondent.

PER CURIAM. The rule is well established that, where one of two or more joint debtors die, his personal representatives should not be joined in an action with the survivors except upon the allegation of the insolvency of the survivors. We see no reason why this rule does not apply to the case of the death of a joint debtor pending the action. Section 758 of the Code has in no manner altered the rule stated, which has been established by a long line of decisions. The order should be reversed, with \$10 costs and disbursements.

CHURCHILL v. WITBECK, (two cases.)

(Supreme Court, Special Term, New York County. February 10, 1890.)

PLEADING—FRIVOLOUS ANSWER.

AN answer in an action on a note which avers that there was "an entire failure of consideration" for the note, and which denies that "the amount, or any part thereof, is due," is not frivolous.

At chambers. Two actions by Sarah P. Churchill against Cornelius V. Witbeck. One action was to settle up partnership business, and the other was on a promissory note executed by defendant to plaintiff. The answers averred that "there was an entire failure of consideration for the promissory note" set out in the complaint, and denied that "the amount [of the note,] or any part thereof, was due" to plaintiff. Plaintiff now moves for judgment, and to strike out the answers on the ground that they are frivolous.

A. R. McMahon, for plaintiff. *A. W. Nicholl*, for defendant.

PATTERSON, J. The motions in these causes are to strike out the answers as frivolous, and for judgment. That these answers are inartificial, is clear, but they state distinctly that the defense is failure of consideration as between maker and payee of the notes; the suits being between those parties. It cannot be said that these defenses are clearly frivolous, and that a mere inspection of the answer shows it. The plaintiff is fully apprised of what the defenses are, and it is not at all clear that the answers would be bad on demurrer. Failure of consideration is a fact, and not altogether a conclusion to be drawn from the facts. At all events, the subject is fairly open to discussion, and therefore these motions must be denied. No costs in either of the motions.

VARNUM v. SKINNER *et al.*

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

WITNESS—CREDIBILITY.

In an action against the maker and indorser of a note, the joint answer of defendants alleged an agreement by which plaintiff's intestate was to receive from the maker \$10 above lawful interest on the loan, which was the consideration of the note. The indorser testified that, some days before the date on which the agreement was averred in the answer to have been made, the intestate agreed to make a loan of \$200 upon a note payable to the order of the indorser, that a bonus of \$10 was paid by the maker, and that afterwards he (the indorser) delivered the note of \$200 to the intestate, and received \$188. *Held*, that the jury was justified in discrediting the testimony of the indorser.

Appeal from circuit court, Monroe county.

Action by Jonas P. Varnum, administrator, etc., of Charles J. Hayden, deceased, against George W. Skinner and John Slater. Judgment was given for plaintiff, and defendants appeal.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

W. F. Edmonds, for appellants. *Howard L. Osgood*, for respondent.

MACOMBER, J. This action, which was brought to recover upon a promissory note in the sum of \$200, given by the defendants to the plaintiff's intestate in the month of January, 1888, is defended upon the ground of usury. The case as settled does not contain any certificate that the whole of the evidence given upon the trial is returned to us, and hence, under the authorities which are now familiar to the profession, we are not able to review the question whether the verdict of the jury was against the weight of the evidence. The defendant Skinner was the maker, and the defendant Slater was the indorser, of the note in suit. The joint answer of the defendants is that there was a corrupt and usurious agreement between the defendant Skinner and

the decedent, whereby the latter was to receive the sum of \$10 over and above the lawful interest upon the loan which was the consideration of the note. The agreement was alleged in the answer to have been made on the 2d day of January, 1888. Upon the trial the defendant Slater was called as a witness, his testimony was properly excluded so far as the same related to any personal transaction with the decedent; but he was permitted to testify in behalf of his co-defendant, Skinner, and the only question is whether this witness succeeded in making out a defense for his co-defendant. There was no evidence to contradict the story thus told by the indorser, and the same was admitted by the learned court to the jury under instruction which substantially advised them that they were not bound by such testimony if the same conflicted with the circumstances of the case, and were so inconsistent with attendant facts as that the jury should not give credence to the witness. In this we think there was no error. Slater's evidence is, in substance, that some days before January 1, 1888, the defendant Skinner, who wished to raise the sum of \$200, went with the witness to the intestate, and asked for a loan in that amount; whereupon the decedent agreed to make the loan upon a note payable to the order of the defendant Slater, and demanded a bonus of \$10, which was thereupon paid by Skinner to the decedent; and after January 1, 1888, the defendant Slater took the note to Hayden, delivered it to him, and received a check for \$188, which was cashed. It will thus be seen that the story so told by the witness related to a substantially different contract from that set forth in the answer, and was so improbable upon its face as that the jury was justified in rejecting it. *Elwood v. Telegraph Co.*, 45 N. Y. 217. The judgment and order appealed from should be affirmed, with costs. *concur.*

In re OVIATT'S ESTATE.

In re HOPKINS.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

WILLS—CONSTRUCTION.

Where a testator directs land to be sold, and the proceeds applied first to the payment of a mortgage on other land, and afterwards to certain legacies, it is the duty of the executor to pay the mortgage in full out of such proceeds, without regard to whether the assets remaining are sufficient to pay the legacies in full.

Appeal from surrogate's court, Monroe county.

Settlement of the accounts of John H. Hopkins, executor, etc., of Rosetta D. Oviatt, deceased.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Arthur E. Sutherland, for appellant, Viola D. Shoecraft. *Porter M. French*, for respondents Wilson D. Oviatt and Percy Oviatt. *John H. Hopkins*, executor, in person, and for the respondent Adelia J. Babcock.

MACOMBER, J. The appeal is from that portion only of the decree of the surrogate which credits to the executor the full amount claimed by him in Schedule C of his accounts, being the sum of \$3,844.15, and which adjudges that there is a balance in his hands of only \$540.10, and which directs the executor to pay to the commissioners of Mt. Hope the sum of \$100, the interest of which last-named sum was to preserve in good order a burial lot in Mt. Hope cemetery, and which requires the executor to pay the balance of the fund in his hands to the respondent Adelia J. Babcock, one of the legatees named in the will, or deposit the same with the treasurer of Monroe county. The questions presented by this appeal arise upon the third provision of the last will of Rosetta D. Oviatt, which is as follows: "3rd. My said trust hereby direct to sell and to convert into money my frame house, and the lot situate upon the north-east corner of South avenue and Comfort Sts. in

city, and out of the proceeds of said premises to pay—*First*, the bond and mortgage upon my store and building situate on South St. Paul street, known as No. 38,—south of Ely street, in second clause above described; and, *secondly*, to pay any and all other debts I may owe therefrom; and then, *3rdly*, to deposit one hundred dollars therefrom, the interest to be used to keep up the lot, being north-east one-quarter of lot No. 80 in Mt. Hope cemetery, for all time, either in a savings bank, or with the commissioners of Mt. Hope, as he may deem best; and, *4th*, to pay from said proceeds \$500.00 to my sister Mrs. Adelia Jane Babcock, of Rochester, N. Y., now of Colorado, as her property forever; *5th*, to pay to Viola D. Shoecraft, daughter of my deceased daughter Imogene Shoecraft, now of Washington Territory, the sum of one thousand dollars as hers, forever; *6th*, to pay to Albert M. Shoecraft, son of my said daughter, now of the city of Rochester aforesaid, the sum of \$500.00, to him and his heirs, forever; *7th*, that the balance of said proceeds shall be securely invested by my said trustee, and the income thereof shall be paid by him for and towards the education and improvement of the four children now living of Eugene A. Oviatt until the youngest child is twenty-one years of age, and at that time said funds shall be equally divided between them, share and share alike, as theirs forever." The executor, in pursuance of this provision of the will, sold the real estate so directed by the will to be sold by him, and with the avails thereof paid a bond and mortgage upon the other real estate mentioned, amounting at the time of payment to the sum of \$2,570. The appellant objected to the allowance of such payment, but such objection was overruled, and from the decision of the surrogate this appeal is taken.

An elaborate argument has been made by the learned counsel for the appellant that the legacies mentioned in clauses 1 to 6, inclusive, in the third paragraph of the will, above quoted, stand on an equal footing, and, inasmuch as there is a deficiency of assets to pay them all in full, they must be paid ratably, and that consequently the payment of the mortgage upon the block mentioned was unauthorized. An answer to this argument is, in brief, that the testatrix was indebted by her bond for the payment of the amount secured by the mortgage resting upon her South St. Paul Street store, and, being so indebted, she did by her will take the case out of the operation of the statute, and charge the payment of such indebtedness expressly upon the avails of the sale of the house and lot on the corner of South avenue and Comfort street. Except for the statute (1 Rev. St. p. 749, § 4; 6th Ed. vol. 2, p. 1130) the devisee could not be obliged to satisfy the mortgage out of his own property without resorting to the executor. But, where there is an express direction in the will of the testator that such mortgage be otherwise paid, the same is obligatory upon the executor as the payment and discharge of any other indebtedness of the decedent. *Searles v. Brace*, 19 Abb. N. C. 17; *Cochrane v. Hawver*, 7 N. Y. Supp. 907. In no sense can this clear and positive direction for the payment of an outstanding indebtedness be deemed a separate and independent bequest or legacy to the son Wilson D. Oviatt and his children. The question, therefore, which has been discussed by the counsel for the appellant, does not, in our judgment, arise upon the reading of this will. It follows, therefore, that the decree of the surrogate should be affirmed, with costs to the respondents, payable out of the estate.

All concur.

HAYES v. HOOD.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

1. GUARANTY—CONSIDERATION—EVIDENCE.

In an action against a married woman on an instrument reciting that, "for value received," defendant guarantied the payment to a certain bank of all the debts of her husband, defendant is not entitled to go to the jury upon the question of con-

sideration merely upon evidence that on the day the guaranty was executed the husband did not receive any money or notes from the said bank.

2. SAME.

A promise, made at the time the guaranty was given, that outstanding notes the husband should be renewed as they fell due, is a sufficient consideration for the guaranty to support an action against defendant on such renewal notes.

Motion for a new trial on exceptions.

Action by Frank M. Hayes, receiver of the First National Bank of Auburn, N. Y., against Mary E. Hood. Judgment was given for plaintiff.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.
M. H. Briggs, for plaintiff. *C. C. Aiken*, for defendant.

MACOMBER, J. This action is upon a written guaranty executed by the defendant in the following words: "AUBURN, N. Y., December 15, 1885. For value received, I hereby guaranty the payment to the First National Bank of Auburn of all debts and liabilities to it, now and hereafter, of Peter Hood & Son, and Peter Hood, of every name and nature, whether as principal, sure or otherwise; and I hereby charge my separate estate with the payment above." The defense to a recovery upon this instrument is that the same was executed without consideration. At the close of the evidence, the counsel for the defendant asked to go to the jury upon the question of such consideration, which was denied him, and an exception was duly taken. The words in this guaranty, "for value received," are sufficient *prima facie* evidence of a consideration. *Quimby v. Morrill*, 47 Me. 470. It was incumbent therefore, upon the defendant to defeat the case so made by the production of the instrument itself, by affirmative evidence, if any existed. The evidence relied upon for that purpose is the testimony of Peter Hood, the husband of the defendant, the only part of which bearing upon this question is to the effect that the firm of P. Hood & Son did not have discounted at the bank which the plaintiff is the receiver any notes on December 15, 1885, the date of this written guaranty, nor did they, or either of them, receive any money or note from the bank on that day. This evidence is not sufficient to overcome the written instrument, for it merely shows that, on the day of the date of the guaranty, no consideration of the kind mentioned by the witness was received by any party. But this was not enough. It was necessary for the defendant to show that there was no consideration, either at the time of the execution of the instrument, or prior or subsequent thereto, which would support the promise. The absence from the witness stand of the defendant herself is doubtless, in this instance, of not much importance on this question because her business was conducted almost entirely by Peter Hood as her agent. But the witness relied upon fails to say that there was no consideration for the guaranty, nor does he relate facts for the consideration of a jury from which such a conclusion could be intelligently derived.

Though this action is brought, not upon the promissory notes outstanding at the time of the execution of the guaranty, but upon those that were executed subsequently in renewal of the previous notes, yet the case discloses with reasonable certainty the fact that the guaranty was asked for and given with the understanding on the part of the cashier of the bank and of Peter Hood that the several notes should be renewed from time to time as they should fall due. Such a promise would be amply sufficient to support the guaranty, provided the same, as was done in this case, was actually carried into effect. *Beckwith v. Brackett*, 97 N. Y. 52; *Maclaren v. Percival*, 1 N. Y. 675, 6 N. E. Rep. 582.

On the whole, we are of the opinion that there was no question of fact for the jury, and that the verdict was properly directed by the court. The motion for a new trial should be denied, with costs, and judgment ordered for the plaintiff on the verdict. All concur.

SCHMIDT v. KEEHN *et al.*

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

1. HUSBAND AND WIFE—NEGLIGENCE OF WIFE'S AGENT.

A married woman is liable for the negligence of her agent in making improvements on her separate property.

2. PRINCIPAL AND AGENT—EVIDENCE—MARRIED WOMEN.

In an action against a married woman for injuries received by plaintiff while working on a building which was being erected on defendant's land, and for the construction of which defendant had borrowed money, it appeared that defendant's husband had charge of the construction of the building. Neither defendant nor the husband testified on the trial. *Held*, that there was a sufficient presumption of the agency of the husband for the wife to require the submission of the question of defendant's liability to the jury; all the other requisites of plaintiff's cause of action being present.

Appeal from circuit court, Monroe county.

Action by Mary Schmidt, as administratrix of Frederick J. Schmidt, deceased, against Norma Keehn and Edward J. Keehn, for the negligent killing of plaintiff's intestate. The complaint was dismissed as to defendant Norma Keehn, and plaintiff appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.
J. & Q. Van Voorhis, for appellant. C. M. Allen, for respondent.

CORLETT, J. In December, 1886, the defendant was the owner of real estate in the city of Rochester, upon which a building was being erected. Her husband had charge of its construction. On the 8th of that month the plaintiff's intestate was a laborer upon the building being erected, and was killed in an elevator used about the building. The plaintiff brought an action to recover damages for negligence against Edward J. Keehn and the defendant, the wife. At the close of the evidence the complaint was dismissed against the wife, but a recovery was had against the husband. Judgment was entered on the dismissal, and the plaintiff appealed. The substance of the evidence on the trial as to the defendant was that she owned the building; that she executed mortgages on which she raised money to aid in its construction; that she knew it was being built; the declarations of her husband that he was overseeing its construction for her; the fact that he had charge of the building during its erection. At the close of the plaintiff's evidence the defendant moved for a nonsuit, which was granted. Neither of the defendants was sworn as a witness on the trial. Except as above stated, there was no evidence showing in what capacity the husband acted. Whether he was a contractor on his own account, or whether he was agent for the defendant, or acted for a third party, the case is silent.

The sole question on this appeal is whether, as against the respondent, the case should have been submitted to the jury. It may be assumed that the evidence tended to show that the elevator was imperfect, and the husband negligent; also that the deceased was free from negligence, because the plaintiff recovered against the husband. If he was the defendant's servant or agent, and was guilty of negligence in his employment, she would be liable. In other words, she is chargeable the same as any other person for the negligence of her servants and agents. The fact of her being a married woman is no answer to an action for negligence in making improvements upon her separate property, nor is it important whether her husband or a third person acts for her. Her personal knowledge of the defect producing the injury is not important. *Armstrong v. Jones*, 10 Wkly. Dig. 144. In *Cutler v. Morris*, 116 N. Y. 310, 22 N. E. Rep. 451, it was held that where services are for the benefit of the separate estate of a married woman, with her knowledge, the presumptions are that they are rendered at her request. It would seem to follow that the claim that the building was constructed for a third person's ben-

elit, or on his responsibility, would require proof. All the cases are to the same effect. *Miller v. Hunt*, 3 Thomp. & C. 762; *Farmilo v. Styles*, 5 N. Y. Supp. 579; *Husted v. Mathes*, 77 N. Y. 390.

It is reasonable to assume that, where buildings are being constructed on a person's land, and the owner raises the money for those purposes, the person having charge and oversight is acting as the servant or agent of the owner. He may be a contractor. He may sustain no relations to the owner except to complete the job and deliver it when finished. But, in the absence of proof, it is difficult to see why improvements upon the owner's land, and for his benefit, should not be assumed to be in pursuance of the owner's directions.

No legal obligation rested upon the defendant to be sworn as a witness for herself, or to call her husband, but an omission to do either is a circumstance entitled to some weight where the evidence is of such a character as to allow inferences either way. In *Clark v. Railroad Co.*, 40 Hun, 607, it was held that the omission of a railroad company to call its employes was a circumstance from which inference could be drawn against the company. To the same effect are *Beecker v. Johnston*, 69 N. Y. 309; *The Fred M. Laurence*, 15 Fed. Rep. 685; *People v. Hovey*, 92 N. Y. 554. The husband and wife were in a position to know what the facts were. Their omission to be sworn is a circumstance from which inferences against them may be drawn.

The general rule is that where there is any evidence, direct or inferential, the case must be submitted to the jury. *Smith v. Coe*, 55 N. Y. 678. The judgment should be reversed, and a new trial granted. All concur.

DORSEY v. PIKE.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

PRINCIPAL AND AGENT—PROOF OF RELATION.

Where it appears that defendant's husband was her agent in operating a quarry, the jury are justified in finding that he had authority to purchase machinery for use in the quarry.

Appeal from Monroe county court.

Action by James Dorsey against Rosella E. Pike for the price of machinery sold. Judgment on a verdict for plaintiff, and an order denying a new trial, were entered, and defendant appeals. For former report, see 3 N. Y. Supp. 730.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

John Desmond, for appellant. *Henry J. Sullivan*, for respondent.

CORLETT, J. This action was commenced in November, 1886, in the municipal court of the city of Rochester, for the purpose of recovering the purchase price of an engine, pump, and boiler, which the plaintiff claims had been sold to the defendant for \$250. The complaint was denied, and judgment rendered for the defendant in that court. The plaintiff appealed to the Monroe county court, where a trial was had, resulting in a verdict for the plaintiff. A motion for a new trial was denied. The defendant appealed to this court, where a new trial was granted because of error in the charge. 3 N. Y. Supp. 730. It was again tried in the county court in April, 1889, resulting in a verdict for the plaintiff. A motion for a new trial was denied, judgment was entered, and the defendant appealed to this court.

The defendant was the owner a stone quarry in the county of Monroe; and on the 3d day of July, 1886, the plaintiff leased the engine and pump for \$12 per week. James B. Pike transacted the business, and was the defendant's husband. He took the property, and a while afterwards used the same in the defendant's quarry. The plaintiff claims, and the evidence tends to show, that on the 6th day of August, 1886, the plaintiff sold to the defend-

ant, through her agent, the husband, the engine, pump, and appurtenances, for \$250. The property was in the quarry at the time of the alleged sale. After that the defendant, through her husband, exercised dominion over the property, and used it as owner in the quarry. There was some evidence given on the trial tending to support this contention. At the close of the plaintiff's evidence the defendant moved for a nonsuit upon the ground that the plaintiff had failed to establish a cause of action against the defendant; also that the contract was void because not reduced to writing, and that no money was paid at the time of the purchase; on the further ground that the property was never received, delivered, or accepted; also that the agency of the husband had not been established. The motion was denied, and the defendant's counsel excepted. At the close of the evidence the motion was renewed and denied, and the defendant excepted.

The trial judge charged the jury to the effect that the proof tending to establish the agency of the husband was mainly circumstantial, and the learned judge calls attention to numerous facts and circumstances in support of this view. The question as to whether there was a sale was also fully considered and commented upon by the learned judge, and also the question as to whether possession was delivered and taken under the sale, leaving to the jury the questions as to whether the husband was agent for the wife in that matter, whether there was a bargain and sale, whether there was a delivery and acceptance under the sale; charging the jury that, if either of those propositions were found in favor of the defendant, the plaintiff must fail. No exceptions were taken to the charge, but numerous requests to charge on the part of the defendant were made, all of which seem to have been properly disposed of by the trial judge. The defendant was not examined as a witness in her own behalf; and, in view of the fact that there were circumstances tending to establish her husband's agency to make the purchase, her omission to testify on that subject was a circumstance which the jury were at liberty to consider in reaching a conclusion upon that branch of the case. *Clark v. Railroad Co.*, 40 Hun, 607. Where an agent has general authority, private instructions are not available against those dealing with him. *Hill v. Miller*, 76 N. Y. 32. It is a familiar rule that the knowledge of an agent, within the scope of his authority, is that of the principal. *Van Schoick v. Insurance Co.*, 68 N. Y. 484; *Sentell v. Insurance Co.*, 16 Hun, 516. There were circumstances tending to show the agency of the husband. The property was used in her quarry to her knowledge, and, its being upon her separate property, must be presumed to be used for her benefit. *Cutter v. Morris*, 116 N. Y. 310, 22 N. E. Rep. 451. It follows that the husband's purchase of the property, he being agent, bound her. There was some evidence tending to show an acceptance under the purchase. The jury found the facts in favor of the plaintiff.

Numerous objections were made and exceptions taken by the learned counsel for the defendant, during the progress of the trial, on the subject of the admission and rejection of evidence. One objection was to allowing George E. Warner to refresh his recollection by looking at memoranda. For that purpose, it is entirely immaterial whether the entries the witness looked at to refresh his recollection are originals, copies, or whether made by himself or by a stranger. *Marcy v. Shultz*, 29 N. Y. 346-351. All the exceptions have been examined, but no errors are discovered, to the prejudice of the defendant, requiring a reversal. The judgment must be affirmed. All concur.

PEOPLE *ex rel.* STEITZ *v.* RICE.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

1. CONTEMPT—BEFORE COUNTY SUPERVISORS—POWERS OF JUDGE.

Laws N. Y. 1858, c. 190, § 4, provides that, if a person duly subpoenaed by the board of supervisors of a county shall refuse to answer a pertinent question, he shall be deemed guilty of a contempt, and the facts shall be reported to "the county judge, or to a judge of the supreme court, * * * or of the court of common pleas," etc. "who shall thereupon issue an attachment, in the form usual in the court of which he shall be judge, * * * to attach such person, and forthwith bring him before the judge by whose order the attachment was issued." Section 5 provides that the return of the attachment the judge shall have jurisdiction, and the same proceedings shall be had as in case of a witness subpoenaed to testify in a civil case before a circuit court or special term. Section 8 provides that all orders, decisions and judgments in proceedings under this act by any judge out of court shall be filed in the office of the county clerk, and have the same effect as if made at a regular term or session. *Held*, that such proceeding for contempt must be before a judge, and cannot be had at special term.

2. SAME—WHO MAY PUNISH—JUDGE.

Under Code Civil Proc. N. Y. § 8343, subd. 3, defining a judge as any "judicial officer," a justice of the supreme court is a "judge," within the meaning of Laws N. Y. 1858, c. 190, § 4, which provides, if any person duly subpoenaed by the board of supervisors of a county shall refuse to answer a pertinent question, he shall be deemed in contempt, and the facts shall be reported to "the county judge, or to a judge of the supreme court * * * or of the court of common pleas, or of any of the cities of this state, who shall thereupon issue an attachment."

Appeal from special term, Monroe county.

Proceeding on the relation of George W. Steitz, as chairman of the board of supervisors of Monroe county, to punish Edward J. Rice for contempt by refusing to answer certain questions propounded to him as a witness before a special committee of the board of supervisors. Defendant was adjudged guilty, and appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

John Van Voorhis, for appellant. *Walter H. Hubbell*, for respondent.

CORLETT, J. On the 9th day of January, 1889, the board of supervisors of Monroe county passed the following resolution: "Whereas, it appears by the reports of the committee and trustees of court-house and jail accounts that excessive prices have been paid for materials furnished in the repairs made by the trustees, therefore, resolved, that a committee of five, including the chairman of the board, be appointed, with full power to employ counsel, and, if deemed necessary, send for persons and papers, to examine witnesses under oath in relation to all matters and transactions connected with the repairs of such court-house from October 1, 1888, to December 1, 1889, and to report the same to the board of supervisors as early as convenient." A committee was appointed in pursuance of this resolution on the 9th day of February, 1889. Edward J. Rice, the appellant, John Rice, and William H. Rice were brothers. John was a member of the board of supervisors of Monroe county for the years 1888 and 1889. The firm of Rice Bros. had been for five or six years engaged in plumbing in Rochester. Edward was connected with the firm either as partner, or in working for the firm on a salary. Edward denied having any interest in the firm, also denied that he received or was entitled to any salary while doing the repairs on the court-house. John Rice, while acting as a member of the board of supervisors, was appointed one of the committee to investigate the sanitary condition of the court-house, and to report the probable expense of putting it in condition. The committee reported that the probable expense would be \$1,700. The board thereupon referred the matters to the trustees of the court-house and jail, with power to act, and would best serve the interests of the county. Soon after the said trustees, by verbal contract, directed the defendant, Rice, to make such repairs on the court-house as he saw fit. No limitations were imposed upon him, either

to the character or the amount of the repairs. Rice commenced work, and the trustees gave him orders for money at different times as the work progressed, amounting in all to \$12,041.26. The job was commenced in February, 1889, and finished in May of the same year. Most of the plumbers and helpers engaged on the work were the employees of Rice Bros. The only statements of account kept by the defendant appeared on the books of Rice Bros. in the handwriting of Swift, their book-keeper. All bills rendered to the trustees were in his handwriting, and all moneys on orders were paid to him, and when received were deposited in the bank-account of Rice Bros., and to their credit. All the radiators (36) that went into the job were ordered by the defendant in the name of Rice Bros., and were charged to, and paid for by, the firm. Most of the material that went into the job came from the same firm. In some of the bills the firm name was signed by the defendant. It is also claimed on the part of the respondent, and the testimony tends so to show, that the defendant charged for large amounts of materials not furnished at exorbitant prices.

On examination before the supervisors' committee, the defendant was subpoenaed as a witness. The following questions were put to him on his direct examination: "How much of the moneys which you received from the trustees of the work done upon this job, and materials furnished upon it, did you pay to Rice Bros.?" Also: "Did you ever have a contract of your own for doing plumbing work, while you were connected with Rice Bros., until this contract?" The witness refused to answer either question, although the committee directed him to do so. The committee thereupon caused this refusal to answer to be reported to Justice RUMSEY. Upon these facts, and on the 4th day of February, 1890, the said justice issued an attachment while holding, as the attachment indicates, a special term. The justice fixed the bail at \$200. The mandatory part of the attachment was:

"Therefore, we command you to apprehend the said Edward J. Rice, of Rochester, N. Y., if he be found in your county, and forthwith bring him before the supreme court at the court-house in Rochester, county of Monroe, N. Y., where the said Edward J. Rice is ordered to show cause why he should not be punished according to law for contempt in refusing to answer each and both of the aforesaid questions so put to him as aforesaid, and have this writ, with your return thereto, filed in the office of the clerk of said county on or before the 5th day of February, 1890, at ten o'clock in the forenoon.

"Witness Hon. WILLIAM RUMSEY, Justice of our Supreme Court at Rochester, N. Y., this 4th day of February, 1890.

"W. M. OLIVER, Clerk. [Monroe County Seal, Rochester, N. Y.]"

The indorsement of the sheriff was:

"I hereby certify that on the 5th day of February, 1890, I took into my custody the within-named Edward J. Rice, and now have him here before Hon. WILLIAM RUMSEY, justice of the supreme court, in obedience to the written writ.

THOMAS C. HODGSON, Sheriff."

"By GEORGE H. LANE, Under-Sheriff."

On the 7th day of February the following order was made:

"*The People of the State of New York to the Sheriff of Monroe County, Greeting:* Whereas, on the 7th day of February, 1890, by an order made by the supreme court at a special term thereof held at the court-house in Rochester, N. Y., in a proceeding brought by the people on the relation of George W. Steitz, chairman, &c., it was ordered that the said Edward J. Rice be committed by the sheriff of the county of Monroe to the county jail of Monroe county, to be there detained in close custody until he submit to answer the following question, namely, 'Did you ever have a contract of your own for doing plumbing work, while you were connected with Rice Brothers, until this contract?' and stated and set forth in said order, or until he be discharged according to law. Then comes the command, and is witnessed by

Hon. WILLIAM RUMSEY, justice of the supreme court, at Rochester, N. Y. this 7th day of February, 1890. W. M. OLIVER, Clerk."

It is assumed by counsel on both sides that the order adjudging the defendant in contempt, and inflicting punishment, was made at special term. The recital in the order of arrest so shows. It does not, except as above quoted, appear whether the attachment was issued at special term or by the justice witnessing it at chambers. The power exercised by the board of supervisors was conferred by chapter 190 of the laws of 1858. Section 4 of that act provides, wherever a person duly subpoenaed shall refuse to answer any question which a majority thereof shall decide to be proper and pertinent, he shall be deemed in contempt, and it shall be the duty of the chairman of the board or of the committee, as the case may be, to report the facts to the county judge, or to a judge of the supreme court or of the court of common pleas of any of the cities of this state, who shall thereupon issue an attachment, in the form usual in the court of which he shall be judge, directed to the sheriff of the county where such witness was required to appear and testify, commanding said sheriff to attach such person, and forthwith bring him before the judge by whose order the attachment was issued. Section 5 provides that on the return of the attachment, and the production of the body of the defendant, the said judge shall have jurisdiction of the matter, and the person charged may purge himself of the contempt in the same way, and the same proceedings shall be had, and the same penalties may be imposed, and the same punishment inflicted, as in case of a witness subpoenaed to appear and give evidence on the trial of a civil cause before a circuit or special term of the supreme court. Section 8 provides that all orders, decisions, and judgments made and given in proceedings under this act by any judge out of court or in term shall be in writing, and be subscribed by him, and shall be filed in the office of the clerk of the county where such proceedings are had, and the clerk shall thereupon enter the proper and necessary orders and rules, and such orders, decisions, and judgments shall have the like force and effect as if made and given to the court at a regular term or session thereof. The appellant claims that no subpoena was issued or properly served. The case shows the reverse. It was properly served, the fees paid, and he appeared in pursuance thereof without raising any objection as to the mode of service.

The counsel also claims that Justice RUMSEY is not a judge of the supreme court. This is a technical criticism, and without merit. Section 3343, subd. 3, of the Code, defines a judge as any "judicial officer." If the construction claimed by the learned counsel obtain, a justice of the supreme court could not issue an attachment. Sections 640, 662, Code Civil Proc.

The real question on this appeal is whether the special term had power to adjudge the defendant in contempt, and punish him. The learned counsel for the respondent urges the affirmative of this proposition, and cites section 2269, subd. 2, and section 2266, of the Code of Civil Procedure, in support of his contention. Section 2266 provides as follows: "In a case specified in section 14 of this act, or in any other case where it is specially prescribed by law that a court of record, or a judge thereof, or a referee appointed by the court has power to punish by fine and imprisonment, or either, or generally, as contempt, a neglect or violation of duty or other misconduct, and a right of remedy of a party to a civil action or special proceeding in the court or before the judge or before the referee may be defeated, impaired, impeded, or prejudiced thereby, the offense must be punished as prescribed in this title." It will be observed that this section only applies to a civil action or special proceeding pending in court. In the matter at bar, there was no proceeding in court, but was one created by a statute before the board of supervisors. The sections of the Code, therefore, have no application. It may be that the writ of attachment could be construed as made by a justice at chambers. *Phinney v. Broschell*, 19 Hun, 116; affirmed, 80 N. Y. 544. But there is no contro-

very as to where the attachment was made returnable, or as to the fact that the defendant was adjudged in contempt at special term. In *Hetshon v. Insurance Co.*, 77 N. Y. 278, it was held that, where a writ is purely a statutory one, the mode pointed out by the statute must be followed; that, therefore, a special term had no power to grant an order for the examination of a defendant for the purpose of enabling the plaintiff to make and serve his complaint. The doctrine of this case would seem to be decisive of this appeal. The statute shows that the proceeding must be before a judge. Here it was at special term. It follows that the order appealed from must be reversed. All concur.

CROUSE *et al.* v. BAILEY, Sheriff.

(Supreme Court, General Term, Fourth Department. April, 1890.)

1. SHERIFFS AND CONSTABLES—FAILURE TO RETURN PROCESS.

No action lies against a sheriff for failure to levy and return an execution within or at the expiration of the time limited for its levy, where it was retained by him for that time at the request of plaintiffs' attorney.

2. SAME—EVIDENCE.

In an action against a sheriff for failure to levy and return an execution, where defendant pleads that the judgment was at the date thereof, and is yet, uncollectible, he may give evidence that the judgment debtor had no property subject to levy.

3. EXECUTION—LEVY AFTER RETURN-DAY.

A sheriff cannot levy an execution after the return-day, though the execution plaintiff gives him an indemnity bond.

4. SAME.

A return of an execution *nulla bona* is *prima facie* evidence that the debtor has no property subject to levy.

5. SAME—LEVY OF EXECUTION.

Goods sold to a son cannot be seized on execution issued on a judgment obtained by the sellers against the father by mistake, for the price thereof.

MERWIN, J., dissenting.

Appeal from judgment on report of referee.

Action by J. M. and Charles B. Crouse against Luman Bailey, sheriff of St. Lawrence county. Plaintiffs had recovered a judgment for \$164.05 against William R. Fuller on January 26, 1886, which was docketed in St. Lawrence county, January 27, 1886. On the same day an execution was issued thereon, and placed in the hands of defendant, as sheriff of St. Lawrence county. In the first count of plaintiffs' complaint it is alleged that defendant "failed to return said execution, to the damage of these plaintiffs of \$164.05, with interest thereon from January 26, 1886." In the second count it is alleged that "there was within said county of St. Lawrence personal property belonging to said William R. Fuller, to-wit, a stock of goods consisting of dry goods and groceries generally, in the possession and under the control of said Fuller, of which said defendant then and there had due notice, out of which the defendant might have made and satisfied said execution. Nevertheless, in violation of his duty as such sheriff, he failed and neglected to levy and make the moneys or any part thereof, as by said execution he was required to do." In the third count it is alleged that plaintiffs, on April 28, 1886, executed a bond of indemnity and delivered the same to the sheriff to save and keep him harmless, and indemnify him, and all persons aiding and assisting him, from trouble and damage by reason of a levy and sale under the execution, and that the sheriff "failed to levy the moneys, or any part thereof, as by said execution he was required to do." In the defendant's answer he sets up in mitigation of damages "that at the time of the recovery of the judgment described in the complaint, and ever since said time, and prior thereto, said William R. Fuller, the judgment debtor named in said judgment, was and is utterly insolvent and worthless, and said judgment is and was wholly uncollectible." The referee found

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that plaintiffs were entitled to recover \$197.25, and directed judgment for that amount. From the judgment entered on the report, defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

V. P. Abbott, for appellant. George W. Adams, for respondents.

HARDIN, P. J. In response to a request, the referee has found that no levy was made by the defendant, as sheriff, prior to April 28, 1886. As the execution was received by the sheriff on the 27th day of January, 1886, the days in which to make a levy expired March 28, 1886. The referee has found "that the said defendant made no levy under the execution in his hands against the said defendant, and, at the request of the plaintiffs' attorney, retained execution in his hands beyond the 60 days allowed by the terms of said execution." If the facts mentioned in the first count of the complaint, which are not denied, be assumed to be true, (Code Civil Proc. § 522,) as the retention of the execution for 60 days was "at the request of the plaintiffs' attorney," no action would lie for such failure to return within or at the expiration of the 60 days. In *Smith v. Smith*, 60 N. Y. 165, ALLEN, J., said: "The defendant was not liable for a neglect or omission of duty by himself or deputy in obedience to the directions, or with the assent, or by the authority of the plaintiffs." It is well settled that a sheriff cannot levy after the return of the execution. His right to levy must be exercised, if at all, during the life-time of the execution. *Hathaway v. Howell*, 54 N. Y. 98; *Smith v. Smith*, 60 N. Y. 164; *Walker v. Henry*, 85 N. Y. 134. As the bond of indemnity was not given until after the execution had run 60 days, and no levy was made within the 60 days, the sheriff upon receiving the bond could not levy or sell. The bond did not cast any fresh duty upon the sheriff, nor does it furnish any evidence of neglect of duty. In *Jackson v. Daggett*, 6 N. Y. Rep. 868, it was held that, where a bond of indemnity is given, the sheriff is not liable if he does not sell, provided he prove that the execution debtor had no title to property covered by the levy; but it is argued that it was the duty of the sheriff to levy within the life-time of the execution, and that, because he did not levy, he is liable. It is in proof, however, that the debtor was insolvent, and the defendant testified that he made an effort to find property "upon which to levy the execution, but could find none." Upon the trial it was proved that the execution was returned by the sheriff *nulla bona*. The return was *prima facie* evidence that the execution debtor had no property out of which the sheriff could make the execution. *Bechstein v. Samuels*, 10 Hun, 585. It was competent for the defendant to prove, under the pleadings, that the judgment debtor had no property upon which to levy the execution. *Humphrey v. Hathorn*, 24 Barb. 280. Plaintiff did not furnish sufficient testimony to overcome the evidence thus given by the defendant.

The referee was asked to find and hold, as a matter of law, that the execution debtor "had no property out of which said execution could have been made." This was refused, and the defendant has excepted to such refusal. It seems the sheriff, on the 28th of January, 1886, held an execution against the son of William R. Fuller, and upon that he had made a levy, and he wrote to the plaintiffs' attorney, supposing that his levy was upon goods of the plaintiffs' debtor. In that supposition he was mistaken. Nothing appears in the evidence to indicate any bad faith on the part of the sheriff, or intention to mislead or deceive the plaintiffs, and there is not sufficient evidence to charge him with deceit or fraud practiced upon the plaintiffs or their attorneys. If the son of the execution debtor was the purchaser of the plaintiffs' goods, and became indebted for them, and the plaintiffs, by mistake, obtained a judgment against the father for the debt, as suggested in the letter of the plaintiffs' attorney, the plaintiffs could not, upon their execution against William R., seize and sell the goods of the son. *Farnham v. Hildreth*, 32 Barb. 27. It is not needful to determine whether the plaintiffs would be entitled to non-

inal damages against the sheriff for not returning the execution as soon as the plaintiffs ceased to assent to its retention by the sheriff, as a determination of that question in their favor would not authorize them to retain the judgment for the damages given to them by the referee, which are equal to their judgment and the interest thereon.

The views we have already expressed lead irresistibly to the conclusion that there must be a reversal. Judgment reversed on the exceptions, and a new trial ordered before another referee, with costs to abide the event.

MARTIN, J., concurs. MERWIN, J., dissents.

CROUCH *et al.* v. GUTMANN. (No. 1.)

GUTMANN v. CROUCH. (No. 2.)

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

REFERENCE—VIEW BY REFEREE.

Where, by consent of parties, the referee inspects the premises which are the subject of the action, he may construe the testimony adduced before him in the light of the information obtained by the inspection, and it cannot be objected that his finding is unsupported by the evidence.

Appeal from judgment on report of referee.

Action No. 1 is by George W. Crouch and Frank P. Crouch against Max L. Gutmann, and No. 2 is by Max L. Gutmann against Frank P. Crouch. Max L. Gutmann is appellant in both cases.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

S. D. Bentley, for appellant. *Fanning & Williams*, for respondents.

CORLETT, J. On the 28th day of September, 1886, John Strachen, a mason and contractor of the city of Rochester, entered into a written agreement with Max L. Gutmann, of the same place, to build and finish a four-story brick block and apartment-house in the city of Rochester, in pursuance of drawings, details, and general specifications made by James C. Cutler, an architect. The building was to be completed by the 1st day of April, 1887; the price, \$16,500, to be paid in installments to the amount of 80 per cent. as the work progressed, and the balance on the proper completion of the work,—payments only to be made on the architect's certificate. All the drawings or specifications are either embodied in, or referred to in, the agreement. On the same day John Wadsworth & Son, contractors of the village of Brockport, entered into a written contract with John R. Strachen to construct the carpenter work of said building for the sum of \$6,000; payments to be made as the money should be received by Strachen from Gutmann on his contract, and on the architect's certificate. The drawings and specifications of the original contract were referred to as a part of this. The job was to be finished at the same time. On the same day Frank P. Crouch executed a bond to Strachen for \$6,000, the condition of which was that, if Wadsworth & Son should in all things perform their contract, the agreement should be void; otherwise in full force. The plaintiffs in No. 1 brought the action to recover a balance alleged to be due of \$1,650 on the \$6,000 contract, over and above all payments. It is alleged this claim was assigned to the plaintiffs by the Wadsworths. It is also alleged that on the 27th day of June, 1887, the Wadsworths made and delivered to the plaintiffs an order of which the following is a copy: "ROCHESTER, N. Y., June 27th, 1887. *Max L. Gutmann*: Please pay to G. W. & F. P. Crouch sixteen hundred and fifty (1,650.00) dollars, and charge the same to our contract. [Signed] JOHN WADSWORTH & SON." This was accepted in the following form: "AUG. 6, 11:30 A. M. This order is accepted, payable out of any balance which may be due Messrs. Wadsworth & Son when the building is completed, to the extent of such unpaid balance, and no

more, and on the architect's certificate only. [Signed] MAX L. GUTMANN. It is alleged that the order or paper as accepted was assigned to the plaintiff. The defendant denied performance by Strachen and Wadsworth & Son, and asked a dismissal of the complaint. In No. 2 the plaintiff seeks to recover the amount of the bond, upon the claim of non-performance by Wadsworth & Son. The complaint alleges an assignment by Strachen to the plaintiff, and further states Wadsworth & Son did not perform, and that thus Strachen was prevented from performing. The answer alleges substantial performance and asks a dismissal of the complaint. Both cases were referred to the same referee. In No. 1 the referee reported \$633.67 for the plaintiffs. In No. 2 the complaint was dismissed. Judgment was entered by the successful party upon each report, and the defendant in No. 1 and plaintiff in No. 2 appealed to this court.

As the rights of all the parties depend upon the same questions, the cases were practically tried as one action, with a stipulation that the testimony in one case, so far as applicable, should apply to the other. In No. 1 the referee finds the contracts, and that on the 5th day of August, 1887, Strachen served written notice to make no further payments to Wadsworth & Son. That the Wadsworths commenced work on the building about the 1st of November, 1886, and on the 1st day of February, 1887, stopped work at the instance of the architect, and also on account of inclement weather. At this time the roof was on the building. Work was after that resumed, and continued until the 30th day of July, 1887, when it ceased. A strike in April caused a delay of two weeks, and there were some other delays. That Strachen substantially performed the work on his part, and that he was paid, from time to time, \$3,500.45, which, with the \$6,000 contract, and the amount allowed for deductions, equaled the contract price, \$16,500. The referee also finds that the Wadsworths substantially performed their contract, except in certain particulars, in which they were guilty of no willful or intentional violation of their contract; that the work not performed by the Wadsworths was of the value of \$145. He also found that, by arrangement, the defendant furnished the Wadsworths hardware to the amount of \$293.64; also tile of the value \$140.50, and \$14 for iron pipe; also \$12 for iron transom guards. That they performed extra work to the amount of \$260. That the walls of the building settled, affecting the carpenter work, for which the Wadsworths were not blame, it being due to the settling of the walls, and shrinkage. That the materials furnished by the Wadsworths were in accordance with the terms of their contract, except in the case of shelving and closets and maple flooring for the halls, part of which was second-rate material. That the Wadsworths stopped work on the building in July, 1887, and did nothing further upon it. That at that time there were defects in the bath-room, on the hard wood floors, in piecing casings on windows in the rear of the building, in defective hand-rails of the front stairs, moulding in some portions of the building not being planed smooth, and improper painting of the building in the front part. That it would cost, to remedy all defects, \$203, which was deducted from the contract price. That, after the Wadsworths stopped work, the defendant had the keys, and took possession of the building on the 21st day of September, 1887, and has since occupied the same. That after April 1, 1887, Strachen and the Wadsworths continued work, with the knowledge and consent of the defendant, and that the architect visited and inspected the same, and made various estimates for payment on the contract. That the defendant made payments up to the 22d day of June. That the payments actually made to the Wadsworths were \$2,869. That, in addition thereto, the defendant accepted an order for \$500. That there should be added to the contract price \$266 for extra work. That the deductions to which the defendant was entitled were \$293.64 for hardware; \$148.50 for tiling; \$26 for iron pipe; \$439.29, amount of J. B. Pike's bill; \$148, an omission by consent of defendant.

ant; \$208, cost of repairing defects not repaired by Pike,—amounting to \$1,258.48, which, added to the amount of payments, made \$4,369, leaving a balance due on the contract and extras of \$688.67. The order of June 27th was given to the plaintiff for lumber which was furnished to the Wadsworths, and used in the erection of the building. The plaintiff had requested the architect for a certificate, but he had refused to give one, and that such refusal was unjust and unreasonable. That the plaintiffs or the Wadsworths did not receive notice to complete the job. That Strachen and the architect had a settlement on the 8th day of August, 1887. That on this settlement the \$6,000 was deducted from the contract price of \$16,500, and also \$1,499.55 for damages under the contract, which included \$1,300 for lost time. That the assignment to the plaintiffs was for a valuable consideration. The findings in No. 2 were substantially the same as those in No. 1, with the additional finding that no consideration was paid to Strachen for the assignment of said bond. It was stipulated that the referee might inspect the building, which he did. It thus appears that before the 1st day of August, 1887, the defendant paid Strachen \$8,500.45; and that afterwards, and on the 8th day of August, a settlement was made with him, the architect taking part, in which he was charged with \$1,499.55 as stipulated damages under his agreement, which included \$1,300 for 180 days' delay from April 1st to August 8th. The \$6,000 agreed to be paid to Wadsworth & Son for carpenter work was also deducted. Some payments before that had been made to the Wadsworths. Action No. 1 was brought to recover the balance due under their contract, which had been assigned to the plaintiffs in that action. After the settlement with Strachen, he assigned the bond to the plaintiff, who brings action No. 2 to recover against the obligor in that instrument its amount; in other words, an amicable arrangement was made between the original parties to the contract, by which payment in full was made, less \$1,499.55. It would seem to have been a part of that arrangement that the bond should be assigned to the plaintiff in No. 2.

All controversies between the original contractors are eliminated from the case, and a consideration of what occurred under the contract, or whether it was performed, is only important as it affects the parties to these actions. It must be assumed that the stipulation that the referee inspect the building was intended to aid him in weighing the evidence before him, as well as secure the information an inspection would impart, in the absence of any limitation as to the uses which the referee might make of a personal examination. In support of his findings, he was not restricted to what he discovered or actually viewed, but he was at liberty to construe the testimony in the light of the information thus obtained. In *West v. Kiersted*, 15 Wkly. Dig. 549, it was held that "where, by consent of parties, the referee inspects the premises in dispute, his report must practically be conclusive on all those facts which came within his observation; the court cannot tell what he saw." To the same effect is *Clafin v. Meyer*, 75 N. Y. 260. The exceptions, therefore, based upon the assumption that certain findings are against or without evidence, are not available.

The substantial question upon which these appeals depend is based upon the referee's findings. The learned counsel for the appellant contends that those findings negative the claim of a substantial performance, and would defeat a recovery in No. 1, and secure a different result in No. 2. The case shows that all the parties treated the original contract as so far completed that the defects might be paid for by deducting their cost from the contract price. This was the theory upon which the parties proceeded in their settlement. If it should be claimed that the expectation of recovering full damages for non-performance from the obligor in the bond was one of the elements which produced the settlement, the natural answer would be that it cannot be assumed on these appeals that the appellant contemplated an injus-

tice to the bondsman as one of the conditions of settlement between the parties to the original contract. Such a contention by the appellant ought to aid him in securing a reversal. The findings of the referee clearly show that the Wadsworths were less in default in performing than Strachen, and that the omissions on their part should be paid for by deductions, as well in the case of the original contractor. Aside from this, the plaintiff in No. 2 had no contract with the Wadsworths. The moment he dealt with the original contractor in settling with him on the assumption of a substantial performance, it must be treated as relating to the whole contract. No reason is seen why he should be allowed to sever the part to be performed by the Wadsworths from that to be completed by the original contractor. It would involve an obvious inconsistency on the part of the plaintiff in No. 2 to insist that he could treat the contract as performed to a sufficient extent as to allow the defects to be paid for, and pay the contractor the balance, and then he could take a different position with a subcontractor with whom he had no contract. The contract, so far as it applies to the plaintiff in No. 2, was not complete. It would not be harmonious or logical to insist upon one remedy as a part of the contract, and an inconsistent one as to the balance. The conclusions of the referee, as a whole, seem to have been substantially just and equitable, and the exceptions do not seem to warrant a reversal of either judgment. Judgments must be affirmed. All concur.

SMITH v. ANDERSON *et al.*

(*Supreme Court, General Term, Fifth Department. June, 1890.*)

BANKS AND BANKING—OFFICERS—MISAPPROPRIATION OF DEPOSITS.

Where plaintiff delivered moneys to the president of a bank to be deposited therein, and the latter, without plaintiff's knowledge or consent, deposited them in his own name as her attorney, and afterwards unlawfully appropriated a large part thereof to his own use, the bank is liable, since it is chargeable with the knowledge possessed by its president.

Appeal from judgment on report of referee.

Suit by Mary Burrows Smith against the First National Bank of Albany, N. Y., and Henry J. Anderson, as receiver. Judgment for plaintiff for \$31,670, from which defendants appeal.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

William N. Cogswell, for appellants. *W. A. Sutherland*, for respondents.

CORLETT, J. The First National Bank of Albion was organized and commenced business on the 22d day of December, 1863, at Albion in the county of Orleans. Roswell S. Burrows was its originator and first president. He died in March, 1879, leaving a will by which he appointed five persons executors. Four qualified, including Albert S. Warner; one died; two appointed Warner in their place, they taking no active part; and, at the time of the transactions hereafter mentioned, Warner was practically the managing executive, and was also president of the bank. The bank continued business until the 22d day of August, 1884, when it closed its doors. Its president, Warner, absconded, and the defendant was appointed receiver. On the 1st day of March, 1884, the American Loan & Trust Company of New York executed its check to the plaintiff for \$25,000, and delivered it to Isaac Signor, her attorney. The check was drawn on the Third National Bank of New York, and was afterwards indorsed by the plaintiff through Signor, her attorney, and by him delivered to Warner. Warner thereupon indorsed the check as follows: "Pay to G. L. Hutchins or order, for collection. A. S. WARNER, President." Hutchins was at that time cashier of the Third National Bank of New York, and Warner delivered the check to him. The Third National Bank was the correspondent of the First National Bank of Albion. On

18th day of March, 1884, the First National Bank of Albion charged this \$25,000 to the Third National Bank in the following words: "Third National Bank of New York. Amount deposited by A. S. Warner, Pt., \$25,000.00." On the same day, the First National Bank entered upon its journal a credit in favor of the plaintiff, as follows: "Mary Burrows Smith, proceeds of loan, \$25,000.00." The First National Bank drew drafts on the Third National Bank on this deposit, of which \$9,448.48 were paid to the plaintiff, leaving a balance of \$15,551.52. Between the 25th day of March and the 18th day of August, 1884, the plaintiff delivered to Warner, for deposit in the First National Bank, in the aggregate, \$14,218.03. Warner, without the knowledge or consent of the plaintiff, deposited such moneys in the First National Bank, or with its New York correspondent, to the credit of the First National Bank, and entered the same upon the books of the First National Bank in his own name as attorney for the plaintiff. She did not know, until after the suspension of the bank, that the account stood in the name of Albert S. Warner as such attorney. Warner, from time to time, drew checks as attorney against this account up to the time of the suspension, when the account was closed and balanced on the books. Of this deposit the plaintiff received, for her own benefit, \$5,583.47, but the rest was not used for her benefit, or drawn with her knowledge or authority. This action was brought by the plaintiff to recover these balances. The answer admitted the formal allegations in the complaint, denied knowledge sufficient to form a belief as to the balance, and then alleged, upon information and belief, that the \$25,000 charged in the complaint was in fact a loan to Warner. Payment is not pleaded. The issues were referred; the referee made his report in September, 1889; found the facts above stated, and directed judgment for the plaintiff against the defendant. This appeal is from the judgment entered upon the report. In *Moore v. Trust Co.*, 115 N. Y. 65, 21 N. E. Rep. 681, it was decided, in substance, that the plaintiff borrowed the \$25,000 from the trust company. The question upon this appeal is whether, upon the facts found by the referee and the undisputed evidence, the defendant, as receiver, is liable. In *Holden v. Bank*, 72 N. Y. 286; *Village of Port Jervis v. Bank*, 96 N. Y. 550; *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. Rep. 537; *Bartow v. People*, 78 N. Y. 377; *Institute v. Bostwick*, 92 N. Y. 564; and *Fishkill Sav. Inst. v. National Bank*, 80 N. Y. 162,—the principle was decided, on various facts, that, where a person occupying the position of Warner, the president, receives moneys which are deposited in the bank, his knowledge will be treated as that of the bank, and it is liable to the depositor, even though the president misappropriates the moneys. If Warner had converted the money without the bank having received it, or without credit being given on its books, it would not be liable. But, when its president receives funds which go into the bank, it is chargeable with all the knowledge possessed by him; otherwise those dealing with banks would be without remedy in case of fraud or misappropriation on the part of its president.

In the case at bar the plaintiff received credit on the books of the bank for \$25,000, and, except as to the amount received by her, the bank or its president had the benefit of the moneys. The \$14,218.03 were deposited in the bank. The fact that the president, without the knowledge or consent of the plaintiff, credited the money to himself as her attorney, and then misappropriated the funds, cannot be urged by the bank or its receiver as a defense, for the reasons above stated. If by such a form of entry the depositor, as against the bank, in case of improper entries by its president on its books, or a misappropriation by him of the moneys, could throw the loss upon the depositor, great mischief would result. The innocent depositor, instead of the bank, would lose the moneys misappropriated by its president. No authority has been cited by the learned counsel for the defendant in support of such a proposition. In the nature of things, the maxim must apply that, where one

of two innocent parties sustains a loss by the fraud of a third, it shall be upon the one whose act has enabled the fraud to be committed. *Moore v. Bank*, 55 N. Y. 41-47. The bank created its president, and if, through fraud, it, or a third person, must suffer, the maxim protects the customer. All the moneys having been deposited, payment is an affirmative defense. *Seward v. Torrence*, 3 Hun, 220; *Brazill v. Isham*, 12 N. Y. 9; *McKyring v. Bull*, 16 N. Y. 297; *Kelsey v. Western*, 2 N. Y. 506; *Getman v. Bank*, 23 Hun, 498. Beyond the amount admitted to have been received by the plaintiff, the absence of the defense of payment, the claim that sufficient credit was given would not seem to be available. But it does not satisfactorily appear from the whole case that the referee awarded too large a sum, on the assumption that the answer was sufficient. The deposits to the full amount have been proved, it devolved upon the defendant to show payment. The judgment must be affirmed.

DWIGHT, P. J., and MACOMBER, J., concur in result.

JAFFRAY et al. v. NAST et al.

(Supreme Court, General Term, Fifth Department. June, 1890.)

ATTACHMENTS—SUFFICIENCY OF AFFIDAVITS.

Defendants, three brothers constituting a firm of retail dealers, on the same day made a chattel mortgage to a bank, confessed judgment in its favor upon a debt due, and rode 20 miles to confess judgment in favor of a fourth brother for a large amount, and under these judgments their goods were immediately seized on execution. Afterwards an attachment was issued in favor of plaintiffs, for goods sold on credit, upon four affidavits showing that defendants had obtained credit with them by representing that the fourth brother, worth a large sum of money, was a member of the firm, but that after the confessions of judgment they asserted that he had withdrawn before the purchase; that when the credit was given defendants knew themselves to be insolvent, and failed to so inform plaintiffs; that just before judgments defendants bought large quantities of goods on credit, and at the same time shipped over 4,000 pounds of merchandise to various relatives and friends. Held sufficient evidence to sustain an attachment, under Code Civil Proc. N. Y. § 636, subd. 2, which authorizes an attachment when the debtor, with intent to defraud his creditors, has assigned, disposed of, or secreted his property, or is about to do so.

Appeal from special term, Monroe county.

Action by Edward S. Jaffray, Howard Jaffray, McVickar, John R. Woodruff, and Charles J. Hatfield against Louis Nast, Samuel M. Nast, and Nathaniel Nast, doing business as Nast Bros. Defendants appeal.

Argued before DWIGHT, P. J., and CORLETT, J.

Baker, Schwartz & Dake, for appellants. *D. M. Page*, for respondents.

CORLETT, J. On the 29th day of October, 1889, the county judge of Albany county granted an attachment against the defendants' property in this action. In December, 1889, the defendants made a motion, based upon original papers, to vacate the attachment. It was heard before Justice MACOMBER, at the Monroe special term, on the 30th day of December. The application was denied on the ground that the defendants were estopped. The court did not consider or determine the sufficiency of the affidavits upon which the attachment was granted. The defendants appeal from the order to vacate the attachment.

The following stipulations were made in this action, which are referred to in the order denying the application to vacate the attachment:

"It is hereby stipulated that, on filing this stipulation with the clerk of Steuben county, an order may be entered by either party without notice to the other that this action be discontinued without costs to either party, or that the undertaking herein given to procure the injunction order be cancelled without any claim for damages on the part of the defendants; that the inju-

tion order herein, granted November 2, 1889, by the Honorable WILLIAM RUMSEY, and modified by him November 9, 1889, whereby the sheriff was directed to pay \$3,000.00 into court to abide the event of this action, be vacated without prejudice to any lien which the plaintiffs may have under the attachment mentioned in the complaint herein.

"Dated, Hornellsville, N. Y., Nov. 20, 1889.

"BEARD & GRIFFIN, Plaintiff's Attorneys.

"DOLSON & ORCUTT, Attorneys for Citizens' National Bank.

"BAKER, SCHWARTZ & DAKE, Attorneys for all other defendants."

"It is stipulated that the sheriff of Steuben county retain the sum of \$2,250.00, part of the proceeds of the sale of the stock of goods formerly owned by Nast Bros., of Hornellsville, N. Y., subject to the final determination of the within entitled action, wherein an attachment has heretofore been obtained by the plaintiffs herein, and under which a levy was made upon said stock. And it is further stipulated that said sheriff deposit said sum of \$2,250.00, to his own order and to the credit of this action, in the Citizens' National Bank or Hornellsville, N. Y., and hold said sum as aforesaid, until the final determination of this action.

"Dated, Hornellsville, N. Y., Nov. 20, 1889.

"BEARD & GRIFFIN, Plaintiffs Attorneys.

"BAKER, SCHWARTZ & DAKE, Defendants Attorneys."

After the attachment the plaintiffs commenced another action in its aid in enforcing their demand, and obtained a temporary injunction preventing the sale of the defendants' property on executions, which was afterwards modified by allowing the sale, and directing the sum of \$3,000 of the proceeds to be paid into court to the credit of the action. Afterwards it was stipulated that that action be discontinued.

The plaintiffs were merchants in the city of New York, and the defendants were retail dealers in Hornellsville, N. Y., doing business under the firm name of Nast Bros. Between the 10th day of June, 1889, and the 24th day of September, the plaintiffs sold the defendants dry goods of the value of \$1,862.45 on credit, no part of which has been paid. On the 28th day of October, 1889, the defendants Louis Nast and Samuel N. Nast confessed judgments to their brother, Philip N. Nast, Jr., for the sum of \$11,622.75; also executed a chattel mortgage to the Citizens' National Bank of Hornellsville, to secure \$4,032, and confessed a judgment to the said bank of \$2,032, to secure a debt not then due. Executions were delivered to the sheriff of Steuben county on the 28th day of October, by virtue of which the defendants' stock was levied upon. The application for the attachment is based upon allegations of fraud, under subdivision 2 of section 636 of the Code.¹ It was granted upon four affidavits,—one sworn to by the plaintiff Edward S. Jaffray, on the 28th day of October, 1889, which alleges in substance the sale of the amount of goods above stated, and that no part was paid; that the amount was the sum above stated, over and above all counter-claims and discounts. The affidavit also alleges that the plaintiff learned from the defendants that the firm consisted of Philip and Louis Nast, and was worth from twenty to forty thousand dollars, most of which had been contributed by Philip; that he was afterwards informed that Philip had withdrawn from the firm before the sale by the plaintiffs, and that the other members had little or no property to secure the plaintiffs. It also stated that, during six weeks before the affidavit, the defendant had shipped various boxes of goods, weighing in all 4,000 pounds, to relatives in different parts of the state, and were thus disposing of and secreting their property; that since the 1st of August the defendants had purchased on credit goods largely in excess of what was required

¹ Code Civil Proc. N. Y. § 686, subd. 2, authorizes an attachment where the debtor, with intent to defraud his creditors, has assigned, disposed of, or secreted his property, or is about to do so.

in their business; that deponent's information was derived from Walter Kellog, plaintiffs' agent. Kellog also made an affidavit, sworn to on the 29th day of October, which alleges in substance the shipping, within six weeks, 4,000 pounds of goods in packages to relatives. It then alleges the confession of the judgments above mentioned, and the making of the chattel mortgage, and that, when the goods were purchased from the plaintiffs, the defendants were insolvent, and knew it, and failed to inform the plaintiffs; that the Citizens' Bank did not require the confession of the judgment, or the making of the mortgage; that on the 28th day of October the defendants received several boxes of goods which they had purchased; that the plaintiffs through deponent, demanded from the defendants that they deliver to the plaintiffs the goods which had been sold by them to the defendants on credit, and shipped on the 19th day of October; that they refused to deliver the same, that executions had been issued on all the judgments, and the defendant's property levied upon, which executions were delivered to the sheriff immediately by the defendants, upon the confession of the judgments; that on the 25th day of October deponent requested the defendants to secure the plaintiffs' claim; they requested time,—until October 29th,—and stated that the demands would be paid as they matured; that on the 28th day of October the defendants stated to deponent that they would not pay or secure the plaintiffs' demand, and refused to do so; that the defendants stored goods in the cellar, which they would not have done if they were intended for use in the business; that two of the defendants, Louis Nast and Samuel N. Nast, on the 28th day of October, went 20 miles to confess said judgments, and hired the deputy-sheriff to take them that distance; that immediately after the delivery of the executions they caused goods to be taken to their store, which they had purchased on credit about the 26th day of October; that the judgments were confessed to defraud creditors. Mayer Hoffman, in his affidavit sworn to on the 29th day of October, states that, on the 24th of the same month, the defendants bought considerable goods in New York. Irwin Wright, by affidavit sworn to on the same day, states he was in the employ of the defendants Louis Nast and Samuel Nast; that when he would leave the store no goods would be packed, but in the morning he would find goods packed in boxes three feet square, and they would be sent away by a carrier man.

The stipulation places the money secured by the attachment under the control of the court, so that practically the rights of the parties to the money are not involved in this appeal; but the learned counsel for the appellant insists that, inasmuch as the attachment is based upon fraud, the defendants have a right to be vindicated from the imputations involved in this charge, by setting aside the attachment, if the affidavits were insufficient, and that the stipulations are no estoppels. As the facts in each case materially differ, the numerous decisions shed but little light on this controversy. Each case must be disposed of upon its own facts, interpreted by the general rule of law on the subject. In *White v. Reichert*, 14 Wkly. Dig. 285, it was held that an affidavit made by one partner of a firm, stating that a certain sum was due on a contract, together with an affidavit of the other partner, stating that the defendant's stock had decreased at a more rapid rate than could be accounted for by his legitimate business, was sufficient to uphold a writ of attachment, granted on the ground that the defendant was disposing of his property with intent to defraud his creditors, in the absence of opposing affidavits on the part of the defendant. The above case is quoted with approval, and the rule reaffirmed in this department, in *Frankel v. Hays*, Wkly. Dig. 417. To the same effect in *Hamburger v. Moeller*, 4 N. Y. S. Rep. 447.

The affidavits upon which the attachment was issued show circumstances strongly tending to establish fraud, in the absence of any explanation on the part of the defendants. All the facts were peculiarly within their knowledge.

and when, instead of basing the motion to vacate upon affidavits, they saw fit to rest on those upon which the attachment was granted, all legitimate deductions and inferences must be construed against them. The large purchases on credit just before the confession of judgment and the making of the chattel mortgage, the confession of judgments to a brother, the causing of executions to be issued by the defendants, the distance they traveled to accomplish that result, the promise a few days before to pay all obligations as they matured, with a change of front as soon as they had effectually placed the property out of the reach of creditors, including a storing of goods in the cellar, and the mysterious and unbusiness-like manner in which goods were boxed and sent away, in connection with the other circumstances stated in the affidavits, in the absence of explanations on the part of the defendant, furnish cogent evidence of intent to defraud. The impression conveyed by the defendants of there being a strong member of the firm, in connection with the subsequent assertion that he had ceased to be a partner before the plaintiffs' goods were purchased, is also suggestive. *Blake v. Bernhard*, 3 Hun, 397. A fraudulent disposition of property avoids the credit upon which the goods are purchased. *Arnold v. Shapiro*, 29 Hun, 478. But in this case it does not appear that the credit had not expired when the attachment was issued. *Newton v. Wales*, 3 Rob. (N. Y.) 453; *Jones v. Fowler*, 37 How. Pr. 104; *Bank v. Voisin*, 44 Hun, 85. A confession of judgment upon a joint indebtedness by a part of the members of the firm would operate as a fraud upon the partnership creditors. *Menagh v. Whitwell*, 52 N. Y. 146. The proof authorized the issuing of the attachment. It is unnecessary to consider the question of estoppel.

The order appealed from must be affirmed.

SEELY v. SHAFFER.

(Supreme Court, General Term, Fourth Department. May 2, 1890.)

APPEAL—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In an action for the diversion of surface water, a verdict for plaintiff on conflicting evidence will not be disturbed, though the evidence of plaintiff himself was not as full and conclusive as it might have been, it appearing that on previous trials, when the jury agreed, the verdict was for plaintiff, and that the last trial occurred 15 years since.

Appeal from special term, Tompkins county.

Action by Obed A. Seely against Amos D. Shaffer. Judgment was given for plaintiff, and defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Simeon Smith and Frederick Collin, for appellant. *Marcus Lyon*, for respondent.

MARTIN, J. When the subject of this action arose, the plaintiff and defendant were owners of adjoining premises situated in the town of Newfield, Tompkins county, N. Y. The farms of both were on the east side of a public highway, which ran north and south. The defendant's farm was higher than the plaintiff's. The action was for damages for the defendant's having wrongfully collected, diverted, and discharged water upon the plaintiff's farm. The plaintiff claimed that the defendant obstructed the sluices across the highway, and destroyed the headings that turned the water into them, and thus caused the water which flowed from the lands west of the highway to accumulate and run down on that side until it reached a point opposite the plaintiff's farm, when it was discharged through a sluice or culvert onto the plaintiff's land. The plaintiff also claimed that a stream known as "Baker's Creek" ran onto the defendant's farm for some considerable distance, and then disappeared from the surface of the ground, but appeared again on the

defendant's premises in the form of a marsh or swamp; that the defendant so drained or ditched this swamp or marsh as to cast the waters therefrom which included the waters of Baker's creek, upon the plaintiff's land, in manner and to an extent different and greater than the natural flow thereof. The plaintiff likewise claimed that his farm was greatly injured by reason of such wrongful acts of the defendant, and that he sustained substantial damage. These claims of the plaintiff were denied by the defendant. Much evidence was given upon the issues thus made. The evidence thereon was conflicting. The jury found for the plaintiff.

While it must be admitted that the plaintiff's evidence upon the first branch of the case was not as full and conclusive as might well be desired, still we think it was sufficient to justify the court in submitting that branch of the case to the jury. It may, perhaps, be properly observed, in passing, that the case has been three times tried before a jury; and upon each trial, when the jury have agreed, its verdict has been for the plaintiff. Moreover, the last trial occurred more than 15 years since; and a new trial, under such circumstances, should not be hastily or improvidently granted, and the parties required to retry the case under the embarrassment that must necessarily arise from death or the frailty of human recollection. We think the verdict was fairly sustained by the evidence, and that under the circumstances it ought not to be disturbed, unless there was some error in the charge or rulings of the trial. The charge of the learned trial judge contained a clear, full, and impartial statement of the evidence, and an accurate and plain exposition of the law applicable to the questions involved, and we have found no valid exception to it. The appellant, however, claims that the case was submitted to the jury upon an erroneous theory, and hence the judgment should be reversed, although no proper exception was taken. "When a case has been submitted at circuit to a jury upon a theory which is wholly erroneous, the general term has power, and it is its duty, to grant a new trial because of the erroneous instruction, though an exception was not taken." *Whittaker Canal Co.*, 3 N. Y. Supp. 576, and cases cited in opinion. In this case we find no occasion for the application of that rule. We think the case was submitted upon a correct theory, and that the legal principles applied on the trial in the submission of the case to the jury are well sustained by the authorities. *Vernum v. Wheeler*, 35 Hun, 53, affirmed 22 N. E. Rep. 1132; *Mitchell Railroad Co.*, 36 Hun, 177; *Moran v. McClearn*, 63 Barb. 185; *Noonan City of Albany*, 79 N. Y. 470. We have also examined the various rulings on the reception and rejection of evidence to which our attention has been called by the appellant, but have found none that would justify a reversal of the judgment, or that we think requires special discussion. Judgment as ordered affirmed, with costs. All concur.

HOLMES v. ROPER *et al.*

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

1. NEGOTIABLE INSTRUMENTS—EXECUTION—FORGERY.

In an action upon a note purporting to have been executed to plaintiff by defendant's intestate, and to be payable after intestate's death, it appeared that plaintiff was a nephew of the intestate, that he had no property, and had had no business transactions with intestate of any significance. Experts testified against the genuineness of the signature to the note after comparison with known signatures. Other witnesses gave contradictory testimony after a similar comparison, and it was shown that plaintiff's father had been in partnership with intestate. Held, that a decision against the defense of forgery would not be disturbed.

2. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

On conflicting evidence, the jury found against defendant on the issues of forgery, duress, and no consideration. Affidavits supporting a motion for a new trial on the ground of newly-discovered evidence were to the effect that, at about the time and subsequent to the date of the note sued on, the intestate, in the presence

of plaintiff, told several persons that he did not owe a dollar, and that he intended that his property should go to his only child, and that plaintiff did not dissent from such statement. Other evidence to be adduced was to the effect that, after the date of the note, plaintiff had said that his uncle was going to leave him a present when he died. A paper was also discovered after the trial bearing a date prior to the date of the note, and indicating a settlement of all transactions between the intestate and plaintiff's father. *Held*, that the motion should have been granted. *MARTIN, J.*, dissenting.

2. SAME—APPLICATION.

Under Code Civil Proc. N. Y. § 1005, providing that entry, collection, or other enforcement of a judgment does not prejudice a subsequent motion for a new trial, such a motion does not come too late, where the judgment is entered on the 29th day of June, the case is settled and filed and notice of the motion served in the following September, and the motion is heard on the 1st of October.

Appeal from special term, Tioga county.

Action by Jerome D. Holmes against William E. Roper and Eliza W. Roper, administrators, etc., of Job Holmes, deceased. An appeal was taken from a judgment entered against defendants on the 29th day of June, 1889, in Tioga county, for \$2,427.84; also from an order confirming the referee's report entered in said county on the 28th day of June, 1889. There was also an appeal from an order denying a motion for a new trial on the ground of newly-discovered evidence granted at the special term in Tioga on the 1st of October, 1889, and entered on the 15th of November, 1889. The plaintiff presented a claim against the administrators of Job Holmes, based upon an instrument of which the following is a copy: "\$2,000. CANDOR, September 14, 1885. For value received, I promise to pay Jerome D. Holmes two thousand dollars, thirty days after my death. *JOB HOLMES.*" The claim was rejected by the administrators. An agreement to refer was entered into by the parties, approved by the surrogate of Tioga county, September 4, 1888. The reference was executed, and the referee made a report on the 10th of May, 1889, in which he found that the deceased made his certain promissory note, (being the one described in the claim,) and delivered said promissory note to the plaintiff, and "that said note was so given by said Job Holmes to said Jerome D. Holmes for a good and valuable consideration;" and the referee also found "that there was no undue influence, fraud, or duress practiced or used by any person upon the said Job Holmes, in obtaining from him the said note, or the giving or making of the same, and that the making and delivering of the same was the free act and deed of said Job Holmes, and that the signature thereto is the genuine signature of said Job Holmes; that the said note became due on the 10th day of August, 1887, and remains unpaid." In his conclusion of law he found the plaintiff was entitled to recover, and he ordered judgment for the amount of the note, "besides his reasonable and lawful disbursements in this action."

Code Civil Proc. N. Y. § 1005, provides that entry, collection, or other enforcement of a judgment does not prejudice a subsequent motion for a new trial.

Argued before *HARDIN, P. J.*, and *MARTIN* and *MERWIN, JJ.*

Simeon Smith, for appellants. *Mead & Darrow*, for respondent.

HARDIN, P. J. Having carefully examined the evidence found in the appeal-book relating to the merits of the controversy had before the referee, we find that the evidence is very conflicting. Defendants, upon the trial before the referee, resisted the claim of the plaintiff on the following grounds: *First*, that the note was a forgery; *second*, that, if the note was as a matter of fact signed by Job Holmes, his signature was procured under duress and fraud; *third*, that the note was void, and was without consideration.

1. By the evidence it appears that Job Holmes died July 7, 1887, at about the age of 70 years; that he had been afflicted with paralysis, and for some years before his death was quite infirm. He died intestate, leaving him surviving

his only child, Eliza Roper, who was his only heir; his wife had died several years before his death. At the time of his death he owned real estate worth about \$5,000, and he left about \$2,800 in personal estate. He had for a number of years been in partnership with his brother Rufus Holmes, who is the father of the plaintiff. Several settlements had been had between the intestate and his brother Rufus. No business transactions of any significance had ever taken place between the plaintiff and the intestate. The plaintiff was an invalid to some extent, and possessed of no property. The body of the note was in the plaintiff's hand-writing. No witness was produced upon the trial who saw the intestate sign the same. Plaintiff produced several witnesses, who gave testimony tending to support the claim made by the plaintiff. Several witnesses expressed the opinion that the signature upon the note was that of the intestate, and some of the witnesses made comparison of the signature upon the note with signatures upon other papers confessedly executed by the intestate. To confront the testimony of the plaintiff, several witnesses were called on the part of the defendants, who gave testimony tending to indicate that the signature to the note was not the genuine signature of the intestate, and that the note was without consideration. Among the witnesses called by the defendants was Mr. Ames, "the pen artist," who examined the signature carefully, and compared the same with the signature upon papers confessedly genuine, and he pointed out the dissimilarities in the features of the signature in question with those upon papers confessedly executed by the intestate, and he concluded his testimony in language following: "Taking all these into consideration, to my mind it presents an array of facts that makes it impossible that, at that time, Mr. Holmes made that signature. I do not believe it is his." While the referee was called upon to determine whether or not the signature was genuine upon the conflicting evidence, and it may not be said that his finding is against the weight of evidence, still a careful perusal of all the evidence found in the appeal-book has left some doubt upon our minds as to whether or not, if the question were now an original one, we should reach the same conclusion stated by the referee. However, under all the circumstances, with due consideration of all the evidence found in the appeal-book, giving to the report of the referee such influence as it justly should receive in reviewing the evidence, we do not feel at liberty to reverse the judgment on the ground that the report of the referee is against the preponderance of evidence.

2. We have looked at the exceptions taken during the trial, and we find no error presented by them calling for a disturbance of the report of the referee. It therefore follows that the appeal from the judgment and the order of confirmation of the same must be permitted to stand.

3. We are of the opinion that the court at special term had power, upon hearing the motion for a new trial on newly-discovered evidence, to grant the same, notwithstanding a judgment had been entered. Code Civil Proc. § 1005; *Tracey v. Altmyer*, 46 N. Y. 598. In *Fisher v. Corwin*, 35 Hun, 253, the motion for a new trial was held properly refused because of the laches of the moving party. In the opinion in that case it is stated, "more than four years elapsed from the time of the entry of the judgment to the making of this motion," and upon this ground the decision seems to have been placed. No reference is made in the case to *Tracey v. Altmyer*, *supra*, or to section 1005 of the Code of Civil Procedure. In the case in hand the motion for a new trial seems to have been made with considerable celerity. Under the established practice, it could not be heard except upon a case prepared and settled, containing all the evidence given upon the trial. *People v. Superior Court*, 10 Wend. 286; *Sproul v. Insurance Co.*, 1 Lans. 71; *Young v. Cuddy*, 23 Hun, 250.

The case was settled and filed on the 6th of September, and the notice of motion bears date September 21, and it was served on the 23d of September,

1889, and the motion was heard on the 1st of October, 1889. We think the defendants are not chargeable with laches in making the motion. We must therefore proceed to consider the merits of the motion. It was made upon 18 affidavits. Several of the affiants take back or modify or explain the statements found in their affidavits read in support of the motion. However, the statements of several of the affiants are not disputed, except by the affidavit of the plaintiff. Starkweather states in his affidavit "that, in the fall of the year 1885, he was in the village of Candor one day, and sitting on the stoop of the Allen Hotel, when he saw Job Holmes and his nephew, Jerome D. Holmes, coming down the walk towards him. Job Holmes came up and shook hands with deponent, and sat down near him; his nephew, Jerome, sitting down near him, and within hearing distance. Job Holmes then said to deponent: 'Charles, how are you getting along now days?' I said, 'First rate.' He then said: 'You are getting out of debt; you have a good farm and a good team.' I then replied: 'I calculate to keep so; this trading business does not pay.' He then said: 'I have quit trading and doing business. I have got enough to keep me as long as I live, if I take care of it. I don't care to have any more. I have only one child, and she will get what I have when I am done with it. I owe no man a dollar in this world, and no man holds any papers against me. I haven't but a little while to live, anyhow, and I propose to keep my business in a snug shape.' * * * Deponent further says that said Jerome did not dissent from any statement made by his uncle in his hearing and presence." Peter Herdic states a similar conversation, in substance, to that detailed by Starkweather, and adds: "This conversation was held on the hotel stoop in Candor, in the presence and hearing of Jerome D. Holmes." Edward J. Wright states that on the 16th day of September, 1885, he heard a conversation in which Job Holmes stated that "he was out of debt, and that no man had his name on paper, and what there was left of his property after he was through with it would go to his only heir, his daughter, and that Jerome D. Holmes was sitting a few feet distant, and in hearing distance, during the conversation, and made no dissension from what was said." Daniel Joy states that in May, 1885, he had a conversation with Job Holmes, in which he stated "he owed no man a dollar, and no man had his name on a note or paper of any kind that he knew of. The above conversation took place in the presence of a young man, whom Job Holmes introduced to deponent as Rufus Holmes' son, and whose name deponent understands to be Jerome D. Holmes." Luther Roper states a conversation had with Job Holmes "in the presence and hearing of Jerome D. Holmes," in which he stated that he was "all out of debt, with the exception of a little store bill, or such a matter." W. H. Decker states in his affidavit a conversation which he held with the plaintiff in respect to his uncle Job, in which the plaintiff communicated to the affiant that his uncle "was going to leave him a handsome present when he died; that similar statements were made to deponent at other times, and as late as the year 1886." William Baker details a conversation somewhat similar which he held with the plaintiff.

All these statements made would, if given in evidence, bear directly upon the vital issues passed upon at the hearing. What influence would they have in the determination of the principal questions involved in the controversy? It is not easy to determine that this newly-discovered evidence, if given upon a new trial, would surely produce a different result. We do not overlook the circumstance that the plaintiff in opposing the motion read his affidavit contradicting and explaining the statements found in the affidavits from which quotations have been made. It is not usual to determine upon conflicting affidavits an important question of fact which enters into the determination of the vital issues between litigating parties. Of course, if we were to give full credence to the affidavit of the plaintiff, little weight or force would remain in the affidavits to which we have referred. Whether the affiants affirm

the truth, or the plaintiff correctly states in his affidavit the facts in respect to such conversations, can better be determined after the affiants have been examined and cross-examined, and the plaintiff has been examined and cross-examined; therefore we should not indicate whether the affiants or the plaintiff are entitled to credence. In the affidavit of W. E. Roper, it appears that after the trial he discovered a paper bearing date August 9, 1883, in the house of the deceased, behind the desk, signed by Rufus Holmes, indicating a settlement of all matters between him and the intestate. The absence of that paper seems to be satisfactorily accounted for, and the finding thereof after the trial satisfactorily explained. Because of the severe conflict in the evidence given upon the trial upon the main issues, it is very difficult to say just what influence the newly-discovered evidence will have upon a fresh hearing of the issues. After some considerable reflection, with a degree of hesitation, we have finally reached the conclusion that the rule stated in *Plate Co. v. Barclay*, 48 Hun, 54, should be applied to the case before us. In deciding that case, the court in the first department observed: "What the effect of the testimony of these witnesses might be upon another trial of the action cannot certainly now be determined. It presents a controverted case, in which the jury might adopt either view. There is no probability certainly that they would consider the case of the plaintiff more out rather than that the defense of the defendant was proved. And in the state of the evidence it will be a matter of propriety and justice to submit the case to the hearing and decision of another jury." We think the rule stated is more satisfactory than the rule announced in *Behrens v. Bloom*, 100 N. Y. Supp. 551, by a special term of the city court, to the effect that the "evidence is not of that controlling character which carries with it the burden that its presentation at the trial would necessarily change the result." In the *Barclay Case* the court further observed: "There is certainly no justice in subjecting a person to what is really an unfounded claim, or for preventing him from maintaining an equally well-founded defense, because the evidence discovered by him by which that can be done may be of the same quality and description as that given upon the trial in which he has been defeated." We are of the opinion that the motion for a new trial should prevail; the order denying the same should be reversed; and an order entered setting aside the report of the referee, and the order of confirmation and the judgment entered thereon, and directing a new trial on the payment by the defendants, within 20 days, of the costs allowed by the order and in the judgment; but, if the costs shall not be paid or tendered within that time, then the motion will be denied, and the order affirmed, with costs. Order reversed, and order of confirmation and judgment thereon set aside, and a new trial directed before another referee, on the payment by the defendant within 20 days of the costs allowed by the order and in the judgment, and costs of the appeal before the trial of argument, and in default of such payment the order denying the motion for a new trial will be affirmed, with costs, and the judgment and order affirmed, with costs.

MERWIN, J., (concurring in result.) One of the defenses urged at the trial was that the note in suit was without consideration, and merely a loan. The form of the note, it being payable 30 days after death of the maker, and not negotiable or on interest, cast doubt upon the existence of a valuable consideration. A loan is not usually secured or a debt paid in that way. In this case, the plaintiff, the payee, paid nothing. It was, however, claimed by the plaintiff that the note was given in place of a similar one made in 1884, that in a settlement in 1884 between Job Holmes, the maker, and his brother Rufus, the father of plaintiff, the amount of the note was charged by Job Rufus; so that in substance Job in this way, with the assent of Rufus, retained in his hands an amount of money belonging to Rufus equal to the

amount of the note. No reason for a transaction of this kind was shown. The statement of settlement of that year, that was signed by Rufus and put in evidence by the defendants, shows nothing about it. Presumptively, from the manner in which Rufus and Job made their settlements, there was at the same time a statement signed by Job which would be in the possession of Rufus, and which, according to some of the evidence given on the part of plaintiff, would contain the \$2,000 item. No such statement was produced by plaintiff, or its absence accounted for. Nor was Rufus sworn as a witness, although he was accessible, and was shown to have been assisting the plaintiff in preparing the case. Rufus was a competent witness for some purposes, at least, and it was known before the trial, as the plaintiff testified, that the question of consideration would have to be met. The referee found that there was a good and valuable consideration. It may be that there was enough evidence to authorize such a conclusion, but the surrounding circumstances, and the character of the note, left it in a good deal of doubt. Having this in view, as it should be, in determining the importance to be given to the newly-discovered evidence, I am inclined to concur in the conclusion of the presiding justice that there should be a new trial.

MARTIN, J., (*dissenting*.) I agree with my Brother HARDIN that the appeal from the judgment in this case should not prevail. I am also of the opinion that the order denying the appellants' motion for a new trial, on the ground of newly-discovered evidence, should be affirmed. To entitle a party to a new trial on this ground, his papers must show that the new evidence has come to his knowledge since the trial; that his want of such knowledge was not caused by lack of diligence on his part; that the evidence is not cumulative; and that it is of a nature so material that it would probably produce a different result if a new trial were granted. Moreover, on such a motion, there must be an affidavit of the witnesses who will give the new evidence, stating that they are ready to swear to the facts claimed to be newly-discovered. *Adams v. Bush*, 1 Abb. Dec. 7. An affidavit that the witness told the party that he would so swear is not sufficient. *Shumway v. Fowler*, 4 Johns. 425. The motion in this case was based on the affidavits of 18 persons, who state therein that they have heard the plaintiff, or the defendants' intestate, in the presence of the plaintiff, make statements which are perhaps somewhat inconsistent with the plaintiff's claim in this action. An examination of these affidavits, and of the affidavits used in opposition to the motion, discloses that the affidavits of Joy, Roper, Whitney, Decker, Davis, Baker, and Eckler do not contain any statement that the affiants are ready to swear to the facts claimed to be newly-discovered, and that the witnesses Whitley, Lacey, Davis, Sincebaugh, Eikler, Lewis Westfall, Myron E. Westfall, and Rice have made subsequent affidavits wherein they state that the affidavits made by them, which were read in support of the motion, were made under a misapprehension as to what was stated therein, and, in effect, state that their first affidavits were substantially incorrect. I am of the opinion that none of the affidavits which were contradicted by subsequent ones made by the same persons should be considered, and that the affidavits that were defective in not stating that the affiants would swear to the matters stated therein should be disregarded.

The only affidavits remaining to be considered are those of Starkweather, Herdic, Wright, Ward, and Hull. Starkweather swears that some time in 1885 the defendants' intestate, in a casual conversation with him, said: "I owe no man a dollar in this world, and no man holds any papers against me;" that the plaintiff was present, and did not dissent. Herdic swears that on or about September 16, 1885, the decedent said to him at Candor, in the presence of the plaintiff, "that he was out of debt, and no man had his name on paper." Wright swears that he heard the conversation between Herdic and decedent on

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September 16, 1885, and that decedent said "he was out of debt, and no man had his name on paper." Ward swears that the decedent said to him "that I was out of debt, and that no man had his name on paper," and that the plaintiff was present; that at another time decedent told him "that all he owed the world was twelve dollars;" but the affiant does not state that the plaintiff was present at that time. Mrs. Hull swears that the decedent said to her: "I am out of debt, and owe no one anything but good will, and what there is is mine, is hers, [Eliza's.] Jerome D. Holmes is down taking care of me, and I pay him one dollar per day for his services;" and that the plaintiff was present and offered nothing to the contrary.

Evidence of the character of that stated in these affidavits would not be admissible against the plaintiff, unless it falls within the rule that, where a person engaged in a conversation with another makes a statement which the other listens to in silence, interposing no objection, when, under the circumstances, the silence is of such a nature as to lead to the inference of assent, such statement may be put in evidence against him. But here the conversation was not with the plaintiff. He, at most, was only present, taking part in it. If it be admitted that, in a casual, slight, and unimportant conversation between neighbors, the decedent boastingly, mistakenly, or truly stated that he owed no man anything, can it be said that the plaintiff was required to rudely dispute such a statement, or be bound by his silence. In other words, would silence, under such circumstances, lead to an inference of assent upon his part? It seems to me not. But, if otherwise, it would be evidence of very slight value. 2 Whart. Ev. § 1137, and cases cited in note 4. Therefore, if we assume the admissibility of this evidence, its value would be so slight as to be entitled to but little consideration in determining the merits of this motion. The evidence was also cumulative.

Moreover, the statements of these witnesses are not only denied by the plaintiff, but his wife swears that, on the day mentioned by the witnesses Her and Wright as the time when they had a conversation with the decedent in the plaintiff's presence, the plaintiff was not in Candor, where the conversation is stated to have taken place, but that he was with her attending a fair at Newark valley, which was several miles distant. There is also evidence which tends to cast a suspicion, at least, upon the propriety of the course pursued by one of the defendants in procuring the affidavits used in support of this motion. In view of the character of the new evidence discovered, of slight value, the denial of its truthfulness, and the rules of law applicable to such motion, I am led irresistibly to the conclusion that the learned judge's special term properly denied the defendants' motion for a new trial. If, however, the affidavits of Joy, Roper, Whitney, Decker, and Baker should not be disregarded as defective, because they do not state that the affiants would swear to the matters therein set forth, still I should be of the opinion that the order should be affirmed, as the new evidence of Joy and Roper is substantially like that of Starkweather and others, which we have already considered, and that of Whitney, Decker, and Baker was only to the effect that the plaintiff said that when his uncle died he would leave him something, and he would pay him well for taking care of him. This evidence I regard of very slight importance in this case. It might well be true, and still not affect the issues between the parties. It seems to me that these affidavits, when all taken together, fall very far short of disclosing evidence which is sufficiently material to justify the granting of a new trial within the rules applicable to such motion. I think the order denying such motion and the judgment thereon should be affirmed, with costs of the appeal from the judgment only.

HADEN v. CLARKE.

*(Supreme Court, General Term, Fourth Department. May 2, 1890.)***1. ASSOCIATIONS—ACTIONS—PROOF OF MEMBERSHIP.**

Where a defendant who is sued as president of an unincorporated association consisting of seven or more members, (Code Civil Proc. N. Y. § 1919,) fails to produce the constitution and by-laws of the association after being notified to do so, evidence that, in addition to the original members, tickets were issued to a large number of other persons who contributed to the support of the association, and were entitled to all the privileges of the original members, is sufficient proof that the association consisted of more than seven persons.

2. SAME—PAROL EVIDENCE.

Parol evidence is admissible, in an action against the president of an unincorporated association, to prove the number of the members, after defendant fails to produce the constitution and by-laws on notice.

3. NEGLIGENCE—DANGEROUS PREMISES.

The establishment of a toboggan slide across one of the principal streets of a populous city is of itself negligence sufficient create liability for injuries caused thereby.

4. HUSBAND AND WIFE—ACTION BY WIFE—PERSONAL INJURIES—RIGHT TO SUE.

A married woman can recover in her own name damages for the pain and suffering caused by personal injuries. *Bennett v. Bennett*, 28 N. E. Rep. 17, followed.

Appeal from circuit court, Oneida county.

Action by Margaret Haden against Wallace Clarke, as president of the Utica Toboggan Club, to recover damages for personal injuries to the plaintiff occasioned by a collision between a toboggan passing over a slide constructed by the above-named club and a sleigh in which the plaintiff was riding along one of the streets in or near the city of Utica. The toboggan slide erected and maintained by the club intersected and crossed the street upon which the plaintiff was riding at the time of her injury. The plaintiff alleged that the club was an unincorporated association, consisting of more than seven persons. This was denied by the defendant. There was a judgment in favor of the plaintiff for \$500 damages, with costs, from which, and from an order denying the defendant's motion for a new trial, made on the minutes of the trial judge, defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Matteson & Harvey, for appellant. *S. M. Lindsley*, for respondent.

MARTIN, J. The appellant contends that the judgment in this action should be reversed, and a new trial granted, upon the grounds: (1) That the Utica Toboggan Club was not an unincorporated association, consisting of seven or more persons, and hence the action was improperly brought against the defendant;¹ (2) that, as the plaintiff was a married woman, the damages sustained were the property of her husband, and therefore she was not entitled to recover; (3) that the defendant, or the association of which he was president, was guilty of no negligence or wrongful act which caused the plaintiff's injury; (4) that the plaintiff was guilty of contributory negligence; (5) that the verdict of the jury was against the evidence; (6) that the court erred in its rulings as to the admission and rejection of evidence.

A proper determination of this appeal requires but a brief discussion of the questions presented. Most of the propositions contended for by the appellant are governed by well-settled principles of law, which are so generally understood that a review of the authorities bearing upon them is unnecessary. We shall therefore content ourselves with but little more than a brief statement of our conclusions in this case.

¹ Code Civil Proc. N. Y. § 1919, provides that an action may be maintained by or against the president or treasurer of an unincorporated association, consisting of seven or more persons, on any cause of action on or for which all the associates may sue or be sued.

First. Was the Utica Toboggan Club an unincorporated association, consisting of seven or more persons? That this club was unincorporated is not denied. That there was an association of persons bearing that name is admitted, but that it consisted of seven or more persons is disputed. The constitution and by-laws of the club were not introduced in evidence. The defendant was subpoenaed, and given notice to produce them, but did not comply with the requirements of either the subpoena or notice. The court then admitted parol evidence as to the manner in which the club was organized, and as to its membership. The evidence as to who were members was not definite or conclusive, but it tended to show that, in addition to the original or first members of the association, tickets were issued to a considerable number of other persons; that such persons were designated on the tickets as members; that all were subscribers to the fund expended in maintaining the business of the club; and that the persons so subscribing, to whom such tickets were issued, paid the same amount towards the maintenance of the club, and possessed the same rights and privileges, as the original promoters of the enterprise. Under the circumstances disclosed by the evidence, we are of the opinion that the proof was sufficient to justify the finding that the club was an unincorporated association, consisting of more than seven persons, and to sustain the action against the defendant as president of such club.

Second. The fact that the plaintiff was a married woman was not a bar to her right of recovery in this action. The trial court charged the jury that she was not entitled to recover for her loss of time and inability to labor, nor for medical attendance, care, or nursing, but could only recover for the pain and suffering which she had endured. We think the doctrine of the case of *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. Rep. 17, is controlling upon this question, and is adverse to the contention of the defendant.

Third. A careful examination of the evidence in this case has led us to the conclusion that it was sufficient to justify the jury in finding that the association of which the defendant was president was guilty of a wrongful, dangerous, and negligent act in building and maintaining its slide across one of the principal streets in or near a populous city, with little or no protection against collision between those riding thereon at a very high rate of speed and travelers passing along the public street. The verdict upon that branch of the case was fully sustained by the evidence.

Fourth. We think the question whether the plaintiff was guilty of negligence which contributed to her injury was, under the evidence, a question of fact for the jury, and that its finding should not be disturbed. *Tolman v. Railroad Co.*, 98 N. Y. 203; *Greany v. Railroad Co.*, 101 N. Y. 419, 5 N. E. Rep. 425; *Parsons v. Railroad Co.*, 113 N. Y. 355, 21 N. E. Rep. 145.

Fifth. The evidence was sufficient to sustain the verdict, and there was no such preponderance in the defendant's favor as would justify an interference therewith.

Sixth. This brings us to the consideration of the appellant's exceptions to the rulings of the court in regard to the admission and rejection of evidence. The appellant objected to parol evidence of the existence of the Utica Toboggan Club, and the number of its members. After the defendant had failed to produce the constitution and by-laws upon notice or subpoena, the court admitted the evidence. If it be conceded that the constitution and by-laws were the best evidence, still, under the circumstances disclosed in this case, we think it was not error for the court to admit the evidence, as the defendant had refused to obey the subpoena or comply with such notice. Nor do we think that the court erred in admitting in evidence a subscription ticket issued by the club in 1885-86, as the proof was that the ticket in use at the time of the accident was in the same form. It tended to show that the subscribers who held such tickets were members of the association. It was not

error to exclude the evidence of the permission by the mayor of Utica to use a portion of the streets for toboggan purposes, as he had no authority to grant such permission. The ordinance which is relied upon by the appellant as authority for such permission does not, we think, confer it. We find no other exception that requires special consideration. We think the evidence fully justified the verdict, and that none of the defendant's exceptions were well taken. Hence it follows that the judgment and order should be affirmed. Judgment and order affirmed, with costs. All concur.

SIMMONS v. SYRACUSE, B. & N. Y. & OSWEGO & S. R. BENEV. SOC.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

1. BENEVOLENT SOCIETIES—UNLAWFUL EXPULSION—PAYMENT OF DUES.

In an action by a member of a benevolent society for weekly benefits, it is no defense that plaintiff was in arrears for dues, where it appears that he paid his dues until he was unlawfully expelled, and that he afterwards tendered them, and they were refused.

2. SAME—EXPULSION OF MEMBER—NOTICE OF CHARGES.

A rule of the society that any member feigning sickness to obtain benefits shall be expelled, does not authorize an expulsion without notice of the charges preferred or opportunity to defend.

Appeal from circuit court, Onondaga county.

Action by Hiram B. Simmons against the Syracuse, Binghamton, New York & Oswego & Syracuse Railroad Benevolent Society, to recover weekly benefits for the period that he was disabled. Judgment for plaintiff. Defendant appeals.

Argued before HARDIN, P. J., and MERWIN and MARTIN, JJ.

Stone, Gannon & Pettit, for appellant. *D. F. McLennan*, for respondent.

MERWIN, J. The defendant was incorporated in 1886 under the act passed in 1875, entitled "An act for the incorporation of societies or clubs for certain lawful purposes." Its object was to assist its members by paying them a stated sum per week while disabled from labor through sickness or accident. Its by-laws provided that any member who is disabled from work, either by sickness or accident, shall, after thirty days' connection with the society, receive benefit from the funds of the society at the rate of one dollar for the first week, and five dollars for each week thereafter, not exceeding 26 weeks. The plaintiff became a member in July, 1885. At the trial he recovered benefits for 12 weeks from the 13th October, 1888. It is claimed by the defendant (1) that the complaint should have been dismissed because the plaintiff had ceased to be an employe of either the Syracuse, Binghamton & New York Railroad Company, or the Syracuse & Oswego Railroad Company; (2) that the plaintiff should have been nonsuited because of arrearages in dues; and (3) because of fraud in his endeavor to obtain benefits; (4) that the court erred in not allowing evidence of the expulsion of plaintiff on the 19th November, 1888; and (5) that the court erred in its charge in divers respects.

1. It is alleged in the complaint and admitted by the answer that an applicant for membership, to be eligible, must be an employe of one of the named railroad companies. There is no evidence of any provision as to what the effect shall be of a person ceasing to be such employe after he becomes a member. There is no defense set up in the answer based on the allegation that the plaintiff had ceased to be such employe, nor was there any motion to dismiss on that ground. It appeared on the trial that plaintiff ceased to be such employe the latter part of July, 1888. There was also evidence that from that time forward he was not well. He, however, worked some for other parties prior to the time he became entirely disabled. The defendant has no good reason for complaining of the course of the trial on this subject.

2. As to the arrearages in dues, it was conceded at the trial that the plaintiff kept them up down to the time of the expulsion. This was November 19, 1888. It appeared that the dues for November were received by the defendant. Those for December were tendered, but refused. There was no ground for nonsuit in this regard.

3. The question of fraud was for the jury. The verdict in that respect not against evidence.

4. The defendant offered to show that at a meeting of the society on the 19th November, 1888, the following resolution was adopted: "The certificate of H. B. Simmons, claiming benefit from July 19th to October 23d, was taken up for action, and evidence being at hand showing that Mr. Simmons worked during the month of July and part of August, and, on motion, Mr. H. B. Simmons was expelled for violating the rules of the society after being duly notified by the secretary to be present." This evidence, upon the objection of plaintiff, was excluded. The only regulation of the society on the subject of expulsion, so far as appears from the record before us, was that "any member feigning sickness, in order to receive benefits, shall be expelled." This ground of expulsion was not stated in the resolution offered. This, it is urged, is a fatal defect. *People v. Society*, 22 Mich. 86, 92. This as it may, the more important question is over the matter of notice to the plaintiff. The rules of the society do not seem to provide for notice. It was shown that on Saturday night the plaintiff received notice to be present at a meeting on Monday evening. The resolution was passed that evening. It was not shown that any notice was given to the plaintiff that any charge was made against him, or that there would be a hearing upon any charge at the meeting. The plaintiff was not present at the meeting, nor, so far as the evidence shows, did any one appear for him. He sent word that he could not come, as the doctor forbade his going out in the night. The court below, in substance, held that notice should have been given to the plaintiff of the charge against him, and a reasonable opportunity given him to be heard, that such notice and opportunity was not given, and therefore the society had no authority to expel the plaintiff. The ruling was not, under the circumstances, erroneous. In the absence of any rule of the society on the subject of notice, the rule held at the trial was correct. *Wachtel v. Society*, 84 N. Y. 28; *Loubat v. Le Roy*, 40 Hun, 552, and cases cited; Nibl. Mut. Ben. Soc. p. 89, § 71.

5. The defendant claims the court erred in charging that the plaintiff, entitled to recover at all, was entitled to recover from October 13th to January 5th, that being the date of the commencement of the action. The exception, however, was to the statement that the company was notified October 13th. The court in reply said: "It was about that date it [the certificate of the physician] was served on the company; the evidence is, between that time and pay-day, which was the 13th, 14th, or 15th." This statement was not excepted to. The certificate of the physician as to plaintiff's sickness was dated October 13th, and was served at about that date upon the president of the defendant. That was a good service on the corporation. The exception is not well taken.

It also appears that the plaintiff's wife notified the president before that. The court in its charge remarked that the plaintiff, down to October, 1888, had received no benefit from the society. This was not correct, as the plaintiff, at his cross-examination, stated he had received benefits from the company, but the amount was not given. The defendant in excepting to this remark did not state the ground of the exception, or call the attention of the court to the evidence. If the defendant deemed it material, attention should have been called to it. The fact itself was immaterial. The remark, as made by the court, was coupled with the idea that, up to the time referred to, the plaintiff had no right to call for aid. It is not apparent that any harm resulted,

was likely to result, from the mistake. The defendant claims that it was error for the court in its charge to say that the plaintiff decided to call for benefits on October 13, 1888. That, however, was a correct statement of the effect of plaintiff's evidence. An entry upon defendant's cash-book as to plaintiff's dues was referred to by the court. It is said the cash-book was not in evidence. The case shows that a portion of the contents of the book, substantially the part referred to, was admitted in evidence without objection. The defendant claims an error in charging that the undisputed evidence showed that the plaintiff from October 13th to January 5th was unable to perform any labor or service by reason of his sickness. This was the evidence of the plaintiff, and the court left it to the jury to say whether it was disputed. Our attention is not called to any other claim of error. We find nothing sufficient to justify a reversal. Judgment and order affirmed, with costs. All concur.

PEOPLE *ex rel.* WEST SHORE R. CO. v. ADAMS *et al.*

(Supreme Court, General Term, Fourth Department. May 2, 1890.)

1. TAXATION—ASSESSMENT—POWERS OF ASSESSORS.

Under charter of the village of Little Falls, § 39, as amended by Laws 1873, c. 158, the village trustees, thereby constituted a board of assessment, whose duty it is to copy from the last assessment roll of the several towns which comprise the territory of the village the names and valuations of persons and property taxable in the village, are not bound to adopt the valuations made by the town assessors, but may, in the exercise of their judgment, increase such valuations for the purpose of village taxation.

2. SAME—OVERVALUATION—EVIDENCE.

The assessment will not be disturbed unless the party seeking to reduce it shows by clear and satisfactory evidence that the property was overvalued.

3. SAME—ASSESSMENT—VERIFICATION.

The village trustees are not required by the charter, § 41, to verify their assessment in the manner prescribed for the town assessors, and the absence of such verification does not invalidate the assessment.

4. SAME—IMMATERIAL ERROR.

When the valuation is not made by the acre, a mistake as to the quantity of land included in the assessment does not affect the rights of the parties, and is immaterial.

Appeal from special term, Herkimer county.

Petition by the West Shore Railroad Company against the trustees of the village of Little Falls to have an assessment reduced. This was a proceeding by writ of *certiorari*, under the provisions of chapter 269 of the Laws of 1880, to review an assessment against the relator made in 1886 by the defendants, as trustees of the village of Little Falls. Section 39 of the charter of that village (chapter 330 of 1850, as amended by chapter 158 of 1873) is as follows: "Sec. 39. The trustees shall constitute the board of assessment of the village for the purpose of valuation and taxes. The trustees shall cause to be copied from the last assessment roll of the several towns, parts of which comprise the territory of said village, the names and valuations of all persons and corporations taxable within the village, as made by the town assessors, and the same shall be deposited with the clerk of the board or one of the trustees, subject to inspection by any person interested. The trustees shall thereupon cause public notice to be given, subscribed by the president and clerk, and published for two successive weeks in all the newspapers published and printed in said village, stating where the roll is deposited for inspection, and designating a time and place, at least two weeks after the first publication of such notice, where and when the trustees will hear any objections, and make corrections of said assessment roll and valuation. The said town valuation shall be adopted by the trustees for the valuation of the property thereon within the village, subject to be assessed for village taxes, as far as practicable, subject, however, to be corrected of any errors which may appear thereon, or

for any change of ownership of property, or for increased value by reason of improvements, or for diminished value by reason of fire or damage by flood, and subject to have the names of persons added or omitted, with valuations accordingly as changes have taken place, or where names or property have been omitted which are subject to taxation, and may reduce or add to the valuation; and the trustees are hereby invested with the same powers within a village in respect to valuation and assessment of taxes, including the power to administer oaths, as town assessors have in respect to the valuation and assessment in towns." Section 41, as amended by chapter 49 of 1858, is as follows: "Sec. 41. Upon the completion of the assessment roll of the valuation, the trustees must cause the amount authorized to be raised, or so much thereof as they may deem necessary, to be apportioned according to the valuation, and to have the several sums so apportioned set opposite the valuation, in the same manner as required for town and county tax-lists, and the same shall thereupon be adopted by a resolution of the trustees, and shall be certified by the president, and deposited in the office of the clerk of the village." The special term made an order reducing the assessment from \$40,000 to \$18,661. The trustees appeal.

Argued before HARDIN, P. J., and MERWIN and MARTIN, JJ.

Myron G. Bronner, for appellants. *William E. Lewis*, for respondent.

MERWIN, J. The property of the relator that was within the village of Little Falls was partly in the town of Little Falls, and partly in the town of Danube. The assessment against relator in 1885 in the town of Little Falls was \$40,000, and in the town of Danube was \$60,000. The assessment roll of Little Falls for that year also stated that the valuation of that portion of property that was in school-district No. 1 was \$15,000. The roll for Danube for that year was not in evidence, but it was shown by one of the assessors that the valuation of that portion within school-district No. 1 of Little Falls was placed by the assessors at \$3,661. It was also shown that school-district No. 1 comprised all the territory of said towns that was within the village. The total of these valuations, being \$18,661, was held at the special term to be the proper valuation. The claim of the relator is that the defendants were bound to adopt these valuations. These school-district valuations were apparently made in pursuance of chapter 694 of the Laws of 1867, as amended in 1884, entitled "An act in relation to the valuation of the property of railroad companies in school-districts for the purpose of taxation." Under that act it was the duty of town assessors, "within fifteen days after the completion of their annual assessment list, to apportion the valuation of the property of each railroad company, as appears on such assessment list, among the several school-districts in their town in which any portion of said property is situated, giving to each of said districts their proper portion according to the proportion that the value of said property in each of such districts bears to the value of the whole thereof in said town." This apportionment was to be in writing, and signed by the assessors, and filed with the town-clerk, and "the amount so apportioned to each district shall be the valuation of the property of each of said companies, on which all taxes against said companies and for said districts shall be levied and assessed until the next annual assessment and apportionment." If the assessors neglected to make this apportionment, then the supervisor must do it, upon request of the trustees of the school-district. Very clearly, this act had reference only to school-district taxation. The apportionment was not a part of the assessment roll. The defendants were not bound by any action of the town assessors on this subject. They were only required to adopt, as far as practicable, the valuation properly appearing upon the assessment roll. Besides, under the charter, (section 83 as amended in 1873, they were expressly given the power to "reduce or add to the valuation." This power was inserted in 1873, and, although inapplicable

cially expressed, is broad enough to cover a case like the present. It seems, therefore, reasonably clear that the defendants were not bound to adopt the apportionment made by the town assessors, but had power to make the assessment in question upon valuation of their own. That being so, it is incumbent on the relator to show it to be excessive.

In *People v. Davenport*, 91 N. Y. 574, it is said that a party assailing an assessment as excessive must make it appear conclusively that the method by which the assessors arrived at the result complained of was incorrect, and that the assessment does not represent the fair value of the property assessed. In the present case there is no satisfactory evidence as to the real value of the relator's property. The main elements on the question of value do not appear. The contest was not over that subject. Some of the defendants, called by the relator as witnesses, testified that the valuation as fixed by them was a full and fair valuation as compared with other property, while others said it was the fair value as compared with the assessment against the Central Railroad. The evidence warrants the conclusion that the amount named in the roll was finally adopted and fixed upon by the trustees as the actual fair and true value of the relator's property as compared with other property in said village. It was known that in four instances the assessments against individuals were greatly disproportionate to the actual value. Not enough was shown to fix any rule on that subject available to the relator, especially in view of the unsatisfactory character of the evidence as to the actual value of relator's property. *People v. Carter*, 109 N. Y. 576, 17 N. E. Rep. 222. I am therefore of the opinion that the relator failed to furnish a sufficient basis for relief as to the amount of the assessment.

But it is said that the assessment was void because not verified by the trustees in the form prescribed for town assessors. Concededly, there was no such verification. The statute, however, under which the trustees acted, did not require it. It did provide (section 41) that upon completion of the roll it should "be adopted by a resolution of the trustees, and shall be certified by the president, and deposited in the office of the clerk of the village." No other verification was required.

It is further claimed that the assessment is erroneous by reason of misstatements as to quantity of land. The assessment is for 45.57 acres, while in fact there is only about 20. This is not specified in the petition as one of the grounds of illegality. It was evidently a mistake in copying from the town roll. The valuation was not by the acre. The quantity named was immaterial, so far as the rights of any of the parties are concerned. The error on this subject is not a sufficient basis for relief.

It follows that the order reducing the assessment should be reversed, and the prayer of the petitioner denied. Order entered July 3, 1889, reversed, with \$10 costs and disbursements, and prayer of petitioner denied, with costs against the petitioner as upon the trial of an issue of fact in the supreme court. Appeal from order entered November 8, 1889, dismissed, without costs.

MARTIN, J., concurs.

HARDIN, P. J. Section 39 of the charter of the village of Little Falls was amended by chapter 158 of the Laws of 1873, and it confers upon the trustees, as a board of assessment, powers with respect to assessments of property in the village liable to taxation. By the section (1) it is made the duty of the trustees, as a "board of assessment," to "cause to be copied from the last assessment roll of the several towns, parts of which comprise the territory of said village, the names and valuations of all persons and corporations taxable within the village, as made by the town assessors." (2) It is made the duty of the board, after such copy has been made, to deposit it with the clerk of

the board or one of the trustees, subject to inspection by any person interested. (3) It is the duty of the trustees to cause a public notice to be given, subscribed by the president and clerk, and published for two successive weeks in all the newspapers printed and published in the village, stating where the roll is deposited for inspection, and designating a time and place, at least two weeks after the first publication of said notice, where and when the trustees will hear any "objections, and make corrections of said assessment roll and valuation." By the words just quoted, it is apparent that the statute requires the "assessment roll and valuation" as taken from the town assessors to be used as the basis upon which further action may be had by the trustees. The subsequent language of the section clearly carries out this idea, for it prescribes in terms, viz.: "The said town valuations shall be adopted by the trustees for the valuation of the property thereon with the village, subject to be assessed for village taxes, as far as practicable, subject, however, to be corrected of any errors which may appear thereon, or for any change of ownership of property, or for increased value by reason of improvements, or for diminished value by reason of fire or damage by flood, and subject to have the names of persons added or omitted, with valuations accordingly as changes have taken place, or where names or property have been omitted which are subject to taxation, and may reduce or add to the valuation; and the trustees are hereby invested with the same powers within said village, in respect to valuation and assessment of taxes, including the power to administer oaths, as town assessors have in respect to the valuation and assessment in towns."

It is quite apparent from the language just quoted that the trustees are not required to adopt the exact state of facts found upon the assessment rolls of the towns of Danube, Mannheim, and Little Falls, so far as they relate to the property within the corporate limits of the village. It is impossible to do so, because, in the assessment found in the three towns against either of the railroads passing through the village, property lying beyond the corporate limits of the village is embraced; hence it becomes the duty of the trustees to exercise a discretion conferred upon them by the words, "as far as practicable," found in the section. Such discretion seems to have been exercised by the board of assessment in each of the cases brought in review in respect to the valuation of the relator's property in the years 1886 and 1887. Such board had jurisdiction of the subject-matter, and was called upon to exercise the power conferred upon the board in respect to the property of the relator. It is not apparent that the board was given power to increase the valuation of the relator's property, or of any other tax-payer's property, beyond the limits mentioned in the section. The first general limitation found in the section is the sum at which the property has been assessed by the several town officers. The second limitation or restriction is to property that has an "increased value by reason of improvements." The power to reduce seems to be limited to such property as has a "diminished value by reason of fire or damage by flood." A further qualified power has been given to the trustees, as a board of assessment, to add to the action of the several town assessors names of persons omitted from the assessment rolls, with proper valuations in respect thereto. It seems that the section confers the power to "reduce or add to the valuation" only in the exceptional cases mentioned in the section. When the trustees, as a board of assessment, found it impracticable to follow the exact figures found upon the assessment roll in regard to the relator's property in the town of Danube and in the town of Little Falls, it became their duty to fix a valuation upon the property for the purposes of an assessment in the corporate limits of the village. In reaching such a valuation, they had the right to make an actual inspection of the property of the relator, to exercise their judgment in respect to its value, and to form a conclusion upon all the *data* accessible to them as to the proper amount in which it should

be assessed. Presumptively, their action was in accordance with the facts and circumstances surrounding the property. Indeed, such seems to be very apparent from some of the evidence found in the appeal book. In seeking to overturn such an assessment thus made by the trustees, it was within the power of the relator to furnish clear, persuasive, and satisfactory evidence that the action of the board of assessors was improper and unjust. Some evidence was given tending to such a conclusion. No evidence, however, was given of "the cost of creating" of the relator's property through the corporate limits of the village. Such evidence was held proper in *People v. Weaver*, 34 Hun, 321. Nor was any evidence given "of the earning capacity of the railroad." Such evidence was held to be proper in *People v. Keator*, 36 Hun, 592. The relator seems to have relied largely upon the circumstance that 2 or 3 pieces of property singled out from a list of over 1,400 found upon the assessment roll were assessed at sums less than their value as expressed by witnesses produced upon the hearing. That evidence, under the rule which has been adopted in regard to the proceedings under chapter 269 of the Laws of 1880, is not sufficient to overturn the judgment of the trustees acting as a board of assessment. In *People v. Carter*, 109 N. Y. 582, 17 N. E. Rep. 222, ANDREWS, J., said: "The object of the statute was to afford a remedy to a party injured by unequal valuations; not to enable him, on mere proof of a mistake or misjudgment of the assessors as to the relative valuation of his property and that of another, to have his assessment reduced, although his own property was not overvalued, and it does not appear, taking into view the aggregate assessment and valuation of the taxable property on the roll, that he will be compelled to pay more than his just share of the tax." That case was approved in *People v. Christie*, 115 N. Y. 162, 21 N. E. Rep. 1024. In the latter case it was assumed "that the properties selected out from the roll by mutual agreement, and used without objection as the basis of comparison, did fairly represent the proportionate rate of assessment of the property of the town, and so serve as a correct basis for comparison."

In the case in hand no such assumption was made. The contrary was claimed by the defendants. Much evidence was given upon the hearing relative to the valuation of the property of the New York Central. Upon a careful inspection of that evidence, considering all the facts and circumstances surrounding the property of that corporation within the village limits, and a careful inspection of all the evidence relating to and circumstances surrounding the property of the relator within the corporate limits, does not lead to the conclusion that the trustees, in making the valuations complained of, placed the property of the relator upon the assessment roll at a sum disproportionate to the sum of \$190,000 of the New York Central. After a careful consideration of all the evidence found in the appeal book, I am of the opinion that the court at special term, upon the hearing upon a *certiorari*, under the act of 1880, was not warranted in determining that the assessment of the relator "is erroneous by reason of overvaluation, or is unequal in that the assessment has been made at a higher proportionate valuation than other real or personal property on the same roll."

Upon the other questions presented by the appeal, I concur in the opinion of MERWIN, J., for the reasons therein assigned, and favor a reversal of the determination of the special term, and the denial of the petition, with costs against the relator. See section 6, c. 269, Laws 1880; *People v. Parker*, 45 Hun, 436.

PEOPLE ex rel. WEST SHORE R. CO. v. EDICK et al.

(Supreme Court, General Term, Fourth Department. May 2, 1890.)

Appeal from special term, Herkimer county.

Petition by West Shore Railway Company to have an assessment of its property by the trustees of Little Falls reduced. Order made reducing the assessment. Defendants appeal.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.
Myron G. Bronner, for appellants. *William E. Lewis*, for respondent.

MERWIN, J. The main question on this appeal is the same as in the case of the same respondent against Victor Adams and others, *ante*, 295, the only difference being that it relates to an assessment for the year 1887. The same result follows. Order entered July 8, 1889, reversed, with \$10 costs and disbursements, and prayer of petitioner denied, with costs against the petitioner, as upon the trial of an issue of fact in the supreme court. Appeal from order entered November 8, 1889, dismissed, without costs. All concur.

RAND v. ROME, W. & O. R. Co.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

APPEAL—REVIEW—WRIGHT OF EVIDENCE.

In an action by a conductor to recover for services rendered in September and part of October, defendant set up that in August plaintiff had collected fares for which he had failed to account, and that by the terms of his contract his salary was not to be paid, in such case, till the fares were accounted for. Several private detectives testified that plaintiff had collected the fares unaccounted for. Plaintiff denied the misappropriation, and the jury found for him. *Held*, that the verdict would not be disturbed.

Appeal from circuit court, Oswego county.

Action by Lory O. Rand against the Rome, Watertown & Ogdensburg Railroad Company, to recover wages for his service as conductor on defendant's road. Verdict and judgment for plaintiff. Defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Rhodes, Coon & Higgins, for appellant. *Whitney & Whitney*, for respondent.

MERWIN, J. This action was brought to recover for the work, labor, and services of plaintiff as a conductor upon the defendant's railroad from September 1 to October 21, 1888, at the agreed price of \$65 per month for working days, and extra at same rate for other days, amounting altogether to \$123. In defense, it was alleged that the plaintiff, during the time named and for a year prior thereto, was in the employ of defendant, at the price named, under a contract, a part of which was that plaintiff should faithfully account for and pay to defendant all fares which he received in the course of his employment as conductor, and, until that was done, should not be entitled to his pay for services; that on the 7th August, 1888, he received for fares \$7.78, and on August 14, 1888, \$3.55, which he did not pay over or account for; and that, therefore, he should recover nothing on his present claim. A counter-claim was also set up for said sums, and also for the sum of \$150, alleged to have been in like manner received and not accounted for between October 21, 1887, and October 21, 1888, without specifying particular dates or amounts. At the trial the amount of plaintiff's wages was not disputed. The contest was over the matters set up in defense, as to whether or not the plaintiff was barred of his cause of action by reason of failure to account for fares collected. On the part of the defendant, there was the testimony of several persons, employed on behalf of defendant as private detectives, who were on the trains run by plaintiff on the 7th and 14th August, 1888, who testified to the plaintiff receiving fares that did not appear in the daily reports of the plaintiff to the company. There was also some evidence as to transactions upon the 12th September, but the court in its charge held it not to be sufficient to show any deficiency then, and limited the jury to the consideration of the transactions in August. This was not objected to. The plaintiff denied any misappropriation, and denied that he, upon the dates named in August, received any fares that he did not account for. His wages for August were paid. The claim of the defendant is that the verdict is against evidence; that there was so great a preponderance of evidence in favor of the proposition that the plaintiff had received fares that he did not account for, that upon that ground a new trial should be granted. The vital question in the case, as submitted by

the court to the jury witho it objection or exception, was whether the plaintiff intentionally retained money which it was his duty to pay over. The verdict of the jury in favor of the plaintiff upon that question should not, under the circumstances of this case, be disturbed. The defendant, notwithstanding the information which it now says was obtained by its agents on the 7th and 14th August, paid the plaintiff his wages for August, and did not discharge him till the 21st October.

It is further claimed by the defendant that the plaintiff, according to his own evidence, failed to perform his contract by omitting to punch the duplex tickets for passengers who paid their fares on the train, at the time when they were paid, and that, therefore, plaintiff cannot recover, and the complaint should have been dismissed on that ground. This point was not taken in the answer or at the trial, and there was no request to have it submitted to the jury. According to plaintiff's evidence, the rule was not invariable, and it cannot be said as matter of law that his failure to punch tickets in the manner testified to by him would be a bar to his recovery of wages. The rulings upon the admissions of evidence to which our attention is called were not erroneous. The explanation of plaintiff, as to his manner of doing business, given by him in rebuttal of the defendant's evidence, to the extent admitted by the court, was not improper. Evidence was given by a witness, Samuel Bull, as to what occurred on another train in the presence of Mr. Parsons, the president of the defendant, with reference to the punching of duplex tickets. The only ground of objection was that it did not appear that Mr. Parsons knew what was going on. This objection was remedied; the witness stating that Mr. Parsons saw him collect fares, and pass them by without punching the duplex. No sufficient reason for reversal is shown. Judgment and order affirmed, with costs. All concur.

MULLIN v. SISSON et al.

(Supreme Court, General Term, Fourth Department. April, 1890.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—DIRECTORY PROVISIONS OF STATUTE.

LAWS N. Y. 1888, c. 994, amending the general assignment act, (LAWS 1877, c. 466,) so as to provide that, in an assignment for benefit of creditors, the residence, kind of business carried on by the debtor at the time, the place where conducted, and, if in a city, the street and number, should be specifically stated, is merely directory; and the failure of the assignor to fully comply therewith will not render the assignment void. Following *Taggart v. Sisson*, 9 N. Y. Supp. 758.

Appeal from special term, Jefferson county.

Action by Joseph Mullin, as receiver of William W. Herrick and Henry H. Ayers, against Humphrey Sisson and others. Plaintiff appeals from a judgment dismissing his complaint. LAWS 1877, c. 466, as amended by LAWS N. Y. 1888, c. 294, provides that, in an assignment for the benefit of creditors, the residence, kind of business carried on by the debtor at the time, the place where conducted, and, if in a city, the street and number, should be specifically stated.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Langsting & Lansting, for appellants. *W. M. Rogers* and *John C. McCartin*, for respondents.

MERWIN, J. This action is brought to set aside, as fraudulent and void as to creditors, a general assignment made by the defendants Herrick & Ayers to the defendant Sisson. The claim of the plaintiff is that the assignment is void by reason of its failure to specify the kind of business carried on by the debtors, and their place of business, as required by section 2 of chapter 466 of the LAWS of 1877, as amended by chapter 294 of 1888. The same question, as to the same assignment, was passed upon by this court, in *Tag-*

part v. *Sisson*, 9 N. Y. Supp. 758, adversely to the plaintiff's position. Following that case, the judgment here must be affirmed.

It is also claimed by the defendant that the plaintiff, as receiver appointed in proceedings supplementary to execution, cannot maintain this action. This point was not passed upon by the trial court, and it is not necessary to decide it here. Judgment affirmed, with costs. All concur.

AMBERG v. KRAMER.

(*Supreme Court, General Term, First Department. May 23, 1890.*)

REFERENCE—APPOINTMENT OF REFEREE—IRREGULARITIES WAIVED.

The substitution by the court, without notice, of the name of another person in the order appointing a referee who has resigned, is an irregularity for which the order may be vacated, but is waived by appearing before the referee without moving to vacate.

Appeal from special term, New York county.

Action for an injunction by Gustav Amberg against William Kramer. The report of the referee appointed to assess the damages sustained by defendant was confirmed, and defendant appeals. For appeal from order appointing referee, see 8 N. Y. Supp. 821. For former litigation, see 8 N. Y. Supp. 240, 4 N. Y. Supp. 618, 6 N. Y. Supp. 303.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.
Joseph E. Newburger, for appellant. *David Gerber*, for respondent.

VAN BRUNT, P. J. Upon the termination of this action an order of reference was granted, upon notice, to assess the defendant's damages sustained by reason of an injunction procured by plaintiff. This order appears to have been made and entered on the 12th of April, 1889. On the 8th of May, 1889, the referee named in said order resigned, and the learned judge seems after its entry to have stricken the name of the original referee therein named therefrom, and inserted the name of a new referee, without any notice to the plaintiff. Notice having been given of proceedings before the referee, the counsel for the plaintiff appeared, and stated that he wished it understood that he appeared without prejudice to an objection on his part to the propriety of the present referee acting herein on the ground that there had been no order entered substituting the present referee in place of the referee appointed by order dated April 12, 1889. He offered in evidence the original order, taken from the files, bearing the name of the new referee, showing upon its face that the name of the original referee had been erased. The referee overruled the objection, and the reference proceeded. Upon the coming in of the referee's report the plaintiff's attorney filed exceptions to the same, excepting to the findings contained in the referee's report, and to his conclusions of law, and to the refusal of the referee to find as requested by the plaintiff. These exceptions were overruled, and the report confirmed, from which confirmation this appeal is taken.

By the stipulation entered into by the parties, it is conceded that the amount of damages found by the referee, and confirmed by the court, is reasonable; and the only question argued upon this appeal was as to whether the whole proceeding was absolutely void because the referee was without authority or jurisdiction. Of course, if the referee was absolutely without jurisdiction, proceeding upon the reference without objection did not confer jurisdiction upon him. But we think that, although the proceeding by which the new referee was substituted for the old was absolutely irregular, and, if the plaintiff had moved to set the order aside as it had been altered, he would have been entitled as matter of right to have the same vacated, yet it was but an irregularity, which, by proceeding before the referee without moving to set it aside, the plaintiff waived. *Roberts v. White*, 73 N. Y. 375. The learned

judge below had no authority, after the order appointing the first referee had been entered, to make any alteration in the same whatever, except upon notice to the plaintiff's attorney, and by another order duly entered. The order, after it was filed, became a public record, and was beyond the reach, for any purpose whatever, of the judge who made it; and the only way in which it could regularly be recalled, affected, or altered would be by the entry of a new order upon notice to the parties interested therein. This, however, was, as already said, an irregularity which would have entitled the plaintiff, upon a proper motion, to have had the proceedings vacated. But it was not for the referee to determine as to whether the order was regular or irregular. He properly overruled the objection, and proceeded with the reference as directed by the order; and, his conclusion being correct, the exception thereto raises no question for review. Upon the whole case, therefore, the order must be affirmed, but without costs. All concur.

PAXTON *et al.* v. BROGAN *et al.*

(Supreme Court, Special Term, New York County. April 24, 1890.)

1. WILLS—REVOCATION OF PROBATE—INJUNCTION.

The surrogate having exclusive jurisdiction, under Code Civil Proc. N. Y. § 2473 *et seq.*, to admit wills to probate, and to revoke probate thereof, an action cannot be maintained to restrain defendant from proceeding before the surrogate to revoke probate of a will, and to admit to probate a later will, on the ground that the limited powers of the surrogate preclude him from considering the question whether defendant is estopped by having received benefits under the first will.

2. PLEADING—DEMURRER—MISJOINDER OF DEFENDANTS.

Code Civil Proc. N. Y. § 488, providing that defendant may demur to the complaint when it appears that "there is a misjoinder of parties plaintiff," or "a defect of parties plaintiff or defendant," does not authorize a demurrer because there is a misjoinder of parties defendant.

Action by Daniel Paxton and John B. Hanchett against Eliza Brogan and others, to restrain a proceeding to obtain revocation of the probate of the will of John Patterson, deceased, theretofore allowed, and for the probate of a later will. Defendants demur to the complaint, on the grounds that there is a misjoinder of parties defendant, and that the complaint does not state a cause of action. For former report, see 8 N. Y. Supp. 872.

Code Civil Proc. N. Y. § 488, provides that "defendant may demur to the complaint when one or more of the following objections thereto appear upon the face thereof: * * * (5) That there is a misjoinder of parties plaintiff; (6) that there is a defect of parties plaintiff or defendant."

Booraem, Hamilton & Beckett, for plaintiffs. *C. G. Moritz*, for defendants.

O'BRIEN, J. The Code (section 488) does not authorize a demurrer on the ground of a misjoinder of parties defendant, therefore the first ground of demurrer is overruled.

The second alleged ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action as against the defendant Eliza Brogan. This ground of demurrer seems to me to be well taken, for the reasons that may be briefly stated. The complaint asserts no cause of action against Eliza Brogan, and contains no averment showing that she is a necessary or proper party for a complete determination of the action between the plaintiffs and the defendant George W. Patterson. The gist of the action is to obtain an injunction to prevent the defendant Patterson from proceeding in the surrogate's court to obtain the revocation of a will already probated, and from proceeding to obtain the probate of another and distinct will, executed by the testator at a period subsequent to the will already probated. The plaintiffs' right to such relief is predicated upon the statement that the defend-

ant Patterson is estopped by his acts, having taken and received benefits under the will probated. As Patterson is the real defendant against whom the allegations in the complaint are made, it is evident that, if a cause of action is not stated as against him, none exists against the demurring defendant Eliza Brogan, who is made a party because she is named as a beneficiary in the will, and against whom no relief or judgment is asked. It remains, therefore, to consider whether a good cause of action is stated as against the defendant Patterson. It is asserted that the surrogate is prevented, by reason of his limited statutory power, from entertaining the defense of an estoppel in the proceeding commenced in the surrogate's court to revoke the will already probated, and to secure the probate of the subsequent will, as hereinbefore stated. In this view as to the surrogate's limited power to do justice between the parties, I do not agree. Upon him has been conferred by statute¹ the exclusive power to probate a will, and to entertain proceedings to secure the revocation of a will already probated. As has been well said by the learned judge in denying an application for an injunction in this case, *pendente lite*: "This court ought not, excepting in a case where the plaintiff would be clearly remediless without resorting to a court of equity, undertake to interfere with the surrogate in the exercise of his jurisdiction." That the plaintiffs are not remediless, and that the surrogate is not powerless to protect the plaintiffs as executors, becomes apparent when we consider the results that would flow, assuming that the defendant George W. Patterson should succeed in revoking the present will, and probating the one now offered. After a revocation of a will an accounting would follow, in which the executors would be protected in reference to any payments made under such will, by directions of those entitled to take thereunder. Again, upon grounds of public policy, the testator is entitled to have his last will probated. When, however, it comes to the distribution of the estate, the surrogate can prevent injustice being done to the executors who have proceeded in the course of such distribution according to the consent and directions of all legatees, devisees, or beneficiaries named in the will, even if it be assumed that he can regard or take notice of the estoppel as a bar or defense. The surrogate, therefore, having ample powers to protect the plaintiffs, and they not being remediless, joined to the reluctance which this court will always show when asked to enjoin the surrogate in matters within his peculiar jurisdiction, seem to me conclusive against plaintiffs' right to an injunction, which is the ultimate relief sought. The facts stated, therefore, not being sufficient to warrant a judgment in plaintiffs' favor, the demurrer must be sustained. Judgment accordingly, with leave to serve an amended complaint, upon payment of costs.

¹ Code Civil Proc. N. Y. § 2473 *et seq.*

SWEENEY v. NEW YORK, N. H. & H. R. Co.

(Superior Court of New York City, General Term. June 27, 1890.)

MASTER AND SERVANT—NEGLIGENCE OF MASTER.

In an action for injuries received by plaintiff while in the employ of defendant as a brakeman, by the breaking of a defective coupling link, it is error to instruct, as a matter of law, that defendant is guilty of actionable negligence, where the evidence tends to show that a fellow-servant of plaintiff used the defective link, though the defect was apparent on inspection, and defendant had provided other links which were perfectly safe.

Appeal from jury term.

Action by Owen Sweeney against the New York, New Haven & Hartford Railroad Company for personal injuries sustained by plaintiff while in the employ of defendant as brakeman. The evidence went to show that the injuries were sustained in a collision caused by the breaking of a defective link connecting the tender of an engine with a freight-car. The defect was apparent on inspection. There was no evidence as to who put the link in place, but such duty devolved upon one of the crew to which plaintiff belonged. Judgment was given for plaintiff, and defendant appeals.

Argued before FREEDMAN and TRUAX, JJ.

Page & Taft, for appellant. *Thomas P. Wickes*, for respondent.

FREEDMAN, J. Assuming that the trial judge was right in refusing to dismiss the complaint, and in holding that the plaintiff was not guilty of contributory negligence, and that the proximate cause of plaintiff's injury was the breaking of the coupling link between the tender and the car next to it of defendant's train, it does not follow that the breaking of the said coupling link constituted negligence *per se* in the defendant. From the evidence on this point, although uncontradicted, reasonable minds may draw different conclusions. In a certain aspect of the case the jury might have reached the conclusion that a fellow-servant of the plaintiff negligently used the said coupling link, notwithstanding its insufficiency and defect were apparent on a bare inspection, and although the defendant had provided quite a number of others which were perfectly safe and sufficient, and from which a selection should have been made by such fellow-servant. The question of defendant's negligence was therefore one of fact, to be determined by the jury, and it was error in law to withdraw it from the consideration of the jury, and to hold that the defendant had been guilty of negligence, as matter of law, in not having provided a safe and sufficient coupling link, and to instruct the jury that the only question to be determined by them was the question of damages. As the error specified necessitated a new trial, it is not necessary to discuss the other questions in the case. The judgment and order should be reversed, and a new trial ordered, with costs to appellant to abide the event.

WOODRUFF v. NEW YORK, L. E. & W. R. Co.

(Superior Court of Buffalo, Special Term. April 1, 1890.)

TRUSTS—ACTION BY TRUSTEE—ALLOWANCE OUT OF ESTATE.

The G. railroad company conveyed all its property to plaintiff in trust to secure its bonds, and afterwards leased all its property to plaintiff, who assumed the bonds secured by the deed of trust. A few days after this lease plaintiff leased the property to the E. railway company, which assumed plaintiff's obligations under the lease to him. Afterwards plaintiff sued the E. company to enforce payment of the bonds, and a judgment was rendered, which relieved plaintiff from personal liability, but was also in other respects unfavorable to the bondholders. Plaintiff appealed, and procured a judgment which fixed his liability, and made the bondholders secure. *Held*, that the litigation was for the benefit of the bondholders, and not for plaintiff's benefit, and that plaintiff was entitled to an allowance for expenses and attorneys' fees.

v.10N.Y.a.no.4—20

At chambers. Action by Lauren C. Woodruff against the New York, Erie & Western Railroad Company. Defendant moves to vacate certain orders granting allowances to plaintiff herein, and for counsel fees, made *parte* upon application of the plaintiff. The motion is made upon plaintiff's papers, and the papers, proceedings, and judgment rolls in several actions and proceedings between the parties hereto, and between plaintiff and the predecessors of defendant. The facts appearing upon this application far as material to a disposition of the present controversy, are as follows: or about the 20th day of June, 1871, the Erie & Genesee Valley Railroad Company, a corporation existing under the laws of the state of New York, for the purpose of completing its road, and being desirous of raising money for that end, executed and delivered to the plaintiff herein, Augustus F. Frick and Le Grand Lockwood, now deceased, a deed in trust of its said property for the purpose of securing the payment of bonds issued by said corporation in amount to the sum of \$120,000, payable at the Metropolitan National Bank, in the city of New York, on the 1st day of July, 1886, bearing interest from the 1st day of July, 1871, at the rate of 7 per cent. per annum. The said bonds were duly delivered by said corporation to said trustees, and were by them negotiated and sold. Subsequently, and about November 1, 1871, the said plaintiff entered into a written agreement with said corporation whereby the said corporation demised and leased to plaintiff its said road together with all its property, rights, and appurtenances connected therewith for and during the term of its corporate existence, in consideration of which plaintiff assumed the payment of the said bonded debt of \$120,000, together with the interest thereon. Thereafter, about the 8th of November, 1871, plaintiff demised and leased said road, its property and appurtenances, to the Erie Railway Company, a railroad corporation duly chartered by the state of New York, in and by the terms of which lease the said last-named company assumed all the obligations imposed upon plaintiff by virtue of the prior lease, and thereupon said Erie Railway entered into possession of the said road, and through itself and its successors, has since continued to control and operate the same. The Erie Railway Company made default in the payment of interest on said bonds during its corporate existence. In 1875 an action was commenced by the attorney general of the state against the Erie Railway Company for a dissolution of the corporation, and pending said action H. J. Jewett was, on the 29th day of May, 1875, appointed temporary receiver of said company, by an order duly entered, and immediately entered upon the duties of his receivership, took possession of, and continued to operate, said road leased by plaintiff, as aforesaid. The said receiver also made default in the payment of the interest due upon said bonded debt. Subsequently plaintiff obtained an order granting him leave to sue said receiver, and thereupon about October 20, 1877, he brought an action against said receiver, the Erie Railway Company, and others, to compel the payment of interest, as provided in said bonds. This action resulted in an interlocutory judgment, directing payment by the receiver of said interest out of any fund in his hands applicable for the payment of rent of leased roads, and directing a reference to determine whether any such funds existed applicable to said purpose, and whether said receiver had been discharged from his trust. This judgment was reversed on appeal to the general term, the court holding that the leases were void, and that plaintiff had no standing to maintain the action. The court of appeals reversed the judgment of the general term, and affirmed that of the special term. Subsequently said reference was executed, and the referee reported that there was, on December 5, 1889, while said interlocutory judgment was in force, funds sufficient for the payment of the judgment therein provided, but that at the time of the reference there was no money in the hands of such receiver, and that he had been discharged from his said trust by order of the court, and the money applicable to the pay-

of the judgment was by said order paid by the receiver to the defendant herein. The special term decided that the receiver was not discharged from the operation of the judgment, but must pay the money into the designated depository. This judgment was modified at general term (25 Hun, 246) by providing that the receiver should only be required to pay such moneys as he might at the time of the referee's report have in his hands, or such sums as might thereafter come into his hands from the Erie Railway Company. This judgment was upon appeal reversed, and the judgment of the special term affirmed, by the court of appeals. 93 N. Y. 609. Subsequently, and about July, 1886, an action was brought in this court by plaintiff to compel the payment of the several sums of interest heretofore mentioned by this defendant, as the successor in interest of the Erie Railway Company, and which had also received the sum of money so held by the said receiver from him at the time of his discharge from the receivership, and which was applicable to the payment of the said judgment, and had also entered into the possession of, and was operating, the said road, so leased as aforesaid from plaintiff. Said action was duly tried in favor of said plaintiff, whereby defendant was commanded to pay the sum of \$49,504.86, with interest from the 16th day of September, 1889, together with certain costs, into the Metropolitan Trust Company of the city of New York, to the credit of Lauren C. Woodruff and Augustus Frank, as surviving trustees under the said mortgage or trust-deed executed by the Erie & Genesee Valley Railroad Company. The said defendant has complied with the judgment herein and has paid the said money to the credit of the said trustees, and the same is now awaiting distribution by the trustees to the holders of the coupons due upon said bonds.

Myron H. Peck and *L. N. Bangs*, for plaintiff. *Rogers, Locke & Milburn*, for defendant bank. *E. C. Randall*, for certain coupon holders. *E. F. Farnan*, for Augustus Frank, trustee.

HATCH, J. It was deemed essential to state the facts connected with this motion with some fullness, that the equities applicable thereto might clearly appear. From these facts and the record it appears that at the time of the execution of the bonds plaintiff and Frank occupied no other relation to the bondholders than such as arose by virtue of their trusteeship to sell the bonds, receive and pay the interest. No personal liability attached to them for any defaults that might be made which did not involve an omission to properly discharge the duties of their trust. Eliminating from this case now all records and proceedings by virtue of which the fund herein has been obtained, we see that it comes to the hands of the trustees by virtue of their capacity as such, and in none other. The result, therefore, of the litigation, however or by whomsoever carried on, has been to bring into court a sum of money payable to no particular individual, not even to the plaintiff, but payable to trustees, to be by them distributed in accordance with the obligation imposed upon them by their original appointment. We therefore have presented a case where a litigation carried on by one of the trustees for a period of years, resulting in a judgment directing the funds to be paid to representatives appointed for distribution, in which we are asked to say that the person carrying on the litigation, who finally receives the money, of which he takes nothing personally, has occupied, and now occupies, the position of an individual litigating for his own interest with respect to the fund, and must pay not only his own expenses, but the charges of counsel, while he gets nothing, and the beneficiary takes all, without charge, cost, or trouble. If this be the law, it must be declared so by some other tribunal than this. It would be perhaps conceded that, if the plaintiff had conducted this litigation in his representative capacity, or been without personal interest or liability with respect to the subject-matter thereof, then the rule would be different with respect to his right for reimbursement. Does the fact, then, that Woodruff was

surety for the payment of these bonds and interest thereon so far change his relation thereto that it must be said that he so carried it on as his personal matter, with the sole purpose and object of relieving himself from his personal obligation, and in no sense to create a fund for the benefit of others? This presents one of the questions urged, and attacks the power of the court. When Woodruff took the lease from the Erie & Genesee Valley Railroad Company, he thereby assumed the payment of the bonded debt, and became, as to the Erie Railway, the defendant herein, and the bondholders, a surety for the payment of the coupons as they matured. It was doubtless intended at the time of the execution of the lease that the Erie Railway was to become the real, and practically the primary, party in the operation of the road, the extension of its line, and the payment of interest upon its bonded debt; for in the lease from the Erie & Genesee Company to the plaintiff is found this clause: "In case of payment of the bonds by the party of the first part, or the Erie Railway Company, thereafter the annual rent to be one dollar and taxes." The answer of the Erie Railway Company and of the receiver also pleads as a defense that plaintiff simply occupied the position of surviving trustee, and that any cause of action which might exist belongs to the surviving trustees under said trust-deed, and not to plaintiff. While these facts do not change the legal obligation of the parties, it bears upon the equity of the application and plaintiff's standing. Such position is also reinforced by the fact that it does not appear that plaintiff was in any sense benefited by the assumption of the liability, as the lease to the Erie Railway was upon terms similar to the one to him; that he occupied the position of a conduit simply, except that the liability attached in the passage.

After default in payment of the maturing coupons, the subsequent insolvency of the Erie Railway, and the appointment of the receiver, plaintiff obtained leave to commence an action against the latter. This he commenced, making the receiving party defendant with others. No actions have ever been commenced against plaintiff to enforce payment of the coupons. The issue between the parties was at once sharply defined, and the claim made that plaintiff had no standing in court, and no cause of action against the defendants; that the said agreements were inoperative and void, creating no liability against or in favor of any person; and the claim thus made has been pressed with great ability, vigor, and skill upon the courts, from the special term to the court of appeals, not only once, but twice, and again in the trial term of this court. The fierceness of the contest has been prolonged for a period of 13 years and upwards, and has resulted at last in the surrender by the present defendant, and the money paid, not to the plaintiff, however, as an individual, but to him as trustee, for distribution among the coupon-holders, of which it does not appear that he is entitled to a single dollar. During this period of 13 years he has borne the whole expense of the litigation, except as his adversary has been by the court compelled to pay certain costs, wholly inadequate by way of recompense, and except the printing of the last case on appeal to the court of appeals. It is now claimed that plaintiff is entitled to nothing, either for money actually expended, or for an allowance as compensation, and that, in addition, his counsel is entitled to nothing beyond the costs taxed and allowed, except as he has the right to demand it from the plaintiff. The claim thus advanced, and as pertinaciously argued as any other in this much litigated case, rests for its basis upon the ground that plaintiff assumed the payment of the interest by virtue of his lease, and consequently that he was litigating alone to relieve himself from liability as a primary debtor. I am not inclined to adopt this view. On the contrary, it impresses itself upon my mind that his liability was simply an incident in the controversy. The property of the lessor railroad, with all its appurtenances, was in the possession and under the control of the defendants in the several actions. This was the property relied upon as security for the payment of the

bonds and interest. As security, the value of its use was the controlling element. Defendants had been in the occupancy and use since the date of the lease, and continued through the whole period covered by the litigation. Their claim to possession rested upon the consent of the Genesee Valley Railroad Company and the rights of the public, and they utterly repudiated being bound by any and all agreements, beyond, perhaps, such as the law might create, based upon the value of the use; and as to that, anchor was cast to the windward in the form of an allegation in the answer that the expense of such use and occupation had been much more than the revenues derived therefrom. Thus, the controlling issue presented for determination was the validity of the agreements. If the attack upon them succeeded, then plaintiff's liability was at once discharged, and with it went the value of the use of the property for the period of the occupancy, and at once the security for the payment of the maturing and matured interest took to itself wings, as it may be assumed the property was not sufficient to pay its mortgage with accumulated interest. If the main purpose of the litigation was to secure the release of plaintiff from his liability, it is inconceivable that he did not accept the judgment of the general term of the supreme court, which effectually wiped out any personal liability disclosed by the present motion. *Woodruff v. Railway Co.*, 25 Hun, 246. But he appealed, not to relieve himself, but for the purpose of securing the property, and the value of its use, upon the faith of which the bonds had been negotiated. Had he been defeated, his liability was gone, and with it went the value of the use of the property, and probably the sum of money secured by this judgment, and now under the control of the trustees. He succeeded, secured the money, and incidentally fixed his liability. Plaintiff was not a primary debtor. It was the Genesee Valley road who executed the bonds, and the real security for their payment was the road, and its earning power measured the value. It was to save that, as we have already seen, and in doing that Woodruff represented the bondholders. At the most, he can only be said to have represented himself as surety in connection with a representation that inured to the benefit of all creditors. It is not seen how this dual relation is inconsistent with his trusteeship. It is true the suretyship gave him standing to litigate, but the fruits of it fix the liability of a solvent debtor for the payment of the bonds, and the fund inures to the benefit of the coupon-holders. The release taken by the plaintiff, as we have seen, made him the conduit through which the leased road was placed in possession of a responsible party, who would pay the interest and extend the road. This contract therefore inured to the benefit of the bondholders, and was made for the purpose of security, and for the advantage of the leasing company as a provision for paying the bonds. Under this scheme, therefore, it is quite apparent that it was intended that the road should be operated by a company that would develop its capacity, and thus that the road, the real primary security for payment of the bonds, should be made to pay in the operation, and the whole to inure to the benefit of the bondholders. This scheme the plaintiff has enforced by compelling the operators of the road to pay, as originally intended, and his suretyship has been incidental to the main purpose; and, as plaintiff takes no beneficial interest in the fund, I am of opinion that he becomes entitled to an allowance, upon the principle applicable to trustees. Counsel cites *Attorney General v. Insurance Co.*, 91 N. Y. 57, as opposed to this conclusion. In that case the attorney general had obtained judgment dissolving defendant as an insolvent corporation. A receiver was appointed of its assets. On a hearing to determine the amount of allowance to the receiver, certain policy-holders were allowed to intervene, the commissioners were materially reduced. Upon an application for allowance by the attorneys of the policy-holders, it was held that the court had no power to grant it. But the opinion expressly recognizes the rule that the court in its control of a fund is bound to recognize

every substantial equity and every existing right in providing for the distribution of the fund. Equity was denied existence on that application, as the petitioners had brought no fund into court, were not parties to the original action, and had simply intervened to protect personal rights. The present application presents different features. Plaintiff was the prosecutor in the original action and in the last. The settlement of the issues have adjudged that the party in the occupation of the property—the primary security—must pay for such use and occupation, not only for the interest due, but the bond as well. Plaintiff comes into court bringing a fund, the result of his exertions, and in this fund he has no personal interest, except to distribute it as trustee. This seems, therefore, to be a case where equity and justice require for recognition, and is within the spirit of that decision.

This motion to vacate the orders, notwithstanding the views here expressed, must be granted, as the parties appearing are entitled to notice and an opportunity to contest the amount of the sums allowed. The granting of the allowances without notice was the result of misapprehension. The order will therefore be that the orders heretofore entered be vacated and set aside, and that a referee be appointed to take proof and determine the amount of the several sums to be allowed to the persons thereto entitled, and report to this court with his opinion thereon. If the parties cannot agree upon a referee, then the court to appoint; and when the parties have agreed upon the referee, or the court shall appoint, then a day shall be fixed for a hearing and such appointment shall be sufficient notice to the parties who have appeared upon this motion upon service of the order herein. The usual notice as for trial before a referee shall also be given by plaintiff to the holders of such other coupons as are known to him, and are entitled to distribution of said fund; and in the event that no such coupon-holders are known, then notice shall be given to Augustus Frank, as trustee, except that in the latter event said Frank having appeared upon this motion, service of the order fixing the time for such hearing shall be deemed sufficient. No costs of this motion shall be allowed to either party.

NEWMAN v. ERNST.

(Superior Court of Buffalo, Trial Term. April, 1890.)

1. HIGHWAYS—COLLISION—BURDEN OF PROOF.

While plaintiff was going along the right-hand drive-way of a street, (the middle of the street being occupied by car tracks,) he collided with defendant, who was going in the opposite direction on the same side. There was room for vehicles to pass on the drive-way, and each party contended that he attempted to avoid the accident. The court charged that defendant was presumptively negligent in being on the side of the street where the accident occurred; yet plaintiff must show that such negligence produced the injury, and that he was free from contributory negligence. *Held*, that a verdict for defendant would not be disturbed.

2. APPEAL—REVIEW—ERRORS CURED.

Error cannot be predicated on the admission of improper testimony where it afterwards stricken out, and the jury instructed to disregard it, unless it appears that a party objecting was prejudiced by the admission of such testimony.

Action by George E. Newman against Harvey Ernst. Plaintiff moves for a new trial on the minutes.

Herman Hennig, for plaintiff. *Robert F. Schelling*, for defendant.

HATCH, J. This action was brought to recover damages for the killing of plaintiff's horse on Main street, in Buffalo. From the facts developed upon the trial, it appeared that plaintiff's horse was being driven by an intending purchaser for the purpose of examination and trial. At the time of the accident he was driving upon the right-hand side of Main street going south. The center of Main street are laid two lines of street-railway tracks, leaving a drive-way on either side sufficient in width for ordinary vehicles to meet and

pass. Defendant was driving northerly on the same side as plaintiff. As the horses met, a collision occurred; the thill of defendant's cutter entering the side of plaintiff's horse, just back of the shoulder, inflicting immediate death. The evidence given upon the trial was quite conflicting, the testimony of plaintiff tending to establish that defendant was driving at a rapid and reckless rate of speed, and that he made no effort to turn his horse to the right as they met, but continued to drive in a straight line and at a rapid rate until the collision occurred; that, at the time, plaintiff was as close to the curb-line of the street as he could get with his cutter, and was driving at a moderate pace; that, just as the collision was about to occur, he pulled his horse to the right to avoid it, but was unable to get out of the way. Upon the part of the defendant the evidence tended to establish that the driver of plaintiff's horse was looking at the movements of the animal, and not the direction in which he was going; that he was driving at a rapid pace; that the defendant turned to the right as far as the car track; that there was space sufficient between him and the side of the street for the horse and vehicle to pass him without collision, and that he called to the driver to turn out and avoid him; that the driver paid no attention, but seemed to pull his horse further towards defendant, and the collision occurred. The court, in submitting the cause to the jury, charged that defendant was presumptively negligent in being upon the side of the street where the collision occurred; yet that it was incumbent upon the part of the plaintiff to establish that such negligence produced the injury complained of, and that he was free from any negligence contributing thereto. The jury found for the defendant a verdict of no cause of action. Plaintiff now claims that the court committed an error in this regard, and that plaintiff should have recovered, as defendant's liability became fixed by reason of his being to the left of the center of the highway at the time of the accident.

I am not inclined to adopt this view; on the contrary, subsequent examination has confirmed the impression existing at the trial. The ruling that defendant was presumptively negligent in being upon the wrong side of the road was quite as favorable as plaintiff was entitled to, although there is authority for it. *Pike v. Bosworth*, 7 N. Y. St. Rep. 665. The statute provides a penalty for a person driving upon the road-way, and about to meet a passing team, who does not turn to the right of the center of the road. *Earing v. Lansingh*, 7 Wend. 185. But such statute does not provide *per se* that an offender shall be liable for all damage which may happen while there. While it may be legal negligence for him to be there, his liability must depend upon the rules of law applicable to cases of negligence. *Simmonson v. Stollenmeyer*, 1 Edm. Sel. Cas. 194; *Brooks v. Hart*, 14 N. H. 307; *Parker v. Adams*, 12 Metc. 415; *Palmer v. Barker*, 11 Me. 338. A different rule would permit an invasion of the rights of others, and authorize a recovery for one's own wrong. The case was therefore correctly submitted to the jury in this respect.

Upon the trial the court permitted an inquiry as to whether it was customary for vehicles to go up and down on both sides of the street; also the number of vehicles which passed the point of the accident, in a reverse direction, within a given time. This evidence was objected to by plaintiff as immaterial and improper, and an exception taken. In its charge to the jury, the court called specific attention to the evidence, and directed the jury to lay it aside, and not permit it to enter into their deliberation, as it was entirely immaterial. There does not seem to have been entire harmony in the expression of courts upon this subject. The case of *Erben v. Lorillard*, 19 N. Y. 299, is a leading case upon this subject, and is relied upon by plaintiff in support of his motion. In that case plaintiff was permitted to give evidence, under objection and exception, of an agreement by which he was to receive, by way of compensation for his services in effecting the purchase of a piece of land, a lease of the same for 21 years, at the annual rate of 8 per cent. on the

purchase price. The court, in its charge, directed the jury to disregard the evidence. In disposing of this question, Judge GROVER states the rule to be: "If the evidence may have affected the verdict, the error cannot be disregarded." This rule places the question upon the precise ground adopted and applied to cases where improper evidence is received under objection and exception, and stands without comment by the court; and its effect is to treat as without any force or effect the direction of the court to the jury, and renders it powerless by that method to correct any error it may have fallen into. That case, however, clearly showed that the jury could not have followed the direction of the court, as it left substantially no evidence upon which the jury could base their assessment of damage. Judge DENIO, in his opinion, seems to have disposed of the question upon the ground that the jury, notwithstanding the direction of the court, must have made the improper evidence the basis of determination. Such conclusion would still leave open room to give force to a direction in a proper case. Such construction was placed upon this decision in *Mandeville v. Guernsey*, 51 Barb. 99. That was an action for assault and battery and false imprisonment. The plaintiff, having been abducted from this state, was taken to Pennsylvania, placed on trial for a criminal offense, and acquitted. Thereupon he brought his action for damages, and upon the trial gave evidence, under objection and exception, showing the expenses incurred in his defense upon the trial in Pennsylvania. Subsequently, the court, on its own motion, struck out the evidence, and directed the jury to disregard it. In commenting upon the case of *Erben v. Lorillard*, the court say: "It is true that Judge GROVER * * * adverts to the familiar rule that, when improper testimony is received under exception, it must be shown that the verdict was not affected by it, or the judgment will be reversed. That rule applies, however, where improper testimony is not only received under exception, but is finally submitted to the jury, or, which is the same thing, is not withdrawn from them. In such case the presumption arises that the jury considered the improper testimony, because it was their duty to do so; but when they are expressly instructed to disregard it, and it is struck from the case, the presumption, as has been said, is the other way;" and the court accordingly held that the presumption was that the jury followed the direction of the court, and based their verdict solely upon the evidence properly before them.

In *Garfield v. Kirk*, 65 Barb. 464, the action was brought for the recovery of attorney's fees, and was tried before a referee. On the trial, evidence was given of a special contract; but plaintiff disclaimed any intention of relying thereon, and on motion the evidence was stricken out. On the authority of *Erben v. Lorillard*, this was relied upon as error. The court, in discussing this question, intimate that the effect of the decision referred to is as stated by Judge GROVER, but say: "The instruction by the court, in its charge, to disregard evidence on the trial is equivalent to striking out; and, if such an instruction does not strike out, then it follows that illegal evidence cannot be got rid of, when once received; and the court, on discovering the error, must commence the trial anew, or let it go on with the knowledge that the verdict will be set aside either by the court itself or on appeal. Such a result cannot have been contemplated. * * * The presumption should be that the jury acted only upon the legal evidence submitted to them, and not upon that which they have been told not to regard, or which has been stricken from the case."

In *Stone v. Frost*, 6 Lans. 440, the court held that an error in the admission of evidence was cured by striking out, and a direction given to disregard the testimony as immaterial.

In *Railroad Co. v. Sage*, 35 Hun, 95, the court held that an instruction in the charge directing the jury to disregard improper testimony theretofore received cured the error. This holding was upon the authority of *Lindsay v.*

People, 67 Barb. 549, affirmed 63 N. Y. 143; *Ostrander v. People*, 16 Wkly. Dig. 63, affirmed by court of appeals in 1883, (not reported;) *Greenfield v. People*, 85 N. Y. 90. The first of these was a capital case. A witness, in response to a general question respecting the conduct of the prisoner at or about the time of the commission of the crime, stated, under objection and exception, that he smoked a good deal. Thereupon the judge stated that he was inclined, if prisoner's counsel desired, to strike out the testimony. Counsel requested that it remain with the exception, but the court struck it out, and directed the jury to disregard it. The court, on appeal, said: "This, I think, took the evidence out of the case, and the exception with it." The court of appeals, however, seem to support the ruling upon a different theory, and except it from the operation of the rule here invoked, as they say: "It is not analogous to the admission of proof of a fact over an objection, and having a lodgment in the minds of the jury, and a subsequent direction to the jury to disregard it;" that the exception was to the question, which was competent. Id. 154, 155. As far as the expression of the court of appeals is concerned, this case can hardly be relied upon to support the doctrine claimed for it. The rule is again stated by the supreme court in the fourth department, in the *Ostrander Case*, to be that an instruction to the jury to disregard the evidence was sufficient to cure any error that had been committed in its reception; but there it was also held that the record showed the evidence competent, and the rule was applied to the "reception of that evidence." *Ostrander v. People*, 28 Hun, 45. In the *Greenfield Case*, 85 N. Y. 90, counsel excepted to the charge "that, if the prisoner declined to answer questions after he was arrested, that fact, taken in connection with the evidence of Hiram Snow, might be considered by the jury as a circumstance against the prisoner." Subsequently, and after the delivery of the charge, but before the jury had entered upon their deliberations, the jury and prisoner were brought in, and the court withdrew the whole subject of that portion of his charge, and directed them to exclude from their consideration the evidence relating to the same, and give it no weight whatever. The court, in disposing of this question, did not discuss whether or not the charge as first made was error, but held that, if there was error in the original charge, it was obviated by the subsequent instruction. No mention whatever is made of the evidence also withdrawn, or the effect of the instruction thereon. It therefore, perhaps, authorizes the inference to be drawn that the instruction also cured any error which attended its reception; and such seems to be the construction placed upon it by the supreme court, for we have seen that it has been cited to sustain such rule.

In *People v. Parish*, 4 Denio, 156, Justice BRONSON squarely lays down the rule that, where improper evidence is received under exception, a subsequent instruction to the jury to lay it out of the case cures the error. In his discussion he says: "It is not unusual for a judge to correct an error into which he may have fallen in the admission of evidence by striking the testimony out of his minutes, and telling the jury to disregard it. When that is done, the exception which was taken when the evidence was received should fall to the ground. We ought not to presume that the jurors disregarded the instructions of the court, and allowed the evidence to influence their verdict."

In *Nell v. Thorn*, 88 N. Y. 276, Judge DANFORTH, in writing the opinion of the court, says: "It is well settled that an erroneous ruling as to evidence may be corrected by the court,"—citing as authority *People v. Parish*, *supra*; but he adds: "It must indeed appear that the error was corrected under circumstances which worked no injury to the party excepting." A somewhat contrary doctrine is found in *Allen v. James*, 7 Daly, 13, where the action was to recover commissions by a real-estate broker. The issue was one of employment, but testimony was permitted to be given, under objection and

exception, showing that the title to the land in defendant was defective. The court, upon authority of *Erben v. Lorillard*, held that a direction by the court to disregard the testimony did not cure the error, the court saying: "It is only in cases where the appellate court can plainly see that the testimony improperly admitted could have had no weight with the jury that an objection can be overcome;" and the court reached the conclusion in that case that the improper evidence influenced the jury. There was also no competent evidence of plaintiff's employment. It was therefore not necessary for the court to announce any general rule upon the subject, as the improper testimony clearly influenced the verdict, and for that reason the judgment was reversed.

In *Neuman v. Goddard*, 48 How. Pr. 363, the action was for conversion of goods, and damages for breaking up and destroying plaintiff's business. Upon the trial, plaintiff was permitted, under objection and exception, to give evidence of threats by defendant of personal injury and violence to plaintiff after the ejection from his store, and after the conversion of his goods; also that the goods, taken afterwards, enhanced in value from 100 to 200 per cent. The court charged the jury, upon request of counsel, not to take this evidence into consideration upon the subject of damages. On appeal the court held and said: "If the evidence may have affected the verdict, the error cannot be disregarded," even though the court directs the jury to disregard it. This holding was based exclusively upon the language of Judge GROVER in *Erben v. Lorillard*. The question again arose in *Traver v. Railroad Co.*, *42 N. Y. 497. The action was for damages for personal injury. Evidence was offered to show the prior earning capacity of the plaintiff, who was an infant. The mother had previously recovered for the loss of services and expense in caring for her. The court instructed the jury not to consider damages for such service. Judge GROVER, writing the opinion of the court, says: "This direction would not have cured the error (if one was committed) in receiving the evidence, if that was such as was calculated to create prejudice in the minds of the jury, and influence them in fixing the amount of damages, unless it appeared from the whole case that the jury were not influenced." It was there held that the evidence was not of such a character as to be excluded. There are some other cases where the principle has been more or less discussed, but they do not tend to make the subject luminously clear, and are not profitable to present them further.

From an examination of all the cases, my mind strongly tends to an adoption of the views stated by Judge JAMES C. SMITH in *Mandeville v. Guernsey*, 51 Barb. 99, as being a clear statement of the principle, and a logical and satisfactory deduction therefrom. But, notwithstanding this inclination, an expression of opinion by the court of last resort does not seem to carry the matter to the extent therein claimed and laid down. On the contrary, I am led to the conclusion that the rule to be extracted from all the varying expressions is not whether the evidence against which the instruction is aimed may have affected the verdict, but whether, taking into consideration all the circumstances, it appears with reasonable certainty that the party has not been prejudiced by the introduction of the evidence excepted to. Such rule seems to find support, in principle, in *People v. Dimick*, 107 N. Y. 26, 14 N. E. 178. This leaves the rule to depend, in its application, upon the circumstances of each case. It has been assumed that the evidence admitted in the present case was erroneously received. Of this there may be some question, but in the view now taken it is not essential to determine it, as the conclusion is reached that the error was cured. The charge of the court upon the principles of law was, as we have seen, unexceptionable, and no competent evidence was made at the trial. The evidence objected to was specifically called to their attention, and they were instructed not to permit it to enter into their deliberations. After the jury had retired and deliberated, they asked

further instructions: "If we find both parties careless, what shall our verdict be?" The court charged, in answer, substantially, that if the driver of plaintiff's horse was negligent, and such negligence contributed to the injury, then plaintiff could not recover; but that, if the injury was due to the act of the defendant alone, the plaintiff became entitled to their verdict. Thereupon they retired, and found a verdict for the defendant. From this it would seem to appear, with reasonable certainty, that the verdict was based upon a consideration of the acts of the respective parties in the management and control of their respective animals, and that the question as to whether it was customary to drive upon either side of the way was not an element affecting such deliberation. It therefore follows that the motion for a new trial should be denied, with costs.

RUSSELL v. GIBLIN.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

DAMAGES—REMOTE—BREACH OF CONTRACT.

Under a covenant in a lease to furnish the lessee with "steam-power and live steam daily, as required * * * for the general business of book-binding," the lessee cannot recover for injury to his business caused by the insufficient and irregular supply of steam, which he nevertheless continues to use, without attempting to procure an adequate supply from other sources. Such damages are too remote, and not within the contemplation of the parties. Affirming 5 N. Y. Supp. 545.

Appeal from city court, general term.

Action on a covenant in a lease by Thomas Russell against Michael Giblin. Plaintiff appeals from a judgment of the city court, general term, awarding him six cents damages. For former report, see 5 N. Y. Supp. 545.

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.

Wilder, Wilder & Lynch, (William J. Lynch, of counsel,) for appellant.
Souther & Steadman, (C. E. Souther, of counsel,) for respondent.

LARREMORE, C. J. Defendant leased certain premises to plaintiff, and covenanted to also furnish him with "six-horse steam-power, and live steam daily, as required, from 7½ o'clock A. M. until 6 o'clock P. M., for the general business of book-binding, to be carried on by the plaintiff in said premises." Plaintiff alleges that, owing to the insufficient steam-power and live steam furnished, he was unable to keep his employes continually at work; and, further, that, by reason of such insufficient service, his stamping-machines were not properly heated, and that much of the book-binding he attempted to do was performed in an inferior manner, and represents a loss. The action is for damages; and a bill of particulars was served, in which, as in the complaint, the two items declared upon recovery are: *First*, the value of the materials destroyed and rendered worthless through the use of the stamping-machines when the steam supply was inadequate; and, *second*, the aggregate amount paid to employes for wages, as estimated, for hours when they were forced to remain idle.

The first of such grounds may be briefly disposed of. Plaintiff himself was the judge of when his stamping-machines were sufficiently supplied with steam to attempt to work with them. Certainly it was not permissible for him to proceed when the proper conditions for operating the apparatus did not exist, and thus spoil good materials, for the sake of creating damages. His own deliberate action was a more influential factor in said damage than defendant's neglect; and no right of action, therefore, could accrue to the plaintiff therefrom. *Stamping Works v. Koehler*, 45 Hun, 150. In the case cited, there was also raised the question of the right to recover because employes did not work full time, by reason of insufficient supply of power. It was said in the opinion, (page 152:) "The facts sought to be proved as to the allegation

that the workman did less work are of an equally uncertain character conjective, and must be included in the damages recoverable as laid down in the cases cited." If this means that the wages a man pays his employees are, as far as the outside world is concerned, to be considered as included in, and constituting an increment of, the total cost of the commodity manufactured, I concur in such view. I can find no principle of law which would authorize the charging of the amount of wages directly to defendant as damages. Plaintiff, it seems to me, might with equal show of reason endeavor to recover by way of damages a proportionate share of his other regular business expenses,—rent, for instance. The property was hired only for business purposes. If in any week he is unable to carry on his business for two-tenths of the time he wishes to prosecute it, why should he demand damages for two-tenths of the rent of that week in addition to two-tenths of the hiring price of labor? The general rule as to damages is that they must be such as would "fairly be supposed to have entered into the contemplation of the parties when they made the contract. They must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature, and in respect to the cause from which they proceed." *Stamping Works v. Koehler, supra*; *Griffin v. Colver*, 16 N. Y. 489; *Cassidy v. Le Fevre*, 45 N. Y. 562.

It is not within the policy of the law to assess damages according to the principle for which plaintiff now contends. The possible total accruing might be far beyond the fair contemplation of the parties. Plaintiff might have supplied the necessary power himself, and have charged defendant with the cost thereof, or he might have recovered the difference in value between the steam contracted for and that actually furnished. It is also quite possible that a third alternative was open to him under some of the later authorities, and particularly under the doctrine advanced in *Wakeman v. Manufacturing Co.*, 101 N. Y. 205, 4 N. E. Rep. 264. If it could be shown that plaintiff made a fair effort to supply the steam himself, and was unable to do so, and it were further proved that he was actually prevented from filling, either in whole or in part, certain contracts which he had for the binding of books, an action for damages might have been maintained to recover the profits that he would have realized from such work which he was prevented from performing. The case last cited holds, in effect, that prospective profits may be recovered when they are reasonably certain, and I think the objection of uncertainty as to damages would be obviated by the existence of definite contracts to be filled. The practical difficulty, of course, in a case of this character, would be to ascertain how much of the contract selling price of the manufactured articles stood for profits. Most of the cases in the books involving the question of prospective profits relate to articles not to be manufactured, but to be purchased by the plaintiff; and the prospective profit was easily ascertainable by taking the difference between the agreed purchase price, and the contract selling price. Still, I do not think that this difficulty would be insuperable in a case like this; and such measure of damages, if it could be practically applied, would be the most natural and equitable one, and the one presumably within the fair contemplation of the parties at the time of the making of the lease. It is clear, however, that plaintiff's present theory of action is untenable; and the judgment appealed from should be affirmed, with costs.

BAYLIES v. PHILADELPHIA & R. COAL & IRON CO.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

LANDLORD AND TENANT—ACTION FOR RENT—EVICTION OF TENANT.

In an action for rent reserved in a lease the defense that defendant was evicted by a third person from a right of way to the North river from the leased premises, which was appurtenant to the lease, is not established, where it appears that

the premises were not bounded by the river, and that the only communication with the river was over other property which did not abut thereon, and which defendant held under a lease from another person.

Appeal from special term.

Action by Nathalie E. Baylies against the Philadelphia & Reading Coal & Iron Company. The court directed a verdict for plaintiff, and a motion for a new trial was overruled, from which defendant appeals.

Argued before LARREMORE, C. J., and BOOKSTAYER, J.

William J. Kelley, for appellant. *Edmund L. Baylies*, for respondent.

BOOKSTAYER, J. The complaint alleges a cause of action for three months' rent which it is charged is due from defendant as the assignee of a lease made in 1873 covering six lots on Twenty-Ninth street. The answer denied that the leased premises are fully set forth in the complaint, admits the original letting, but denies that the covenants of the lease are binding upon the defendant, and also avers that the defendant has not been in the possession of the premises leased, for the reason that a right of way to the North river was appurtenant to said lease, which was an element of value, and a consideration inducing to the assignment of the lease, and that there was an eviction of the defendant from a part of the demised premises by the department of docks, under an act of the legislature by which the department laid out and constructed an exterior street outside of these premises in such manner as to destroy the water approach aforesaid. From the evidence it appears that the lots in question were not at any time during the lease bounded by the North river, and that the only communication between these lots and that river was over certain other lots on Twenty-Eighth street which did not abut thereon, and were in the possession of the defendant under a lease from other parties. Consequently the right of way was not dependent upon the lease in question, but upon another lease by other parties. The defendant, having alleged the existence of the right of way, is bound to prove it; and no proof sufficient to warrant the submission of the case to the jury was offered by the defendant. But, even if it had succeeded in establishing that it obtained from the lease a right of way to the water over the lots in question, it is not shown that the plaintiff was in any way responsible for the interference therewith, and therefore the right of way could not be used as a defense in the action by the plaintiff to recover the rent. *Gallup v. Railroad Co.*, 65 N. Y. 1. The verdict, therefore, was properly directed for the plaintiff; and the judgment should be affirmed, with costs.

COFFEY v. LYONS.

(*Common Pleas of New York City and County, General Term. June 2, 1890.*)

1. EVIDENCE—COMPETENCY.

In an action for work and materials, an itemized bill, which plaintiff testifies was made within a month of the transaction, and delivered to defendant, years before, and the items in which are not disputed, is admissible to show when the work was done, over an objection that it is incompetent, irrelevant, and immaterial, where defendant pleads the statute of limitations, though it would have been incompetent had the items been disputed.

2. APPEAL—REVIEW—HARMLESS ERROR.

Where certain facts are admitted by the answer, the admission of incompetent evidence to establish them is not prejudicial.

Appeal from city court, general term.

Action by Thomas Coffey against Jeremiah O. Lyons. Judgment for plaintiff, and defendant appeals.

Argued before LARREMORE, C. J., and BOOKSTAYER, J.

Doherty, Durnin & Hendrick, for appellant. *Anson Beebe Stewart*, for respondent.

BOOKSTAVEN, J. The general term of the city court having passed on the questions of fact, they are not reviewable by this court. *Bell v. Baromero*, 12 Wkly. Dig. 33. The complaint was for materials sold and delivered to defendant, and for work done for him, between January and February, 1884. The answer denies that the materials were furnished or the work done at the time alleged in the complaint, and also sets up the statute of limitations, and pleads payment; thus admitting the sale and delivery of the goods and their value, as well as the value of the services rendered. Notwithstanding these admissions, the plaintiff on the trial undertook to prove the truth of his claim, but could not, without looking at a bill which he presented to the defendant years before. This was objected to by defendant on the ground that the paper was not the best evidence, not being a copy from the books which he claimed. But plaintiff testified that it had been made within a month of the transaction. After looking at the paper, the witness testified to the items, apparently from recollection; at least, the defendant did not object to the answer, because he read from it. We think the case falls within the rule laid down in this court in *Howard v. McDonough*, 8 Daly, 365, affirmed by the court of appeals, 77 N. Y. 592. But, even if it did not, it could not injure the defendant by any possibility, because the facts thus sought to be established had been already admitted by the defendant in his answer.

Subsequently the witness testified that the bill was in his handwriting and had been made about a month after the work had been finished, and that it was delivered to the defendant. But he did not testify as to its correctness, nor that it was a true copy from his books; nor did he testify that he could not remember the items after refreshing his memory by looking at it. It was subsequently offered and received in evidence, under the general objection made by the defendant that it was incompetent, immaterial, and irrelevant. This objection would have been good had the items contained in the bill been disputed, but, as before shown, they were not, and the only value of the paper as proof was the date which it bore. Plaintiff had sworn that the identical paper had been delivered to defendant years before, and it was certainly material, as bearing on the statute of limitations, to establish the date when the work was done, and we think was competent for that purpose, and that there was therefore no error in admitting it in evidence in this case.

These being the only questions of law presented to us either by the briefs or oral argument of counsel, the judgment should be affirmed, with costs.

TOTTEN v. READ.

(Common Pleas of New York City and County, General Term. June 3, 1884.)

BREACH OF MARRIAGE PROMISE—EVIDENCE—DEFENDANT'S FINANCIAL CONDITION.

In an action for breach of marriage promise, declarations by defendant that she was the only heir of his uncle, who would leave a large estate to him, and that she had received money by plaintiff that she "heard" defendant was a very rich man, are inadmissible to prove defendant's financial circumstances.

Appeal from trial term.

Action by Clara Totten against Cassius H. Read for breach of promise of marriage. The complaint contained two counts. The first was for a breach of promise of marriage, aggravated by the alleged seduction of the plaintiff by the defendant, and by a further allegation that at the persuasion of the defendant she permitted an abortion to be performed upon her, which resulted in the ruin of her health and great physical injury. The second count contained the allegations that at various times between the 1st day of September, 1884, and the 22d day of the same month, the defendant promised to marry the plaintiff within the 30 days next ensuing after said promise. On the 22d day it appeared that the first cause of action had been released, and plaintiff testified that this release formed the consideration for the promise set forth in the second count.

her second cause of action. Defendant denied the promise alleged in the second cause of action. He introduced evidence showing that plaintiff had an action pending in the superior court on what now constituted her first cause of action; that plaintiff's mother, Mrs. Lydia C. Cocks, also had an action pending against defendant and his attorney for slander committed by the attorney, at defendant's direction, by asking her certain questions on cross-examination in another action; and that on September 22, 1884, both their suits were discontinued, and defendant paid Mrs. Cocks \$1,200. Defendant's claim was that this payment constituted the real consideration for the release of defendant's first cause of action.

At the trial, the court admitted various statements of one Charles H. Peshall, made to the plaintiff at different times, as evidence of admissions by the defendant. These statements, which consisted of admissions of the former cause of action against the defendant, of repeated promises to marry, and other statements damaging and injurious to the defendant, were admitted upon the ground that Peshall was an agent of defendant, and therefore competent to bind the defendant by his declarations. The jury returned a verdict of \$15,695.69 for plaintiff, and from a judgment thereon defendant appeals.

Argued before LARREMORE, C. J., and BOOKSTAYER, J.

Christopher Fine, (Ezek Cowen, of counsel,) for appellant. *John F. Baker, (A. W. Tenney, of counsel,)* for respondent.

LARREMORE, C. J. This is an action for breach of promise to marry. The first ground upon which the distinguished counsel for appellant asks us to reverse the judgment in plaintiff's favor is that the weight of evidence to support the second promise, upon which she now relies, is strongly in favor of defendant. But I cannot subscribe to this view. It is true that this agreement of September 22, 1884, rests substantially on the testimony of plaintiff herself; but, if her personal motive for so testifying is very obvious, that of the witnesses who contradict her is equally apparent. The latter consist of defendant, and persons closely affiliated to him. Plaintiff's ground of recovery on this second cause of action is that the new promise made on September 22d constituted the consideration for the release of the then existing claim. The form of release would seem to bear out this contention. The consideration therein named is "one dollar and other valuable consideration." It is not at all likely that plaintiff, after making a demand based upon such serious grounds as she alleged for her first cause of action, would, without some strong motive, surrender all her rights. Unless she relied upon such new promise, it is difficult to discover what the consideration moving to her was. Counsel for appellant contends that it was the \$1,200 paid to her mother. But Mrs. Cocks also had a suit pending against defendant, with others, growing out of the general facts set up in plaintiff's suit, and such payment was the consideration for a general release from the mother, executed simultaneously with plaintiff's release. This money was paid with considerable ceremony, after having been formally counted by the notary in her presence, to Mrs. Cocks personally. It is argued that such payment must have in reality inured to plaintiff's benefit, and been in effect a consideration for her release, because Mrs. Cocks' claim was groundless in law. Nevertheless, Mrs. Cocks had brought a suit for it, which she discontinued; and whether or not she could have been successful is immaterial, if defendant chose to pay her something to have the litigation dropped. It is alleged that Mrs. Cocks had spent considerable money in prosecuting such suit, and would not consent to its discontinuance without being compensated for her actual outlay. Certainly, there is nothing grossly improbable in the jury's finding that a new engagement was entered into on September 22, 1884, at which time all old scores between all parties were wiped out.

The trial judge did not err in the admission of the declarations of the witness Peshall. It appears that he was defendant's confidential friend and general go-between in his relations with plaintiff, arranging interviews, carrying messages and letters back and forth. There is no good reason why the ordinary principle of agency on this subject should not apply.

Objection was also made to testimony tending to show defendant's financial circumstances. It is well settled that evidence of this character is material in actions for breach of promise, as it tends to show what the plaintiff lost in the way of maintenance, support, and position by defendant's refusal to fulfill the engagement. *Kniffen v. McConnell*, 30 N. Y. 285; *Lawrence v. Cooke*, 56 Me. 187; *Miller v. Rosier*, 31 Mich. 475; *Bennett v. Beam*, 42 Mich. 346, 4 N. W. Rep. 8; *Watson v. Watson*, 53 Mich. 168, 18 N. W. Rep. 346; *Kelley v. Riley*, 106 Mass. 339.

Nevertheless, the plaintiff was allowed to testify as to alleged declarations of defendant to the effect that he was the only heir of his uncle, who would leave a large estate to him. This evidence was clearly immaterial, and cannot say that it did not materially increase the amount of the verdict rendered. In *Miller v. Rosier*, *supra*, one of the reasons for reversal was that plaintiff had been allowed to show the value of a farm owned by defendant's father. The ground upon which this evidence had been allowed was that defendant has made statements to plaintiff that his property was invested in the farm. But even under such circumstances, which rendered the evidence material for the admissibility of the evidence a much stronger one than was advanced in the case at bar, the supreme court of Michigan held (Justice COOLEY writing the opinion) that this evidence "only went to show the defendant's circumstances, which were wholly immaterial to the case on trial." The evidence of the pecuniary resources of an uncle, to whose estate the defendant was not shown to have added anything, and who is, moreover, legally entitled to devise and bequeath his estate to any person other than defendant, is not only more irrelevant, and its reception was substantial error. We think it is also erroneous, under the pretense of proving defendant's general reputation for wealth, to allow plaintiff's answer to stand: "I heard that he was a rich man." I cannot see that this tends to establish general reputation. It may have "heard" it only once from a single person. This should have been stricken out on defendant's motion. As the record stands, it is the basis of "hearsay." In my opinion, declarations of the defendant himself as to specific property, real and personal, he owned or had purchased would be admissible. They would come in under the general rule admitting a party's statements against him which tend to prove a material fact. I do not understand that the intimation in *Kniffen v. McConnell*, *supra*, at page 288, that evidence of this kind might be objectionable, was intended to apply to a case where it was confined to defendant's admissions. Nevertheless, for the reasons above pointed out, a new trial must be had. The irrelevant evidence obviously introduced solely to increase the damages, and the verdict is sufficiently large to make it seem probable that it was an influential factor in the result. The judgment should be reversed, and a new trial ordered, with costs to abide the event.

BOOKSTAVEN, J., (*concurring*.) As the judgment in this action must be reversed on the grounds hereinafter stated, and a new trial had, I prefer to express no opinion on the reasonableness of plaintiff's position, or whether or not it is sustained by the weight of evidence; nor do I express any opinion as to the motives which may have induced her to execute the release of the cause of action set up in the complaint; neither am I clear that the witness Peshall was the agent of the defendant in such a sense as to allow his testimony to be received in evidence. The testimony on all these points may be greatly varied on another trial, and I consider it premature to discuss it.

But I fully concur with the learned chief judge that it was error to allow plaintiff's evidence of defendant's declarations that he was the only heir of his uncle, who would leave him a large estate, for the reasons stated in his opinion. I also concur with him, and for the reasons he states, that it was error not to strike out plaintiff's reply to a question, that "I [plaintiff meaning] heard that he was a very rich man." And on these grounds I concur in the opinion that the judgment should be reversed, and a new trial had, with costs to abide the event.

BOYLE v. VAN TASSEL.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

An appellate court will not disturb a judgment rendered on conflicting evidence.

Appeal from eleventh district court.

Action by William J. Boyle against Emory M. Van Tassel for commissions as broker. From a judgment in plaintiff's favor, defendant appeals.

Argued before LARREMORE, C. J., and BOOKSTAYER, J.

Jas. Hillhouse, for appellant. W. L. Snyder, for respondent.

LARREMORE, C. J. This is an appeal from a judgment rendered in plaintiff's favor for commissions as a broker or dealer in machinery. It is shown by the evidence that the plaintiff brought a customer who bought the boiler in question, for which the defendant received \$800. Plaintiff testified that the defendant, through his manager, Hillhouse, agreed that, if plaintiff found a purchaser for the boiler, he would pay him 10 per cent. of the purchase price. The sale was consummated, and, for a refusal on the part of the defendant to pay such commission, this action was brought.

The main question in this case is one of fact, as to the authority of Hillhouse to bind the defendant. It is a well-settled question of practice that an appellate court will not disturb a judgment rendered upon disputed facts. The court below has found, upon the whole testimony, that the agreement was made, plaintiff did act in good faith, procured a customer, and defendant got the fruits of his labor, and that the agency was established. *Leslie v. Insurance Co.*, 68 N. Y. 27; *Dunn v. Insurance Co.*, 19 Wkly. Dig. 531; *Warburton v. Camp*, 112 N. Y. 688, 20 N. E. Rep. 592; *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. Rep. 261. The judgment appealed from should be affirmed, with costs.

JOHNSON v. BINDSELL.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

CONTRACTS—PERFORMANCE—CONDITIONS.

Plaintiff agreed to give defendant lessons in a certain art every evening, till defendant had fully acquired it, and to receive therefor \$25 on the first day of the lessons, and \$25 each week for two other weeks, if the lessons should be satisfactory, and a final payment of the same amount when defendant was satisfied. Plaintiff gave ten lessons, receiving two payments, and then, on account of illness, discontinued the instructions, and never offered to resume them. Held, that he could not recover the last two payments, if plaintiff had not acquired the art from the instructions already given.

On motion for reargument, or for leave to go to court of appeals.

Action on contract by Moses M. Johnson against Herman F. Bindsell. Judgment for defendant. Plaintiff's motion for reargument or leave to go to court of appeals denied. For former report, see 8 N. Y. Supp. 485.

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

A. Kahn, for appellant. M. Stuyvesant, for respondent.

v.10N.Y.S.DO.4—21

PER CURIAM. This case was decided at the January general term of court, and the judgment affirmed. The plaintiff's counsel now claims on the argument of this case, *Doll v. Noble*, 116 N. Y. 231, 22 N. E. 406, was not then reported, and consequently was not brought to the attention of the court, and that this case is decisive of the questions involved in this. We think not, for in this case the contract was as follows: "New York, January 8, 1889. I, Moses Johnson, agree to teach Herman F. Bindsell the art of draughting patterns by scale, and in every particular and branch of said art, lessons to be given 2½ hours each evening in the week, (Sundays excepted,) until said Herman F. Bindsell has acquired full knowledge of said art; for which I, Moses Johnson, am to receive payment as follows: Tuesday, Jan. 8, 1889, being the first evening instruction, \$25.00; and the foregoing lessons are satisfactory to Herman F. Bindsell, I am to receive on Monday, Jan. 14, 1889, \$25.00; the same amount on Monday, Jan. 21, if all is satisfactory; and a final payment of \$25.00 when Mr. Herman F. Bindsell is satisfied." This contract evidently contemplates the giving of lessons for four weeks if necessary, and at least until defendant had acquired full knowledge of the art to be taught, provided the defendant was satisfied with the manner in which the plaintiff performed the services to be rendered by him. The first and second payments were made, and suit was brought to recover the third and fourth installments. On the trial plaintiff admitted the instructions were continued for 10 evenings only; and from the evidence it appears that they were then discontinued, not because of any act of the defendant, but by reason of the plaintiff's confinement at Mount Sinai Hospital on account of illness, and that he never thereafter offered to give further instructions. Defendant, on the trial, claimed that, by reason of such failure to give the instructions which had already been given were useless to him, as he had not at that time acquired full knowledge of the art to be learned, and therefore could not use with advantage the instructions already imparted; he claimed that he had not acquired proficiency in the art. The justice of the law is a right to rely upon this testimony, and was justified in coming to the conclusion that he did. *Doll v. Noble*, 116 N. Y. 231, 22 N. E. 406, announced a new doctrine, but merely reaffirmed an old one, and applied it to the facts of that case, which related to an executed contract. Substantially the same rule had been announced and applied in *Smith v. Brady*, 17 N. Y. 176; *Thompson v. Fleury*, 26 N. Y. 26; *Wyckoff v. Meyers*, 44 N. Y. 145; *Nolan v. Whitman*, 88 N. Y. 648; *Whiteman v. Mayor*, 21 Hun, 121,—cases of executed contracts in which a certificate was refused in bad faith or unreasonably, by the party who was to give it, or the refusal to pay was an arbitrary act after work had been performed. Of course such a rule applies with greater force where work has been done to the satisfaction of the party himself, and where it has been done than where the certificate of a third party is necessary. The satisfaction required in such case must be reasonable. The party for whom the work has been done cannot defeat a just claim for payment of work done by arbitrary and unreasonably saying that he is not satisfied.

But the rule is different where a person is to work for another, or perform services for another, so long as such work or service proves satisfactory to the employer. In such case, so long as the employee performs services for the employer, he must be paid for it; but, if he or his work is not satisfactory to the employer, he may at any time discharge him without subjecting him to further claim, and in such case the employee loses nothing, for the fact that he has performed no services, and has entered into a contract in which there is an implied condition that it may be discontinued at any time when the employer becomes dissatisfied with him or his work. And this, we think, was the doctrine which was intended to be announced in the opinion given in this case on the former argument, although some of the expressions then used contained may leave it in doubt whether it was intended to apply to an

utory contract only, or to an executed contract as well. The motion for a reargument or for leave to go to the court of appeals should therefore be denied.

MANDEVILLE v. AVERY *et al.*

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

MORTGAGES—RIGHTS OF MORTGAGEE—REFUNDING PROCEEDS.

Where a *bona fide* debt, secured by mortgage on the debtor's property, has been paid by a sale of the property, the mortgagee cannot be required by other creditors to refund, because as to them the mortgage would have been adjudged void.

Appeal from special term, Monroe county.

Action by Wesley Mandeville, as receiver of the property of Henry J. Beck, against Edward H. Avery, Henry J. Beck, and another. The complaint was dismissed, and plaintiff appeals.

Argued before MACOMBER and CORLETT, JJ.

David Hays, for appellant. *J. C. & C. I. Avery*, for respondents.

CORLETT, J. The defendant Beck in September, 1886, was engaged in the boot and shoe business at the city of Auburn. On the 13th of November of that year, Lewis P. Ross, a jobber in boots and shoes at Rochester, sold and delivered to Beck a bill of goods in his line. On the 11th day of March, 1887, Ross recovered a judgment for those goods in the supreme court for \$931.64, damages and costs. Execution was issued, and returned unsatisfied; and such proceedings were had that on the 13th day of May, 1887, the plaintiff was appointed receiver. On the 24th day of January, 1887, said Beck executed to the National Bank of Auburn a chattel mortgage to secure \$1,150, and, on the 8th day of February of the same year, he executed another chattel mortgage to the defendant to secure \$290, with interest. The mortgages covered the stock in trade of the defendant Beck, and in March, 1887, the Bank of Auburn assigned its mortgage to the defendant Avery. These two mortgages were given to secure honest debts, and the validity of the last one is not assailed for any reason. On the 16th day of March, 1887, both mortgages were foreclosed, and the property sold for \$1,350.50. The proceeds were at once applied to the payment of the debts of \$1,440 secured by the two mortgages. On the 16th day of February, 1887, Ross caused the goods covered by the mortgages to be attached. Avery replevied the property, which was sold under the mortgages as above stated. The replevin action resulted in favor of Avery. The present action was commenced about the 1st of June, 1887. Issue was joined, and it came on for trial at an equity term held in Rochester, and the trial court decided that the action was one of law, and sent it to the circuit for trial. Two specific questions were submitted to the jury on that trial, each of which was answered in the affirmative. Those questions were: "(1) Was the mortgage to the National Bank of Auburn, dated January 24, 1884, executed upon an agreement or understanding with the bank that the mortgagor might remain in possession of the property covered by the mortgages, and sell the same, in substantially the same manner as before the execution of the mortgage, and use the avails? (2) Did the plaintiff, with full knowledge that such an agreement had been entered into, assent to the same?" The mortgage of \$290 was in all respects held to be valid. After the answering of those questions, motion was made for judgment on the verdict, which was granted. A motion was made by the plaintiff for a new trial, which was denied; and from the judgment entered the plaintiff appealed to this court, where the judgment was reversed, and a new trial ordered, (3 N. Y. Supp. 745,) on the ground that the action was an equitable one, and should have been tried at special term. A trial was afterwards had on the equity side at the special term, where the two findings above stated

were adopted, and the complaint was dismissed. Judgment was entered, and the plaintiff appealed to this court.

The complaint in this action alleges, in substance, the recovery of the judgment, the appointment of the plaintiff as receiver, the execution of the chattel mortgages, the sale of the property under them, and then alleges that Avery was president of the said bank, and that "the said mortgages were given by the said Beck and to the said Avery with intent to hinder, delay, and defraud the creditors of said Beck, and particularly the said Ross; that they were executed for more than the amount due from the said Beck; that they were not accompanied by an immediate delivery, or followed by an actual or continued change of possession of the chattels mentioned; that, when the same were made, it was understood and agreed between the parties thereto that the mortgagor should continue to deal with the mortgaged property, and sell the same in the course of business as his own property, and the said Beck did in fact, after the execution of said mortgages, and for some period thereafter, with the consent of the mortgagees, dispose of said property, or a part thereof, and appropriate the proceeds of the sale thereof to his own use by selling as a retail merchant to his customers." The complaint further alleges that Avery never accounted to Beck or the plaintiff as receiver, the insolvency of Beck, and that the judgment remains unpaid. The prayer is to the effect that the mortgages be adjudged fraudulent and void, and that Avery be required to account for the property or its proceeds. On the trial it appeared that, when Ross heard of the mortgages, he sent his agent, Gordon, to Auburn, to get an explanation from Avery; that a conversation occurred between them, which was to the effect that Gordon asked Avery why he took the mortgage after he was given to understand that the liens for which the mortgage was taken should be without security; that Avery replied that Beck was pressed by other creditors, and offered to secure the debt by mortgage, which he did; that the bank would let him go on the same as if no mortgage had been made; that Gordon replied to the effect that if Beck would continue in business, and pay Ross a little now and then, he would be satisfied; and that Beck had some goods left which were out of season, and that, if he would return them, he would get credit. Avery replied he had no objections. None of the goods were returned, nor did Beck afterwards make any payments. The trial justice held, in substance, that the debts secured by the mortgage were honest, and that, after hearing Avery's statement, Ross concluded to acquiesce in the mortgages, and that he assented to them with full knowledge of all the facts.

It will be noticed that the goods were taken by virtue of the two mortgages. It is agreed that the second mortgage of \$290 was valid. It was adjudged in the replevin suit that, as against the attachment, Avery was in the lawful possession of the property under his mortgages. There is no question as to the validity of the mortgages between Ross and the bank, or him and Avery. They were given to secure honest debts, and, as against the mortgagor, valid and enforceable. In the case at bar the property was sold, and the debts paid, before any lien was acquired by the receiver. No lien was obtained by virtue of the attachment, because Avery succeeded as against the sheriff in establishing his superior right to the property. Judgment had been recovered, execution issued, and returned *nulla bona*, so there is no lien by virtue of any levy at the time the receiver was appointed, which was not until long after the sale under the chattel mortgages, and the application of the proceeds in the payment of the debts they were given to secure. This action was not commenced until more than two months after the debts secured by the chattel mortgages had been paid by the sale of property, and nothing appears that the sale was not in all respects regular, or that the debts they were given to secure were not extinguished to the extent of payment. The learned and diligent counsel for the appellant has not called attention to

any authority going to the length of holding that, when an honest debt has once been paid out of the debtor's property, another creditor can compel him to refund, because, as against creditors, the mortgage given to secure a paid debt would have been adjudged void. In a controversy between different creditors, the one who is most vigilant, and prior in point of time, usually has the advantage. Where a creditor is so diligent as to acquire a lien on property applicable to his debt before payment of another secured by a mortgage void as against creditors, he is in a position to show that his lien is superior, and remove the fraudulent obstruction. But no such question is involved in the case at bar. All these debts were honest, the judgment was valid against everybody, the mortgages between the parties were valid, the debts they were given to secure, *bona fide*; and, although one of the mortgages could be adjudged void against creditors, it being valid between the parties, and the debt it was given to secure paid before proceedings commenced or lien acquired, the law will leave the parties where it finds them; and such seems to be the reasoning of the authorities. *Hone v. Henriquez*, 18 Wend. 240; *Brown v. Platt*, 8 Bosw. 324; *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Grover v. Wakeman*, 11 Wend. 187; *Averill v. Loucks*, 6 Barb. 470.

The judgment must be affirmed.

IN RE FAULKNER'S ESTATE.

IN RE BINGHAM.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

1. EXECUTORS AND ADMINISTRATORS—PROCEEDING TO SELL DECEDENT'S LAND—PETITION.

Under Code Civil Proc. N. Y. § 2752, prescribing the contents of a petition by the creditors of an estate to subject testator's lands to the payment of his debts, to be all the names of creditors and a description of all decedent's real estate, a petition is not fatally defective because of an omission to describe one tract of land owned by testator, of which the petitioners neither knew, nor could have known by diligent inquiry.

2. SAME—AMENDMENTS.

Names of creditors of the estate, not known at the time of filing the petition, may be subsequently added.

3. SAME—LIABILITY OF ADMINISTRATORS—ASSESSMENT ON BANK STOCK.

The estate of an administrator, who in that capacity held stock in a national bank, and never had it transferred to himself, though he was the sole heir of intestate, is not liable to an assessment on it, under Rev. St. U. S. § 5132, providing that persons holding stock as administrators shall not be personally subject to any liability as stockholders.

Appeal from surrogate's court, Livingston county.

A proceeding to subject the realty of a testator to the payment of his debts. Decree for the creditors, and an appeal. Code Civil Proc. N. Y. § 2750, provides that the creditors of an estate may file a petition to subject the realty of decedent to the payment of their debts within three years after letters of administration granted; section 2751 provides that the time during which an action is pending by the creditors against the administrator or executor shall not be counted as part of the time limited in section 2750; and section 2752 prescribes the contents of the petition to be all the names of creditors, and a description of all of decedent's real estate.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

William A. Sutherland, for appellant. *McNaughton & Taylor*, for modification of the decree. *John N. Beckley*, for respondent and appellant. *J. H. & C. W. Stevens*, for respondent Christiana Smith.

CORLETT, J. The First National Bank of Dansville was organized under the United States statute of August, 1863. Its capital stock was \$50,000. Samuel D. Faulkner died August 9, 1878, intestate and unmarried, leaving

his father, Dr. James Faulkner, his sole heir and next of kin. Samuel, at the time of his death, owned 50 shares of stock of the bank, and other property to the amount of about \$25,000. James Faulkner, the testator, and Henry Faulkner, became administrators of the estate of Samuel. The father, James Faulkner, died in 1884, leaving a will. Letters testamentary were issued upon the will to the son James Faulkner, Jr., one of the executors named therein, who was removed in October, 1887, by the surrogate of Livingston county, and then letters were issued to Lester Faulkner as sole executor. At the time of the death of the said James Faulkner he was the owner of 290 shares of the capital stock of the bank, which has since continued to be owned by his estate. Late in the summer of 1887 the bank failed, and Charles L. Bingham, in September, was appointed receiver by the comptroller of the currency. He qualified, and has since acted in that capacity. On the 28th day of September, 1887, the comptroller made an assessment against the holders and owners of the capital stock of 100 per cent., which became due to the receiver. James, the testator, died seised of several pieces of real estate. During his life-time he exercised control over the stock owned by Samuel at his decease. Samuel's estate was never judicially settled. The personal estate of the testator did not exceed in value \$5,000. Letters testamentary upon the will were issued on the 25th day of April, 1885, and on the 25th day of February, 1888, an action was brought by the receiver to recover \$29,000, with interest from the 29th day of September, 1887, the amount of the assessment; and on the same day a notice of *lis pendens* was filed in the Livingston county clerk's office, and three days later in the office of the clerk of Allegany county. It thus appears that the receiver's action was brought, and a notice of *lis pendens* filed, about two months less than three years after letters testamentary were issued. Before the three years expired, Charles J. Bissell brought an action in the supreme court to recover \$620.65, with interest from the 9th day of October, 1884, in which notice of pendency was filed according to section 2751 of the Code of Civil Procedure. The surrogate of Livingston county also brought an action as relator to recover a sum of money, but no notice of the pendency of the action was ever filed, and no allowance made for the claim. Christiana Smith, a creditor of the testator, recovered a judgment on the 8th day of August, 1888, for \$2,875, in an action commenced on the 4th day of October, 1887, in which a *lis pendens* was filed in pursuance of the statute. The above facts were found by the surrogate, as hereinafter explained, upon sufficient evidence. On the 9th day of July, 1888, a petition was filed praying for a decree directing the sale or other disposition of the real estate of the testator to pay his debts, which described all the real estate owned by the deceased, except an undivided interest in his real estate known as the "Tolles Property," owned by Samuel D. Faulkner at the time of his death. The lands described in the petition as parcel No. 14½, situate in the town of South Dansville, Steuben county, N. Y., containing 86½ acres of land, being all of the Nathaniel Drayton farm, so called, which was owned by said James Faulkner, deceased, at the time of his death, were described in the petition, but were not included in any *lis pendens*. The surrogate was induced to find, on the request of George Hyland, that the 86½ acres above mentioned were not described in the petition. This was a misapprehension and mistake, but the one-half interest in the real estate known as the "Tolles Property" was not described in the petition.

There is no finding of any want of diligence or proper inquiry to ascertain the existence of the Tolles land, and the whole case shows, as matter of fact, that no one connected with these proceedings knew that the testator had any interest in it at the time the petition was filed. No description was contained, or disposition made, of it in the will. The learned counsel for the appellant admits that the omission to describe the Tolles property was excusable, on the ground that the fact could not have been ascertained with diligent in-

quiry. Sections 2750-2752, Code Civil Proc., dispose of the objection. The petition was filed within three years after letters were issued,—an action was pending. The above sections do not require that all the real estate should be mentioned. The leaving out of the Tolles property was not jurisdictional. The Revised Statutes required a description in the petition of all the real estate, but it was held that, where a portion was omitted by mistake, an amendment could be made by the surrogate including the property left out. *Sheldon v. Wright*, 7 Barb. 39-48, affirmed in court of appeals, 5 N. Y. 497. This shows that the original omission was not jurisdictional. To the same effect are *In re German Bank*, 39 Hun, 181, (in this department;) *Richmond v. Foote*, 8 Lans. 244. The language of section 2752 of the Code of Civil Procedure is not as mandatory as the Revised Statutes. Some defects were supplied after the filing of the petition by including names not known at the time, but those defects were not jurisdictional. *Barnett v. Kincaid*, 2 Lans. 320. Sections 2752-2755, Code Civil Proc., sustain this construction. A willful *devastavit* would not exempt the real estate. 2 Lans., above cited; section 2759, Code. The question of jurisdiction depends upon the petition, which in this case was sufficient for that purpose. None of the claims against the estate were expressly charged upon the realty. *Hamilton v. Smith*, 110 N. Y. 159, 17 N. E. Rep. 740. Nor was the real estate converted into personality by the residuary clause in the will. *Ogsbury v. Ogsbury*, 115 N. Y. 290, 22 N. E. Rep. 219; 8 Pom. Eq. Jur. § 1166; *Chamberlain v. Taylor*, 105 N. Y. 185, 186, 11 N. E. Rep. 625; *Prentice v. Janssen*, 79 N. Y. 478; *Armstrong v. McKelvey*, 104 N. Y. 179, 10 N. E. Rep. 266.

The estate of the testator was indebted in the sums above named. The surrogate's conclusions of law were based upon his findings of fact as contained in the above statement. Hyland is in no position now to ask a reversal, because of a mistake which he induced the surrogate to make. The decree was limited to the lands in Livingston and Allegany counties. There is no force in the objection that the surrogate was personally disqualified. Sections 46, 2497, Code Civil Proc. No objection was taken on this ground. It is not claimed that any injury was inflicted, as the demand in which the surrogate was relator was rejected.

It is insisted that the surrogate erred in refusing to allow the claim of the petitioner upon the assessment of the \$5,000 stock owned by Samuel D. Faulkner in his life-time. The surrogate finds that the testator and Henry J. Faulkner were appointed administrators of the goods of Samuel D. Faulkner, and that the testator took possession as administrator of the property left by Samuel D. Faulkner, which consisted mainly of the 50 shares of stock, and an undivided interest in the copartnership property of Sweet, Faulkner & Co.; that no decree settling the accounts of the administrators had ever been made; that the estate of Samuel had never been judicially settled; and that the surviving administrator, Henry J. Faulkner, was removed by the order of the surrogate of Livingston county, and that J. Crisfield was thereupon appointed administrator of such estate; that no transfer of the 50 shares of stock held by Samuel had been made upon the books of the bank. Section 5152 of the Revised Statutes of the United States provides: "Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liability as stockholders; but the estate and funds in their hands shall be liable in like manner, and to the same extent, as the testator, intestate, ward, or person interested in such trust funds would be if living, and competent to act and hold the stock in his own name." The ground upon which it is sought to charge the testator's estate with the assessment of the 50 shares is that he was next of kin as well as administrator of Samuel, and exercised dominion over the stock as owner during his life-time. But the surrogate's finding shows that the stock always remained in his hands in a representative capacity, and passed in the same form to those who suc-

ceeded him. It was never transferred on the books of the bank, nor Samuel's accounts judicially settled.

It is urged that all claims against Samuel's estate had been paid except one which was rejected, and that, therefore, the estate is practically settled. Attention has not been called to any adjudication holding that any individual or his estate shall be charged personally with the payment of debts of a person for whom he is acting as administrator or executor. The stock of this bank is, and for a long time has been, worthless. To charge the testator's estate with the payment of the assessment would be to make it liable for the whole amount, without any way of getting compensation. No reason is perceived for extending the liability of the estate by construction, so as to impose such burdens, or for taking this case out of the provisions of the section above quoted, because of the fact that the testator was next of kin of Samuel as well as administrator. The finding of the surrogate shows that the conclusion, that the testator's estate was not liable for the assessment upon that 50 shares, is correct. The decree must be affirmed. All concur.

LE ROY *et al.* v. BROWNE *et al.*

(*Supreme Court, Special Term, Albany County. March 20, 1890.*)

1. COSTS—ACTION TO ABATE NUISANCE—NONSUIT.

Where, in an action to abate a nuisance, plaintiffs are nonsuited, costs are not allowed as of course, but only on the award of the court.

2. SAME—ACTION TRIED AT CIRCUIT—POWERS OF SPECIAL TERM.

Code Civil Proc. N. Y. § 8230, provides that, in cases where costs are not allowed as of course, the court, in its discretion, may award them to any party "rendering final judgment." *Held* that, in an action to abate a nuisance tried at circuit, a dismissal of the complaint without directing costs to be awarded to defendants is, in effect, a final judgment without costs; and the special term, sided over by another judge, has no power to allow the costs of the action to defendant, though the omission of the circuit court to allow them grew out of a apprehension by the counsel and the court as to defendant's right to costs of court.

3. SAME—DISCRETION OF COURT.

Where the circuit judge, in the exercise of his discretion, has not awarded costs to defendants on deciding the case in their favor, and defendants have entered judgment accordingly, the special term will not assume that the circuit judge is mistaken in the exercise of such discretion, and will not send the case back to him for his determination on the question of costs.

Action by William B. Le Roy and others against Anne Browne and Mary Levy for maintaining a nuisance. Plaintiffs were nonsuited, but no costs were awarded defendants. They now move to have costs allowed. For opinion of general term ordering costs to be stricken from judgment as entered by defendants, see 8 N. Y. Supp. 82.

J. F. Crawford, for plaintiffs. *Doyle & Fitts*, for defendant.

MAYHAM, J. This was an action to abate an alleged nuisance, and damages occasioned by the same. On the trial at Albany circuit, before Justice TAPPAN and a jury, the plaintiffs were nonsuited. No motion was made by the defendants for costs, and no costs were awarded to either party on trial. The defendants proceeded to enter judgment on the nonsuit, with costs against the plaintiffs. The plaintiffs moved at special term to strike from the judgment the costs inserted therein, which was denied, on the ground that the plaintiffs having appealed from the judgment to the general term they had waived their right to have the costs stricken out by special term motion. From the order denying that motion the plaintiffs appealed; and the general term reversed the same, and struck out the costs, as asked in the notice of motion. See 8 N. Y. Supp. 82. The defendants now move at special term for costs in the action tried before Justice TAPPAN. This motion is opposed by the plaintiffs on the ground that this special term has no power

pass upon questions as to the allowance or disallowance of costs; that that was a question for the trial court alone, and cannot be determined on motion at special term before another judge.

This is a class of actions in which costs are not allowed of course, and can only be recovered upon the order of the court, in the exercise of the judicial discretion. There are manifest reasons why that discretion, if exercised at all, should be by the trial judge. He is cognizant of the facts, and can judge whether or not there are elements in the case that would justify the court in awarding costs, of which another judge, sitting at special term, could not be possessed. It is quite true, as suggested on the argument by the learned counsel for the defendants, that the supreme court of the state is but one court, although its functions are administered by different judges.

Section 8230 of the Code of Civil Procedure, under which this motion is made, provides that, "except as prescribed in the last two sections, the court may, in its discretion, award costs to any party upon the rendering of a final judgment." My attention has not on the argument been directed to any adjudication upon the language used in this section. In *Andrews v. Moller*, 20 Wkly. Dig. 377, the defendant taxed costs and entered judgment on a dismissal of plaintiff's complaint, without leave of the court, in an action where costs were not allowable as of course; and the court, on a motion to strike out the costs, made an order allowing the same on that motion, and allowed them to remain in the judgment. In this action a final judgment was entered upon the nonsuit dismissing the complaint. A judgment is defined by section 1200 of the Code as interlocutory or final. The judgment entered in this action was clearly a final judgment. The court at the trial granted the only judgment asked for which was a dismissal of the complaint. Section 1203 provides that "judgment must be entered in the first instance, pursuant to the direction of the court, at a term held by one judge, except where special provision is otherwise made by law." As costs were not allowable of course, and there was no direction by the judge holding the term for costs, it was, I think, in effect, a determination dismissing the complaint without costs. In *Commissioners v. Spofford*, 3 Hun, 55, DAVIS, J., says: "No costs are allowed by the statute to any party, in either of these cases, without the express adjudication of the court. Silence is a denial of them, and the addition of the words 'without costs to either party' adds nothing to the legal effect of an omission to award them." If this rule be correctly stated in the above case, then the failure of the judge to allow costs was an adjudication by him against their allowance. Section 1022 of the Code provides that, "when costs are in the discretion of the court, the decision or report must award or deny costs." The decision in this case nonsuited the plaintiff without awarding costs, and judgment was entered on that decision; but, as the judgment entered included costs, which were not allowed by the decision, the general term struck them out, thus making the judgment conform to the decision.

But it is urged by the defendants that the omission of the trial court to allow costs grew out of the misapprehension by the counsel and court as to the right of the defendants to costs of course. It can hardly be claimed that such misunderstanding of the law, if it exists, furnishes any legal excuse for the allowance of costs on this motion. It is a well-understood legal maxim that "ignorance of law is no excuse." *Moulton v. Bennett*, 18 Wend. 588.

Again, it is objected by the plaintiffs that this motion, after the entry of judgment by the defendants, comes too late; that the defendants, by the entry of judgment, waived their right to make the motion for costs. In answer to this objection it is urged that the court, in the exercise of its power, not infrequently sends a case back to a referee to pass upon the question of costs. But none of these cases hold that a judgment already entered may be changed on motion at special term, by a judge who did not try the cause, so as to al-

low costs where none were allowed by the trial judge or referee; and in *B. v. Levy*, 41 Hun, 461, the general term of the third department reversed order sending a report back to a referee to pass upon the question of costs and they seem to put it, in part, upon the ground that at the trial no request was made for an award of costs. The defendants in the moving papers ask the alternative relief that the judgment be vacated as entered, and then award costs, or by an order send the case back to Justice TAPPAN for his determination of the question of costs. If the question of costs could now be determined, there would be great propriety in having that determination made by the learned justice who heard the cause. But I have not been cited to authority for making such an order, nor am I aware of the existence of such power in the special term.

On the whole case, I think that this court should not on this motion, upon the facts disclosed, after the proceedings already had in this action, and the time which has elapsed since the trial, assume the exercise of a discretion which existed in the court at the time of the trial, and which was not at that time exercised in favor of the defendants. The motion must be denied, with \$10 costs.

REDMOND v. ROME, W. & O. R. Co.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

CONTRIBUTORY NEGLIGENCE—EVIDENCE.

A conductor who, in the day-time, and in a freight-yard with which he was thoroughly familiar, steps from his moving train, and walks along a parallel track without looking behind him, and is injured by an engine coming from that direction, is guilty of contributory negligence, though he was engaged in watching a brakeman throw a switch to conduct the train upon a siding.

Appeal from circuit court, Jefferson county.

Action for damages for personal injuries by Patrick Redmond against Rome, Watertown & Ogdensburg Railroad Company. The complaint dismissed, and plaintiff appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Henry Purcell, for appellant. Edmund B. Wynn, for respondent.

MARTIN, J. We think the appeal in this case should not prevail. The action was for negligence. The relation of the parties was that of master and servant. The accident which was the subject of the action occurred on the 4th day of June, 1886, at or near the intersection of the defendant's road with Arsenal street, in the city of Watertown, N. Y. The circumstances under which it occurred, briefly stated, were as follows: The plaintiff was a conductor upon one of the defendant's freight trains. On the day of the accident he ran his train from Watertown to Gouverneur and return. On return, between 6 and 7 o'clock in the afternoon, he ran in and switched cars for the south in the west end of the defendant's yard, leaving the cars and a caboose in the train. When the train reached a point near the water-plug, the engine was detached, and the cars were permitted to run down the grade into that portion of the yard where they were to be switched. The caboose was ahead. As the train reached the point where the accident occurred, the plaintiff stepped off, and, without looking west, walked on near to a parallel track, and stood there until he was struck and seriously injured by an engine which was backing from the west on that track. The plaintiff was well acquainted with the yard and its tracks, and had been so many years. He passed the engine by which he was injured while his train was backing into the yard. If he had looked in the direction from which the engine came, he would have had no difficulty whatever in discovering its approach, as the track was straight for about a mile. No excuse for standing upon or so near the track without looking to see the approaching engine.

was given, except that he was watching a brakeman who was running to throw a switch to let the train in on a branch or siding. The plaintiff claimed that no bell was rung or whistle sounded as this engine approached the crossing; that it was in the hands of a fireman, the engineer having left it; and that the defendant was negligent in retaining such engineer in its employ, as he was an improper person to have the charge or management of an engine, by reason of his accustomed negligence, which was, or should have been, known to the defendant. On the trial, at the close of the evidence, the plaintiff was nonsuited.

As we view this case, the only question we need consider is whether the plaintiff was guilty of negligence which contributed to his injury. If the evidence failed to show that the plaintiff was free from negligence, it follows that the court properly directed a nonsuit, as in an action of this character the burden of establishing affirmatively his freedom from contributory negligence is upon the plaintiff. *Hale v. Smith*, 78 N. Y. 480; *Lee v. Gas-Light Co.*, 98 N. Y. 115; *Tolman v. Railroad Co.*, Id. 198. The question of contributory negligence is usually a question of fact to be submitted to the jury; still, there may be such an absence of proof of freedom from such negligence, or the proof thereof may be so strong and convincing, as to make it the duty of the court to direct a nonsuit or a verdict for defendant. If the evidence in this case, either circumstantial or direct, tended to show that the accident occurred without the plaintiff's negligence, a question of fact arose which should have been submitted to the jury. If, on the other hand, the evidence wholly failed to establish the existence of any cause for the accident which was consistent with the exercise of proper care and prudence by the plaintiff, the court properly nonsuited. It has been repeatedly held that it is negligence *per se* for a person to aboard or alight from a moving train, (*Burrows v. Railroad Co.*, 63 N. Y. 556; *Morrison v. Railroad Co.*, 56 N. Y. 302; *Solomon v. Railroad Co.*, 108 N. Y. 437, 9 N. E. Rep. 430; *Hunter v. Railroad Co.*, 112 N. Y. 371, 19 N. E. Rep. 820;) or to attempt to cross a railroad track without looking for approaching trains, (*Woodard v. Railroad Co.*, 106 N. Y. 369, 13 N. E. Rep. 424; *Young v. Railroad Co.*, 107 N. Y. 500, 14 N. E. Rep. 484; *Powell v. Railroad Co.*, 109 N. Y. 613, 15 N. E. Rep. 891; *Cullen v. Canal Co.*, 113 N. Y. 667, 21 N. E. Rep. 716; *Bombay v. Railroad Co.*, 47 Hun, 425; *Brickell v. Railroad Co.*, 12 N. Y. St. Rep. 450;) or to stand between the rails of a side track upon which cars are standing, (*Van Schaick v. Railroad Co.*, 43 N. Y. 527; *Toomey v. Turner*, 24 Hun, 599;) or to be inattentive to his dangerous position when on the track, whether lawfully there or not, (*Burns v. Railroad Co.*, 101 Mass. 50; *Denville v. Railroad Co.*, 50 Cal. 383.)

We think the doctrine of the cases cited fully sustains the action of the trial court in nonsuiting the plaintiff. As we have already seen, the plaintiff had been in the defendant's employ for many years, was thoroughly familiar with its tracks at the place of the accident, and the purpose for which they were used. He knew that engines and trains frequently passed over the track upon or near which he stood. With this knowledge, in broad daylight, without looking or in any way attempting to ascertain whether a train or engine was approaching from the west, he stepped from his train, and stood upon or so near the track as to incur the peril of the injury which he sustained. Our general knowledge and common experience leads us to the conclusion that this act was dangerous, and consequently negligent. That it was fraught with danger, the plaintiff must have known, and therefore he was guilty of negligence, unless his action was explained or justified by special circumstances. We find nothing in this case to explain or justify it. Nothing special had arisen which required unusual attention, or which should have induced the plaintiff's inattention to his own safety. No necessity is shown for his constant watchfulness of the movements of his brakeman in throwing the

switch. The act to be performed was a simple one, and presumably the brakeman was competent to perform it. We are of the opinion that the evidence in this case not only failed to show that the plaintiff was free from contributory negligence, or the existence of any cause for the accident which was consistent with the exercise of proper care and prudence by him, but that it established conclusively that he was guilty of gross and inexcusable negligence, which resulted in the injury complained of. These considerations lead us to the conclusion that the court properly nonsuited the plaintiff, which renders it unnecessary for us to examine the other questions presented on this appeal. Judgment affirmed, with costs. All concur.

MCINTYRE v. BUELL *et al.*

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

1. MINES AND MINING—CONVEYANCES—PRIOR DEED OF SURFACE GROUND.

Plaintiff conveyed to defendants "all of that certain mining lode or claim known as the 'John,'" and the conveyance refers to the deed under which plaintiff acquired title, which conveyed all the dips, spurs, and angles, and metals, ores, gold and silver bearing quartz and rock and earth, and all privileges and franchises thereto incident, etc. It appeared that plaintiff had theretofore executed a deed to another person of "all that portion of the surface ground to the John mine, being and lying south of the John mine, commencing at the center of the vein, * * * and running its entire length. This deed is intended to convey the south 100 feet of the surface ground of the John mine," etc. *Held*, this deed conveyed only the surface ground, and did not include any of the mineral rights, and therefore constituted no defense to an action for the price of the mining claim.

2. SAME.

But, even if such deed did include the property conveyed to defendants, it constitutes no defense to the action for purchase money, where it appears that it was not recorded, that no claim has ever been made under it, and that defendants have sold and conveyed the mine at a large advance, and without regard to any claim that might be made under it, and that the deed to defendants was without warranty or covenants.

Appeal from circuit court, Erie county.

Action by George W. McIntyre against Luther H. Buell and another. Verdict and judgment for plaintiff, from which defendants appeal.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

H. C. Doy, for appellants. *Adelbert Moot*, for respondent.

MACOMBER, J. This action was brought to recover an unpaid balance alleged to be due the plaintiff upon a written agreement bearing date July 21, 1881, by which the plaintiff agreed to sell to the defendants certain mining property in San Juan county, Colo., known as the "John Lode," for the sum of \$8,000, to be paid, one-half in cash, and the other half in certain syndicate shares of stock of a company thereafter to be organized for the operation of this and another mine. This agreement was followed by a delivery of a deed or grant by the plaintiff to the defendants, though the last-named instrument bears date the 16th day of July, 1881. This instrument conveys "all of that certain mining lode or claim known as the 'John,' situate, lying, and being in the Uncompahgre mining district, in the county of San Juan, and state of Colorado, about half a mile from Mineral Point in Lake Park, and which was located by George W. McIntyre and Addison Rice, October 8, 1875, and recorded in Book 5, page 61, of the Records of said county, at Silverton, (No. 10,209.)" The deed recites the fact that one-half of said lode was conveyed to the plaintiff by one Addison Rice in the month of September, 1878, by a good and sufficient deed, properly recorded, to which reference was made in the conveyance to the defendants for a more particular description of the silver-bearing lode. This deed also conveyed all the dips, spurs, and angles, and metals, ores, gold and silver bearing quartz and rock and

earth, and all privileges and franchises thereto incident and appertaining, together with all the hereditaments and appurtenances thereto belonging. The answer sets up, as a defense to the action, false and fraudulent representations of the plaintiff, by which he represented the John lode to be 1,500 feet long and 300 feet in width, being 150 feet on each side of a vein, and that he was seized of the whole lode; and, further, that he represented that the ore in the John lode would yield between 90 and 100 ounces of silver to the ton, all of which is alleged to be false, to the knowledge of the plaintiff. Very little need to be said upon this branch of the case, for the evidence fails wholly to substantiate in any particular the false representations set up. The answer further alleges that the plaintiff on the 9th of October, 1879, conveyed to one Hannah B. McIntyre a part of said John lode, namely, 100 feet on the south side, running the whole length thereof, namely, 1,500 feet. A deed is produced from the plaintiff to Hannah B. McIntyre without date, but acknowledged on the 9th day of October, 1879, by which the plaintiff sold, released, and quitclaimed to Hannah B. McIntyre all the right, title, interest, claim, and demand which the plaintiff had "in and to the following described mining property, situate, lying, and being in the county of San Juan and state of Colorado, to-wit, all that portion of the surface ground to the John mine being and lying south of the said John mine, commencing at the center of the vein, excepting fifty feet; said fifty feet being that portion adjoining the said John mine commencing at the center of said vein, and running its entire length. This deed is intended to convey the south one hundred feet of the surface ground of the John mine its entire length, and to include the location and vein of the 'location or mine' known as the 'Morning Star' mine, located by B. R. McIntyre, and recorded in Book B 2, page 120, including all dips, angles, and spurs."

The learned trial judge held that the quitclaim to Hannah B. McIntyre was simply of the surface ground, and did not convey any part of the metals, ores, and silver-bearing quartz, rock, and earth, as mining deeds used in Colorado usually do. In this we are inclined to think he was correct, and that the same did not impair the property purchased by the defendants from the plaintiff, as stated in the contract, and as described in their deed. The parties contracted in view of the condition of the property in the mining districts of Colorado, and with knowledge that a vein of ore, situate as this is described in the contract and deed, may be held by one party, and the surface of the ground by another, and that a grant of the lode or vein may not include the surface, like the deed to the defendants. *Sedgw. & W. Tr. Title Land*, § 115; *Wolfley v. Mining Co.*, 4 Colo. 114; *Eighmie v. Taylor*, 98 N. Y. 288.

But there is another reason why the judgment should be sustained, even though the quitclaim of the surface ground to Hannah B. McIntyre did convey some part of the property contracted to be sold and conveyed to these defendants. There is no proof that Hannah B. went into possession of the land under this deed, but the case rests solely upon the production of the deed itself. The plaintiff testifies that he has no recollection of ever executing such a paper. There is no evidence that any claim has ever been made to any portion of this property under it. There is no evidence that the defendants have been in any way injured, or their rights jeopardized, by the existence of this paper. They have sold and conveyed the property at a large advance, and without regard to any claim that might be made under the quitclaim to Hannah B. McIntyre. There is no warranty or covenant in the deed to the defendants. There has been no ouster, or even a threat of ouster. Under these circumstances, the mere production of the deed and a minute of its record is not sufficient to defeat an action brought for the unpaid balance of the purchase price of the land conveyed to them. Treating the defense set up in the answer as proceeding solely upon the ground of false and fraudulent representations, and not upon a false warranty in respect to the title of

the plaintiff to the property at the time the contract was made with the defendants, it is sufficient to say that the evidence wholly fails to substantiate the defense. The judgment should be affirmed. All concur.

DAVIS v. ROME, W. & O. R. Co.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

EVIDENCE—PROOF OF CRIME IN CIVIL SUIT.

Where the defense in an action for services rendered is that plaintiff embezzled moneys of defendant, the embezzlement need not be shown beyond a reasonable doubt. A fair preponderance of evidence, having due regard to the presumption of innocence, is sufficient.

Appeal from circuit court, Onondaga county.

Action by Edgar C. Davis against the Rome, Watertown & Ogdensburgh Railroad Company. Verdict for plaintiff. Motion for new trial denied. Defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Edmund B. Wynn, for appellant. Stone, Gannon & Pettit, for respondent.

MARTIN, J. This action was to recover for services performed for the defendant by the plaintiff as a conductor on one of its trains. The defense was that the plaintiff was guilty of such flagrant acts of dishonesty or crime in embezzling the funds of the defendant as to bar his right of recovery. The case was tried, and submitted to the jury, upon that issue. In submitting the case to the jury the court charged as follows: "In addition to that, he has the presumption of law in his favor; and in this case the presumption goes something further than what I have had occasion to say to you in other cases, where I have simply stated to you that, if there was a preponderance of evidence in favor of the party having the burden of proof, then you must find for the party having such preponderance. In this case, where the charge is of a crime, the burden which is laid on the defendant is something more than that, because the real question is the same as if the plaintiff was on trial for theft; and you must find not simply, on weighing the testimony, that there is a preponderance of evidence in favor of the defendant in this case, but you must find that the evidence satisfies you beyond reasonable doubt that the position which the defendant takes here is the correct one, and that the plaintiff did on the occasions referred to take the moneys which have been testified to here, and that he did not report and pay them over. If you are satisfied beyond reasonable doubt that all this is true, then the defendant is entitled to something more than offset of these moneys against the claim of the plaintiff which has been established. The plaintiff will not be entitled to recover at all for his services, if you are satisfied that he performed his duties in the dishonest way which the witnesses for the defendant would indicate. And so, gentlemen, you will determine in this case, if the evidence satisfies you beyond reasonable doubt, considering the testimony on both sides, and the presumption of law in favor of the plaintiff. I say, if the testimony here satisfies you beyond reasonable doubt that the plaintiff did receive the moneys as charged here, and did not report and pay over those moneys, then your verdict must be for the defendant. If, from this evidence, you find he received these moneys, but you are not satisfied that he intentionally withheld and failed to pay them over, then the defendant would be entitled to an offset to that extent. If neither of those were found, the plaintiff would be entitled to recover the full amount claimed, \$110.87, with interest." To this portion of the charge the defendant excepted.

The effect of the portion of the charge excepted to was to impose upon the defendant the burden of establishing its defense beyond a reasonable doubt.

The rule as established by the earlier English cases was that proof beyond reasonable doubt was usually required to establish a charge of crime in a civil action. This rule has been followed in a number of the states, and seems to have been followed in the earlier cases in this state. *Woodbeck v. Keller*, 6 Cow. 118; *Clark v. Dibble*, 16 Wend. 601; *Hopkins v. Smith*, 3 Barb. 602. But in the more recent cases, especially in this state, it has been held that in a civil action the party upon whom the burden of proof rests as to an issue is not bound to establish it beyond a reasonable doubt. It is sufficient if there is a fair preponderance of evidence in his favor. *Indemnity Co. v. Gleason*, 78 N. Y. 508, 518; *Johnson v. Insurance Co.*, 25 Hun, 251; *Freund v. Paten*, 10 Abb. N. C. 811; *Stearns v. Field*, 90 N. Y. 640, 642; *Seybolt v. Railroad Co.*, 95 N. Y. 562, 569; *People v. Briggs*, 47 Hun, 266, 268; affirmed, 114 N. Y. 56, 20 N. E. Rep. 820; *Ferry Co. v. Moore*, 6 N. E. Rep. 293, less fully, 102 N. Y. 667. In the last case, Judge EARL, who delivered the opinion of the court in that case, said: "There is no rule of law which requires the plaintiff in a civil action, when a judgment against the defendant may establish his guilt of a crime, to prove his case with the same certainty which is required in criminal prosecutions. Nothing more is required in such cases than a just preponderance of evidence, always giving the defendant the benefit of the presumption of innocence. Where a judgment for the plaintiff involves crime or a moral turpitude on the part of the defendant, the court should always require satisfactory proof; and, when that has been given, judgment should follow, regardless of consequences. In no other way can the law be properly administered, and private rights effectually protected." We are of the opinion that the authorities cited are conclusive upon this question, and require us to hold that the exception under consideration was well taken. This leads to a reversal of the judgment and order appealed from. Judgment and order reversed on the exceptions, and a new trial ordered, with costs to abide the event. All concur.

PEOPLE *ex rel.* MALONEY v. EDWARDS, County Treasurer.

(Supreme Court, General Term, Fourth Department. May 2, 1890.)

1. TAXATION—REDEMPTION BY MORTGAGEE—MANDAMUS.

Laws N. Y. 1880, c. 91, § 12, provides that "all powers which are conferred upon the comptroller of this state in relation to * * * the effect of any such sale of land for taxes upon the lien of any mortgage thereon, the right of a mortgagee to redeem, the consequence of neglect to do so after notice, and the lien of the mortgagee for the amount paid on such redemption, * * * are hereby conferred, so far as relates to the county of Oneida, upon the treasurer thereof." Section 14 provides that all acts relating to Oneida county in conflict with this act are hereby repealed. *Held*, the general law of the state as to redemption by a mortgagee is still applicable to Oneida county, the county treasurer being substituted for the state comptroller; and, where a mortgagee tendered to such treasurer the amount for which the mortgaged lands were sold, with interest, as provided by Laws N. Y. 1855, c. 427, § 83, it was the treasurer's duty to receive the same, and issue his certificate therefor, and on refusal a writ of *mandamus* was properly issued to compel him thereto.

2. SAME—TENDER.

Section 8 of the special act provides that the payment shall be "for the use of the purchaser, his heirs and assigns." *Held*, a tender "for and in full redemption of said premises from sale for delinquent taxes in August, 1887, to Davis & Johnson," was sufficient.

3. SAME—RECEIPT.

When the tender was rejected by the treasurer on the sole ground that he had no right to receive the money or give the certificate, it was not invalid because a receipt or certificate was demanded.

Appeal from special term, Oneida county.

Application by Joseph F. Maloney for *mandamus* to John R. Edwards, treasurer of Oneida county. Defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Davis & Johnson, for appellant. *J. D. Baker*, for respondent.

MARTIN, J. This is an appeal from an order directing that a peremptory writ of *mandamus* issue to the appellant, as treasurer of Oneida county, commanding him forthwith to receive the money tendered him by the relator, assignee of a mortgage which was a lien upon certain premises situated in town of Florence, in that county, which had been sold for the taxes levied thereon for the year 1886, and to deliver to the relator a receipt or certificate for such payment, certifying that the same was in full redemption of premises and the lien of said taxes, and from the sale thereunder. The premises sold consisted of about 22 acres of land. The state and county taxes levied thereon for the year 1886 were returned unpaid. By virtue of the provisions of chapter 91, Laws 1880, as amended by chapter 8, Laws 1881, the treasurer of Oneida county sold the premises for such unpaid taxes in August 1887. They were struck off to Davis & Johnson for \$12.75, and a certificate issued to them August 28, 1887. The treasurer executed and delivered to them a deed, August 31, 1888. The mortgage held by the relator was given by the then owner of the premises February 17, 1886, and recorded on the 24th day of the same month. It was given to secure the payment of \$400 and interest, and was assigned by the mortgagee to one Woodruff, December 29, 1888, and by Woodruff to the relator, March 29, 1889. Both of said assignments were duly recorded in the office of the clerk of the county of Oneida. On February 8, 1889, Woodruff, as assignee of such mortgage, caused to be served upon the appellant a notice similar to that required to be served on the comptroller by section 82, c. 427, Laws 1855, and tendered the appellant a sum of \$20, which was more than the sum for which said premises was sold, with 12 per cent. interest, and the treasurer's fee for the deed given by him, added, and demanded a certificate of such payment and redemption. The appellant refused to receive the money so tendered, or to give such certificate. On the 23d day of May, 1889, and after the transfer of said mortgage to the relator, he served upon the appellant a similar notice, made a similar tender, and demand, and the appellant again refused to receive the money tendered, or to give the certificate demanded.

The motion for *mandamus* was opposed by the appellant for the reason that he states in his brief, "that defendant had no right to receive the money so tendered him by the assignees of such mortgage,] or to cancel said certificate." Therefore the question presented is whether the county treasurer had power to do so, and could have rightfully received the money tendered, and delivered to the relator a receipt or certificate showing that said money was paid in redemption of the premises from such sale. A solution of this question is dependent upon the general statutes in relation to the sale of lands for unpaid taxes, unless those statutes have been repealed or modified by a subsequent one relating to the collection of taxes in the county of Oneida. To determine the question, it becomes necessary to examine the General Statutes so far as they relate to the rights of a mortgagee by virtue of his lien upon real estate which has been sold for unpaid taxes, his right as such to redeem, and the method of effecting such redemption, and also to examine the special act relating to the collection of taxes in the county of Oneida.

Chapter 427, Laws 1855, as amended by subsequent acts, which constitute the general law of the state in relation to the collection of taxes on lands of non-residents, and in relation to the sale of such lands for unpaid taxes, provides, among other things, as follows: "No sale of real estate hereafter made for the non-payment of any tax or assessment shall destroy, or in any manner affect, the lien of any mortgage thereon, duly recorded or registered at the time of such sale, except as hereinafter provided." Section 76. "It shall be the duty of the purchaser at such sale to give to the mortgagee a written receipt of such sale, requiring him to pay the amount of the purchase money

with interest at the rate allowed by law thereon, within six months after the giving of such notice. Such notice may be given at any time after the expiration of two years from the last day of such sale." Section 77, as amended by Laws 1870, c. 280. "If such payment shall be made, the sale shall be of no further effect; and the mortgagee shall have a lien on the premises for the amount paid, with the interest which may thereafter accrue thereon, at the rate of seven per cent. per annum, in like manner as if the same had been included in his mortgage." Section 78. "If case the mortgagee shall fail to make such payment within the time so limited, he shall not be entitled to the benefit of section seventy-six of this act." Section 79. "The term 'mortgagee,' as used in this act, shall be construed to include assignees whose assignment shall be duly recorded, and personal representatives; and the term 'purchaser' shall be construed to include assignees and real or personal representatives, as the case may be." Section 80. "The notice required by section seventy-seven of this act may be given either personally or in the manner required by law in respect to notices of non-acceptance or non-payment of notes or bills of exchange; and a notarial certificate thereof shall be presumptive evidence of the fact. Such certificates may be recorded in the county in which the mortgage was recorded, in the same manner and with the same effect as is by law prescribed in respect to deeds or other evidences of title of real estate. A copy of such notice served, together with the affidavit of some person, who shall be certified as credible by the officer before whom such affidavit shall be taken, that such notice was duly served, specifying the mode of service, shall be filed in the office of the comptroller within one month after such service." Section 81, as amended by Laws 1870, c. 280. "The notice required to be given under the last preceding five sections, in cases of sales by the comptroller, shall be directed only to such persons as shall within two years from the time of such sale file in the office of the comptroller a notice stating the name of the mortgagor and mortgagee, the date of the mortgage, and the amount claimed to be due thereon, and the county, town, and tract in which said mortgaged premises are situated, with the number of the lot on which said mortgage is claimed to be a lien, with the name of the person or persons claiming notice, their residence, and the post-office to which such notice shall be addressed. In case such mortgagee or other person shall omit or neglect to file such notice with the comptroller within the said two years, then said mortgagee or other person shall be barred from all claim to redemption by virtue of said mortgage, and the title of the purchaser shall become valid and effectual the same as if such mortgage had not existed." Section 82 as revived by the repeal of chapter 285, Laws 1862, by chapter 280, Laws 1870. The statute of 1855 was further amended by chapter 280, Laws 1870, by providing as follows: "A mortgagee whose mortgage is duly recorded, or the assignee of any mortgage whose assignment is duly recorded, and the personal representatives of such mortgagee or assignee, who shall have filed with the comptroller, as required by law, a notice and description of his mortgage, may, at any time after the sale of all or any part of the mortgaged premises for unpaid taxes, and before the expiration of six months from the giving of the notice required by section seventy-seven of chapter four hundred and twenty-seven of the Laws of 1855, entitled 'An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes,' may redeem the said premises so sold, or any part thereof, from the said sale. If the said sale shall have been made by the comptroller, such redemption shall be made by paying to the state treasurer, upon the certificate of the comptroller, for the use of the purchaser, his heirs or assigns, the sum mentioned in his certificate, with interest at the rate allowed by law in the case of redemption by occupants from the date of such certificate; and, if the said sale shall have been made by a county treasurer or other county officer, the redemption shall be made by paying to the county treasurer the amount

for which said lands were sold, with interest at the same rate from the sale. The mortgagee or assignee of a mortgage or other person redeeming land sold for unpaid taxes, as authorized by this section, shall have a lien on the premises so redeemed for the amount paid, with interest thereon from the time of such payment, at and after the rate of seven per centum per annum in like manner as if the same had been included in the mortgage." While the statute last quoted was repealed by chapter 563, Laws 1889, passed July 1889, still the repealing act contained the following saving clause: "Nothing in this act contained shall affect any suit or proceeding now pending in any court of this state, or the rights of any party to any suit or proceeding commenced before the passage of this act." This proceeding was commenced before such repealing act was passed, and hence is not affected thereby.

This examination of the general statutes which were in force when the act for the collection of taxes in Oneida county was passed discloses that those statutes as they then existed, and still exist, a mortgagee's lien on land sold for unpaid taxes was not only preserved, but also that a distinct independent system for the redemption of such lands by the mortgagee thereby established. Indeed, it seems to be admitted by all that, if the question had been made by the comptroller under the provisions of the statute of 1855, the relator's right of redemption would not have been barred when the notices and tenders made by the relator and his assigns were served and made. But the appellant claims that the sale in this case was made under a special statute relating to the collection of taxes in Oneida county, and hence that the foregoing provisions of the general law have no application, and the relator's right to redeem was barred by the limitation of one year contained in the Oneida act. That the sale in question was made in pursuance of such special act is admitted, but that the statute of 1855 is not applicable to the relator's right to redeem is denied. The special act referred to (Laws 1880, c. 91, as amended by chapter 8, Laws 1881) provides for the collection of taxes in Oneida county by a sale of lands by the treasurer of that county. It prescribes the notice to be given, where the sale shall be made, the manner of making such sale, the certificate to be given to the purchaser, the rights acquired by virtue of such sale and purchase, and provides: "The owner of, or any person interested in, any real estate sold for taxes as aforesaid, may redeem the same at any time within one year after the last day of such sale, by paying to the said county treasurer, for the use of the purchaser, his heirs and assigns, the sum mentioned in his certificate, and the interest thereon at the rate of twelve per cent. per annum, to be computed from the date of such certificate." Section 8. "If such real estate sold for taxes, or any portion thereof, be not redeemed as herein provided, the said treasurer shall execute to the purchaser, his heirs or assigns, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee. The said treasurer shall be entitled to demand and receive from the purchaser one dollar for preparing such conveyance." Section 9. "When any lot or piece of land sold for taxes by the treasurer after the expiration of six months from the last day of the annual sale for, be in the actual occupation of any person as a residence, the purchaser or the person claiming under him, shall serve a written or printed notice on such occupant, or by leaving such notice at the dwelling thereof with a person of suitable age, or by affixing such notice upon the outer door of the dwelling; or, if such land shall not be occupied as aforesaid, such notice shall be published in one of the newspapers published in the city of New York or the city of Utica, once each week, for three weeks, stating in substance the sale of such lands, the person to whom made, and the amount for which the same was sold, and stating the time when the purchaser thereof was entitled to receive a deed, and stating also that unless the said amount and the interest thereon, is paid to the county treasurer within one year from

last day of such annual sale, the same will become absolute, and the owner or other persons interested in said lands will be forever barred from all right or title thereto, and no other notice, either by the county treasurer, or by the holder of the certificate of any sale, or by any other person, shall be necessary or required. In case any of the lands so sold shall be redeemed therefrom subsequent to service of notice, the expenses of advertising, and service of the notice herein provided, and any taxes upon lands so sold which may be assessed upon and paid by the purchasers, or assignees of such purchasers, between the time of the sale and redemption thereof, shall, with the interest thereon at the rate provided by this act, be added to the amount otherwise required to be paid for such redemption. This section shall apply to the sales made by the treasurer of said county in the year eighteen hundred and eighty." Section 15, Laws 1880, as amended by chapter 8, Laws 1881. This act contains no express provision in relation to mortgage liens on land sold for taxes under it, nor is there any express provision in relation to the mode of procedure to be pursued to effect a redemption by a mortgagee, except so far as it is contained in section 12 of said act, which is as follows: "All powers which are conferred upon the comptroller of this state in relation to the cancellation of a tax which shall have been paid to a collector; the repayment of any tax paid more than once; the payment of a part of the tax on land by any person claiming a part of such land; the redemption of lands sold for taxes by persons claiming an undivided share or a specified part thereof; the effect of such redemption reducing the land to be conveyed; the effect of any such sale of land for taxes upon the lien of any mortgage thereon; the right of a mortgagee to redeem; the consequence of neglect to do so after notice, and the lien of the mortgagee for the amount paid on such redemption; the authority to withhold conveyances when it shall be discovered that any sale of land for taxes was ineffectual to convey a title, and to refund the purchase money and interest to the purchaser,—are hereby conferred, so far as relates to the county of Oneida, upon the treasurer thereof." Section 14 of said act is as follows: "All acts and parts of acts inconsistent or in conflict with this act, so far as the same do conflict, and relating to the county of Oneida, are hereby repealed."

The first inquiry presented arises as to the effect of the repealing act contained in the special statute relating to the collection of taxes in Oneida county. Did it effect a repeal of the provisions of the General Statutes in relation to mortgage liens and redemption by the holders of mortgages on the land sold for taxes, so far as it was applicable to that county? We think not. It will be observed that the repeal provided for was limited to such acts or parts of acts as were inconsistent or in conflict with the special act relating to Oneida county, and that such acts and parts of acts were repealed only so far as they were in actual conflict with it. We think that the repealing act quoted indicates an intention upon the part of the legislature not to repeal, but to preserve, as applicable to Oneida county, all acts or parts of acts relating to the sale of lands for the collection of taxes that were not actually inconsistent with the provisions of such special act, or in real conflict with it. The general law contained definite and full provisions in relation to mortgage liens on lands sold for taxes, and as to the right and manner of redemption by a mortgagee or assignee of a mortgage thereon. The special act contained no provision on the subject, except as expressed in section 12. There was, therefore, no inconsistency or conflict between the provisions of the general law on that subject and the special act, and the special act did not effect their repeal as to Oneida county. Moreover, the provisions of section 12 of the special act seem to indicate quite clearly that the legislature did not intend to repeal these provisions of the general law, as that section seems to recognize the provisions contained in the General Statutes in relation to "the effect of any such sale of land for taxes upon a lien of any mortgage

thereon, the right of a mortgagee to redeem, the consequence of neglect so after notice, and the lien of the mortgagee for the amount paid on redemption," as unrepealed, and a part of this act.

We are of the opinion that those provisions of the General Statutes relate to mortgage liens and redemption by mortgagees were not repealed and hence we are led to the examination of the question whether they were modified by that act, and, if so, to what extent, and in what particular. While it must be admitted that the special statute under consideration is inartificially drawn, and that it is somewhat ambiguous, still, when considered in the light of the statutes as in existence when it was passed and the obvious purpose of its passage, we are led to the conclusion not that the provisions of the general law in relation to mortgage liens, and redemption under them, were not repealed, but that it was the intent and purpose of section 12 to make such general provisions a part of the special act but modified by a substitution of the treasurer and his office in the place of the comptroller and his office, and by conferring upon the treasurer the powers and duties which under the general law devolved upon the comptroller, and substituting the county treasurer's office, instead of the comptroller's office, in the place where notices in relation to such redemption should be filed. In support of our conclusion as to the effect of that statute, it follows not that the period for redemption by the relator was not barred by the expiration of one year, but also that the appellant had the power and could rightfully receive the money tendered by the relator or his assignor, and have delivered to him a receipt or certificate showing that such money was paid in redemption from the sale of such premises. That a notice was given to the treasurer, as provided for by section 82, Laws 1855, by the assignor of the mortgage in question within the time therein limited, and that the whole amount of the purchase money, interest, and expenses was tendered to him, is not denied. It is said, however, that the tender was not for the use of the purchasers, as required by section 8 of the special act, and was therefore insufficient. It was not in that language. It was tendered "for a full redemption of said premises from sale for delinquent taxes, in August 1887, to Davis & Johnson," which we think was sufficient.

Nor do we think that it was invalid because a receipt or certificate was demanded for, in redemption of said premises from the sale for unpaid taxes, was demanded. There is nothing to show that the tender was on condition that a receipt or certificate should be given. The tender was rejected by the relator upon the sole ground that he had no right or power to receive the money, and give such certificate, and not upon the ground that such certificate was demanded. If the appellant had received the sum tendered, we think it would have effected a redemption of the premises; and it would have been proper for him to have given a certificate as provided by section 71 of the Laws of 1855.

These considerations lead us to the conclusion that the order appealed from was proper, and should be affirmed. Order affirmed, with \$10 costs and disbursements. All concur.

GARFIELD v. BLAIR.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

1. CONTRACTS—VALIDITY—PUBLIC POLICY.

In an action for moneys belonging to plaintiff which came into defendant's hands, defendant pleaded and testified that plaintiff agreed to give him part of the proceeds of actions against him wherein plaintiff was attorney for the persons suing, and plaintiff agreed to furnish evidence to defeat a recovery thereon. *Held*, a contract, that, if the money came into defendant's hands in pursuance of such an agreement, plaintiff could not recover, because the contract was immoral and against public policy, was as favorable as defendant could ask, and was not erroneous.

2. TRIAL—UNANSWERED INTERROGATORIES.

Three questions, in substance as follows, were propounded to the jury: (1) Was such an agreement made? (2) If it was, was the money delivered to defendant in pursuance thereof? (3) Was the arrangement sworn to by a certain witness, in regard to allowing the note to go to protest, entered into between plaintiff and defendant? The first two questions were answered in the negative, but the third was not answered. *Held*, the two answers given disposed of the defense, plaintiff was therefore entitled to judgment, and the failure to answer the third was immaterial.

Appeal from special term, Onondaga county.

Suit by Isaac D. Garfield against Charles C. Blair. The verdict and judgment were for the plaintiff. A motion for a new trial was denied, and defendant appealed.

The action was to recover the sum of \$1,270.21, with interest from May 29, 1886, for money belonging to the plaintiff which came into the defendant's hands. The defense was that there was an agreement between the parties that, if the defendant would refuse to pay a note held against him for \$4,000, which had been given in settlement of certain actions in which the plaintiff was attorney for the parties who had sued the defendant, the plaintiff would furnish information which would defeat a recovery thereon; but, in case the note was collected of the defendant, he should be entitled to \$750 of the money which came into his hands, and which belonged to the plaintiff for services performed by him as attorney for the other parties to such actions. The evidence upon the part of the plaintiff showed that the defendant received the sum of \$1,500 for the plaintiff, and that no part had been paid, except that it was agreed between the parties that the sum of \$229.78, which the plaintiff was then owing the defendant's firm, should be deducted therefrom, leaving due the plaintiff the sum of \$1,270.21. The defendant's evidence tended to show that the plaintiff promised to give the defendant one-half of his interest in said \$1,500 if he would decline to pay the note, and one-half of whatever was saved outside, and that the plaintiff stated to the defendant that he had a perfect defense to the note, and he thought that the defendant would not have to pay it. The plaintiff was at this time the attorney for other parties to the actions included in the settlement, and the relation of attorney and client existed between the plaintiff and the real parties interested in the debt for which such note was given. The evidence of the defendant as to such agreement was disputed by the plaintiff. The court charged the jury, in substance, that if the agreement between the parties was as testified to by the defendant, and the check in question was delivered to him in pursuance of such agreement, the plaintiff could not recover, as the contract was immoral, against public policy, and could not be enforced. To this portion of the charge the defendant excepted. He requested the court to charge that the agreement was valid as to him, which was refused, and an exception was taken. The court also charged that the burden of establishing the defense set up in the answer was upon the defendant, and the defendant duly excepted. The jury was not only directed to find a general verdict in the case, but there were also submitted to be answered by it three questions, which questions, answers, and verdict were as follows: "The jury rendered the following verdict: To the first interrogatory, did the plaintiff, Garfield, and the defendant, Blair, enter into an agreement in relation to allowing the \$4,000 note made by Blair and given to Daniel Gates to go to protest, and to litigate its payment, as sworn to by Charles C. Blair? they answer, 'No.' To the second interrogatory, if the jury find the agreement was made as sworn to by Blair, was the \$1,500 check delivered by Mr. Brown to defendant, Blair, so delivered by Garfield's direction, and in pursuance of such agreement, and to carry same out? they answer, 'No.' To the third interrogatory, was the arrangement sworn to by the witness Garfield in relation to defendant, Blair, allowing the \$4,000 note to go to protest, and to be sued, entered into as tes-

tified by them? And the jury further say they find for the plaintiff a sum of \$1,331.37."

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Louis Marshall, for appellant. *Wm. G. Tracy*, for respondent.

MARTIN, J. We find nothing in the defendant's exceptions to the verdict which would justify a reversal of the judgment appealed from. The defendant, in effect, charged that, if the defense set up in the answer was established, the plaintiff could not recover. This was as favorable to the defendant as the plaintiff could properly ask. That the charge was more favorable to him than he was or was entitled to is not a ground for reversal. Besides, the jury have expressed their finding that the agreement set forth in the answer was not made, and hence the charge as to the legal effect of such an agreement was erroneous, and the defendant could not have been injured by it. The court properly charged the burden of establishing the affirmative defense set up by him was upon the defendant. The undisputed proof was that the \$1,500 check in question was to be left with the defendant for the plaintiff. Such were the directions to the plaintiff to the witness Brown, who received it for him, and it was in pursuance of such directions that it was received by the defendant, as shown by his receipt given to Brown. Under these circumstances, the burden of establishing the defense relied upon was to be borne by the defendant. Nor do we think that the appellant's contention, that the failure of the jury to answer the third question submitted constituted such a mistrial as requires a reversal of the judgment, can be sustained. It is quite manifest that if the defendant failed to establish his defense, the plaintiff was entitled to the recovery awarded him. Therefore, when the jury answered the first two questions in the negative, it was a complete determination by it that the defense was not sustained, and that the plaintiff was entitled to the general verdict rendered. The validity of the verdict in this case is fully sustained by the doctrine of the case of *Murray v. Insurance Co.*, 30 Hun, 423, 10 Y. 614, and the same distinction exists between the case at bar and the case of *Ebersole v. Railroad Co.*, 23 Hun, 114, as is there pointed out. Moreover, there was no exception to the form of the verdict, nor objection to its substance. There was a conflict in the evidence upon the questions raised by the defendant's answer. They were fairly submitted to the jury, and it found for the plaintiff. There was no such preponderance of evidence in favor of the defendant as requires or would justify us in disturbing the judgment. We think the judgment should be affirmed. Judgment and order affirmed, with costs. All concur.

WILCOX *et al.* v. JOSLIN.

(*Supreme Court, General Term, Fourth Department. April, 1890.*)

1. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE.

The fact that plaintiff had forgotten the presence of a third person at a settlement of a disputed claim between himself and defendant, as to which settlement both parties testified at the trial, is not a reasonable ground for a new trial. An affidavit by plaintiff that he was unable to procure the testimony of the third person at the trial, though he used every effort he thought necessary, is insufficient to show diligence, in the absence of a statement as to what he in fact did, or the efforts he in fact put forth, to procure such testimony.

2. PLEADING—GENERAL DENIAL.

A general denial of a counter-claim wherein defendant sets up a contract which he permitted plaintiffs to cut logs on designated premises at a specific price per 1,000 feet does not raise an issue of payment or settlement of the sum due defendant under the contract.

Appeal from circuit court, Lewis county.

Action by Joseph H. Wilcox and others, partners, etc., against Lewis Joslin, for goods sold and delivered. There was a judgment for defendant.

on his counter-claim, and plaintiffs appeal from the judgments and an order denying a new trial on the minutes, and also from an order denying their motion for a new trial on the ground of newly-discovered evidence.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Wm. H. Hills, for appellants. *Walter Ballou*, for respondent.

MERWIN, J. The plaintiffs in their complaint alleged that on the 14th March, 1888, the defendant was indebted to them in the sum of \$116.86 for goods, wares, and merchandise previously sold and delivered to him to that amount and value. This was proved at the trial, and not disputed by the defendant. The defendant, however, set up a counter-claim, which was the subject of the contest at the trial; and the verdict of the jury represented the amount found due to the defendant over and above the claim of the plaintiffs. The defendant alleged that on the 26th August, 1884, he entered into a written contract with the plaintiffs by which he agreed to cut, skid, and deliver at the plaintiffs' mill or mill-pond all the spruce and hemlock timber suitable for saw-logs on lots 29, 23, 24, 17, and that portion of 22 north of Bear creek, all on the Devereaux tract, Herkimer county, in a certain manner, and for which the plaintiffs agreed to pay a certain price per 1,000 feet; that prior to the making of the contract the boundaries of the premises to be included in it were pointed out to defendant by the plaintiffs or their agent, and did not include lot 17, but did include lot 16; that the lot boundaries were unknown to defendant; that, by mutual mistake, lot 17 was inserted in the contract, instead of lot 16; that after the execution of this contract, and in the fall of 1884, defendant entered into a parol agreement with plaintiffs by which he agreed to permit them to cut and deliver logs from lots 16 and 22, being portion of the premises included within the boundaries pointed out to defendant, and plaintiffs agreed to pay for each 1,000 feet of logs so cut by them the sum of 75 cents; that plaintiffs cut under said agreement 250,000 feet of logs, amounting to \$187.50, which defendant set up as a counter-claim. The reply was a general denial. At the trial the making of an agreement by the firm of J. H. Wilcox & Co. to pay defendant 75 cents a thousand feet for logs cut on the territory covered by the previous contract was shown by defendant, and was not disputed; but it was claimed on the part of plaintiffs that most of the logs cut were on lot 16, and not within the scope of the agreement, and also that the plaintiff Snyder was not then a member of the firm. There were, therefore, two questions to be decided: *First*, whether Snyder was at the time of the latter contract a member of the firm; and, *second*, whether lot 16 was intended by both parties to be included in the contract of August 26, 1884. Upon each of these questions there was a conflict of evidence. They were both submitted to the jury in a charge not excepted to, and the finding was, in effect, for the defendant on both questions. This finding was not against evidence. The plaintiffs cannot complain of the form of the submission of the question of mutual mistake, as no exception was taken, or any request made for submission or decision in any other form.

Our attention is called to some exceptions to rulings upon evidence, but no sufficient ground for reversal is shown. The defendant was permitted to show a statement from one Barnes upon the assumption that Barnes had authority to speak for the plaintiffs. This authority was afterwards shown. The plaintiffs did not deny it. The plaintiffs offered to show that the defendant did not perform the contract of August, 1884. The issue was not as to the non-performance of that contract. The plaintiffs set up no claim in that regard. It appeared from the plaintiffs' evidence that all matters relating to that had been settled. The question at the trial was, not whether anything was due on that contract, but how much timber the plaintiffs had taken under the subsequent agreement. The defendant, on the subject of the partnership of the plaintiffs, gave in evidence a certain sworn statement of the

plaintiff Wilcox. Wilcox was then asked what he meant by that statement. This was properly excluded. The operation of the mind of the witness was not competent. He was not asked to explain the circumstances under which the statement was made.

The motion for a new trial on the ground of newly-discovered evidence based upon affidavits which showed certain declarations of the defendant from the spring of 1885 to the effect that everything was settled up between him and the plaintiffs. It was shown at the trial that about March 1, 1885, the plaintiff Wilcox and the defendant had a settlement at the office of Wilcox. The defendant and the plaintiff Wilcox both testified in regard to it. The defendant testified that at that time he asked for pay for the logs which were the subject of the counter-claim; that Wilcox said "he didn't know anything about it; that Mr. Brown claimed the logs were theirs. He would have to go and see, but he would do what was right about it." Wilcox testified in substance that, upon the occasion referred to, defendant claimed pay for the logs, and he (Wilcox) claimed that defendant had not fully performed his contract, had not put in all the logs that were within his contract, and it was finally agreed that this was a damage to the plaintiffs more than sufficient for anything that defendant might claim. The office of Wilcox was the store of one Woolworth, and the new evidence is that of Mr. Woolworth and his clerk, Mr. Wells, as to declarations made by defendant upon the occasion of the settlement.

The proof as to diligence is in the affidavit of Mr. Wilcox, as follows: "That deponent was unable to procure this testimony on the trial; that he had forgotten that Mr. Woolworth was in the office while he was settling up with defendant; that he was unable to learn from Mr. Woolworth or Mr. Wells that they knew anything about the case, and, although he [deponent] used every effort to discover everything that he thought would be of service to him on the trial, he was unable to procure this testimony until after the case was tried and decided." What the affiant in fact did, or what effort he in fact put forth, in order to procure testimony, is not shown. The conclusion is stated that he was unable to procure the testimony in question, although he used every effort he thought necessary. The opinion of the affiant as to his diligence is hardly enough. *Oakley v. Sears*, 7 Rob. (N. Y.) 207. He had forgotten that Mr. Woolworth was present. In *Bond v. Cutler*, 10 Wend. 293, it was said that want of recollection of a fact which by due attention might have been remembered, cannot be a reasonable ground for granting a new trial; for a want of recollection may always be pretended, and it is hard to be disproved. This was approved in *People v. Superior Court*, 10 Wend. 293. The materiality of the new evidence is upon the question whether there was a payment or settlement of whatever was due to the defendant for logs cut by the plaintiffs; the plaintiffs, in substance, conceding that some had been cut by them which they were to account for. The issue is not presented by the pleadings. The plaintiffs do not set up a payment or settlement. The reply is only a general denial. We think the action of the special term in denying the motion for a new trial should, under the circumstances, be disturbed. Judgment and orders affirmed, with costs. See section 3239, Code Civil Proc. All concur.

PARKS *et al.* v. ANDREWS *et al.*

(Supreme Court, General Term, Fourth Department. April, 1890.)

1. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

On foreclosure of a land contract because of the non-payment of a balance due to be due thereon, brought by the vendor's administrators against the vendee's administrator, the latter, who is also one of the heirs, is incompetent to testify that the vendor, in his life-time, never presented a claim against the vendee's

tate for the balance due on the contract; Code Civil Proc. N. Y. § 829, providing that on "the trial of an action" a party or person interested shall not be examined in his own behalf against the administrator of a deceased person.

2. SAME—"TRIAL OF ACTION."

The trial of a feigned issue out of chancery, before a jury, as to the amount due on the contract, is a "trial of an action," within the meaning of the above-cited section 829.

3. APPEAL—REVIEW—HARMLESS ERROR.

The payments indorsed on the contract showed that a large balance of the purchase money was still unpaid. In addition to the erroneously admitted evidence of the vendee's administrator, the only evidence of payment consisted of alleged admissions to that effect by the vendor, to overcome which plaintiffs introduced admissions by the vendee that a large amount due on the contract had never been paid. *Held* that, though Code Civil Proc. N. Y. § 1008, permits an appellate court to disregard an error in the admission of evidence where substantial justice has been done, the general term could not fairly say that the evidence, without the objectionable part, was sufficient to sustain a finding that the contract had been paid in full, and hence a new trial would be granted.

Appeal from special term, Oneida county.

Action by Horace C. Parks and Amanda Tinker, as administrators, etc., of J. Lee Tinker, deceased, against Clarence Andrews, individually, and as administrator of Josiah Andrews, deceased, and others.

The action is brought to collect, by foreclosure and sale, the amount due upon a land contract given on April 1, 1861, by J. Lee Tinker, plaintiffs' intestate, to Josiah Andrews, defendants' intestate, and one George Weyand. The amount to be paid was \$2,714.25, and it all became payable on or before July, 1865. The plaintiffs admitted some payments, and claimed there was a balance due of about \$3,000. In 1868, Weyand transferred all his interest to Andrews, who remained in possession until his death, in 1884. Tinker died in November, 1885, and his widow, the plaintiff Amanda Tinker, afterwards became the owner of the fee. The heirs at law of Andrews and the administrator of his estate are defendants. Relief is asked as in mortgage foreclosure. The defendants in their answers allege that the contract was fully paid up before the death of Andrews. They also allege that in June, 1886, they tendered to plaintiffs the sum of \$316.78, and demanded a deed, which was refused, and they ask a specific performance of the contract. In June, 1887, it was ordered, at special term, that the question, "What amount is now unpaid upon the land contract annexed to the complaint in this action?" be tried by a jury in pursuance of section 823 of the Code of Civil Procedure. Such trial was had in May, 1888, and the answer of the jury to the question was, "Nothing." Thereafter, upon case and exceptions made and settled, the plaintiffs moved at special term for a new trial upon the exceptions taken, and upon the ground that the verdict was contrary to the evidence, and contrary to law. This motion was denied. At the same term the case came on for the trial of the remaining issues, and for final judgment. The court adopted the verdict of the jury, declining to receive further evidence on that issue, and findings were made upon which judgment was entered dismissing the complaint, and directing that plaintiffs execute and deliver to the defendants a good and sufficient conveyance of the premises.

Plaintiffs appeal from the judgment, and from an order denying their motion for a new trial.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

William Kernan and *W. A. Matteson*, for appellants. *William E. Scripture* and *Oswald P. Backus*, for respondents.

MERWIN, J. Upon the trial before the jury, the defendant Clarence Andrews was called as a witness on behalf of the defendants, and, having testified among other things that he was a son of Josiah Andrews, deceased, and was appointed administrator of his estate in May, 1884, was asked the question: "After the death of your father, did Mr. Tinker present any claim to

least, not very strong. This being the situation, the evidence of the defendant Andrews that Tinker made no claim against the estate of Josiah Andrews would naturally be deemed by the jury to be important, and we cannot say that it probably had no influence upon them in arriving at their verdict. On the part of plaintiffs, it was shown that in 1872 Andrews was insolvent, and testified in proceedings supplementary to execution that he had not been able to keep up the interest on the contract; that in 1882 and 1883 he stated to several persons, in substance, that there was a large amount due on the contract,—more than the farm was worth. Andrews was a justice of the peace and town-clerk, and had no business except working this farm. Tinker kept a store, and there was an unsettled store account between him and Mr. Andrews. Under section 1003 of the Code, an error in the admission of evidence may, in a case of this kind, be disregarded, if the court is of opinion that substantial justice does not require that a new trial should be granted. The evidence in this case is not sufficiently satisfactory to enable us to fairly say that substantial justice is done by the finding that the contract was fully paid up. Judgment and order reversed upon the exceptions, and new trial ordered, costs to abide the event. All concur.

NEWTON, Railroad Commissioner, v. MANWARRING.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

1. MORTGAGES—PRIORITY.

A mortgagor conveyed the mortgaged premises to M., and the latter subsequently executed a mortgage on the land to plaintiff. *Held*, that plaintiff, not being a creditor of the original grantor, could not contest the priority of the first mortgage, in the hands of one to whom it had been assigned at the instance of the original grantor, on the ground that such assignment was in fraud of creditors.

2. SAME.

The deed to M. having been recorded, plaintiff had notice of a clause in such deed by which M. assumed the payment of such prior mortgage.

3. SAME—MERGER.

Although the assignee of such prior mortgage was the wife of the mortgagor, there was no merger; the wife having only an inchoate right of dower in the land, and the assignment having been made for the purpose of securing her for sums of money advanced to the husband.

4. SAME—INTEREST.

The wife was entitled to hold such mortgage as security for interest on such loans to her husband, the latter having voluntarily agreed to pay interest.

Appeal from special term, Chenango county. Action by Warren Newton, as railroad commissioner of the town of Norwich, against Annie E. Manwarring, to foreclose a mortgage for \$6,000 collateral to a bond executed November 15, 1882, by Miles Palmer Newton and wife, which mortgage covered 347 acres of land situate in the towns of New Berlin and Sherburne. In 1888 the appellant served an answer, in which she alleged, viz.: "That on the 27th day of March, 1886, the said Charles W. Lewis, as executor of the last will and testament of Charles Lewis, deceased, for the sum of \$1,280.20 to him in hand paid by this defendant, or at her request, duly assigned to this defendant the mortgage referred to in folio 32 of the complaint, which said mortgage was dated December 7, 1878, for the sum of \$1,000, signed by G. L. Manwarring, Lottie M. Manwarring, E. F. Manwarring, and Annie E. Manwarring, to Charles Lewis, which was recorded in Chenango county clerk's office on the 11th day of December, 1878, in book 86, at page 1; and also, by the same instrument, assigned the bond of the same date, for the same amount, executed by G. L. Manwarring and Annie E. Manwarring to said Charles Lewis, and which bond is principal to the mortgage aforesaid, and delivered the same to her. This defendant further alleges that she is at this time the owner and holder of said bond and mortgage, and that they are at the same time valid and subsisting obligations, and that said mortgage is a valid lien upon the lands therein

described, and that said lien is prior and superior to the lien on the same lands described in the plaintiff's mortgage. This defendant, further answering, alleges that there is now due on said bond and mortgage the sum of \$1,000, and interest on the same from the 1st day of January, 1882. Wherefore this defendant demands judgment that her said mortgage be adjudged to be a valid and subsisting lien upon the premises therein described, and for the amount above stated, and that any sale made under this foreclosure action shall be subject to this defendant's rights under her said mortgage, with costs of action." The reply of the plaintiff contained only a denial of the allegations contained in the answer. There was an interlocutory judgment decreeing the sale of the premises, and "reserving the questions of issue between the plaintiff and Annie E. Manwarring," entered at a special term in November, 1888. The trial now brought before us was had at a special term in December, 1888. It was found as a fact that in December, 1878, Gilbert L. Manwarring and Eliphalet Manwarring were the owners in fee of the 347 acres and a fraction; and that on the 7th day of December, 1878, to secure their bond in the sum of \$1,000 to one Charles Lewis, they and their wives executed a mortgage, which was recorded December 11, 1878, "whereby they granted, bargained, and conveyed the 102 acres and 88 rods of land in New Berlin aforesaid," being a portion of the premises covered by the plaintiff's mortgage. Charles Lewis having died, his executor, Charles W. Lewis, on the 27th of March, 1886, "assigned said bond and mortgage to Annie E. Manwarring, the wife of Eliphalet F. Manwarring, which assignment was duly recorded November 8, 1888, in book of mortgages No. 107, page 92. Shortly after such assignment, said bond and mortgage were delivered to said Annie E. Manwarring, and she has ever since retained them." It was found as a fact, viz.: "That the defendant, Eliphalet F. Manwarring, was not personally liable upon the bond held by the plaintiff. It was agreed between Eliphalet F. Manwarring and his wife, at the time of making this statement, [a settlement between themselves,] that she should have this mortgage, [the Lewis mortgage,] and that he would procure this assignment to her in payment for these sums which she claimed that he owed her, and he acknowledged he owed her." As a conclusion of law, it was found, viz.: "That the referee appointed herein to sell the premises in action shall pay out of the sum of money arising from the sale of the New Berlin land the sum of \$440, and the further sum of \$35.60, being the defendant's costs and disbursements herein, with interest from this date, into this court, to await the final order of this court in this action, and the balance of the proceeds of the sale of said New Berlin land, so far as the same may be necessary, be paid to the plaintiff upon his judgment herein; the surplus, if any, to be paid into the treasury of Chenango county." The court was requested to find "that Eliphalet F. Manwarring was indebted to his wife for interest upon the several items mentioned, upon those which go to make up the \$440, and also upon the \$330, from the dates of each, respectively." The court refused, and there was an exception taken. The appellant filed exceptions to the decision. Upon a case containing all "the evidence given upon the trial of the action bearing upon the issues raised by the complaint herein, and the answer thereto of the defendant, Annie E. Manwarring," brings her appeal before us.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Charles A. Fuller, for appellant. *Howard D. Newton*, for respondent.

HARDIN, P. J. 1. Plaintiff was not a creditor of Eliphalet Manwarring. He can derive no aid from the doctrine laid down in *Coleman v. Burr*, 25 Hun, 240; affirmed, 98 N. Y. 17. It appears in the opinion delivered in that case when before this court that the plaintiff was a judgment creditor of Burr, and that his action was brought to set aside a conveyance made by Burr to his wife "on the ground that such conveyance was without consideration, and

was executed with intent to defraud Burr's creditors." Whatever may have been the intent on the part of Eliphalet Manwarring in making the settlement with his wife for money and property theretofore received of her, and in acknowledging an indebtedness to her of a sum nearly equivalent to the amount due upon the Lewis mortgage, the plaintiff was not in a situation to allege that such settlement, and the transfer of the mortgage in the payment of the sum found due, was fraudulent and void because made to hinder and delay creditors of Eliphalet Manwarring. *Allyn v. Thurston*, 53 N. Y. 622; *Briggs v. Austin*, 8 N. Y. Supp. 786. So far as the evidence is disclosed in the appeal book, it would have been competent for Eliphalet Manwarring to have taken the money which he had in the Sherburne Bank, and paid off the indebtedness which he was under to his wife; and she with that money, either in her own personal hand, or in the hand of her husband as agent, might have procured an assignment of the Lewis mortgage, and, having done so, the mortgage in her hands would have been a valid security, prior in point of time, prior in point of record, and prior in point of equity to the lien of the plaintiff. It appears in the evidence that Gilbert Manwarring and Eliphalet Manwarring, subsequent to the execution of the Lewis mortgage, conveyed the premises subject to the "Charles Lewis mortgage of \$1,000," as well as the Pellett mortgage of \$3,500 to M. Palmer Newton; and in the conveyance to him is a clause assuming the payment of such mortgages. As between Miles Palmer Newton and the Manwarrings, the land was chargeable with the payment of the Lewis mortgage, and they had the right to compel the payment thereof out of the land. *Marsh v. Pike*, 10 Paige, 595. The obligation of the grantee in the deed inured to the benefit of Lewis, and he was entitled to enforce it, not only against the lands, but against the party thus assuming the payment thereof. *Blyer v. Monholland*, 2 Sandf. Ch. 478. When the plaintiff took his mortgage from Miles Palmer Newton, he was informed by the record of the existence of the Lewis mortgage, and of the fact that the purchase by Miles Palmer Newton was subject to the mortgage given to Lewis, and that the payment thereof had been assumed by Miles Palmer Newton. Such was the force of the record.

2. Even if the appellant was only entitled to hold the mortgage as a security for loans and advances of money or property to her husband actually made, she was entitled, as he had voluntarily agreed to pay interest thereof, to hold the same for the amount of the principal, and the interest as well. If it were assumed that the plaintiff was in the situation of a creditor challenging the settlement between the appellant and her husband as fraudulent, still, if the debts were valid and the claims honest against the husband, and he agreed to pay interest thereon, an allowance thereof in a settlement with her would be valid. *Spencer v. Ayrault*, 10 N. Y. 202. In delivering the opinion in that case, EDWARDS, J., said, viz.: "In my judgment it is not absolutely necessary to the *bona fides* of such an allowance that the charge should be of such a character that it might be recovered in a suit brought by a creditor against his debtor. Interest is always chargeable where there is either an express or implied agreement to pay it, (*Meech v. Smith*, 7 Wend. 315;) and there are many dealings amongst men in which interest is habitually charged and paid when it could not be claimed on the ground of strict legal right. These transactions are regarded as fair and just as between the parties, and they cannot be considered fraudulent as to others." It appears quite clearly from the evidence, as well as the findings of fact made thereon, that the money and property which the husband received from the wife was upon an agreement that the husband should pay for the same to the wife; and according to *Jaycox v. Caldwell*, 51 N. Y. 395, "the agreement is for a good consideration, and imposes an equitable obligation upon the husband." It was in that case further held, where a preference was made in good faith, without an intent to defraud, in an assignment for the benefit of

creditors, the preference is valid, and does not vitiate the assignment. We have recently discussed a kindred question in *Ellis v. Myers*, 8 N. Y. Supp. 139, and we there cited the case of *Jennett v. Noteware*, 17 Wkly. Dig. 438, where an indebtedness that had existed 18 years was secured by a mortgage, together with interest on it; and the court held in that case that, "as the debt was *bona fide*, the judgment creditor could not attack the mortgage."

3. We think there is no force in the suggestion made by the respondent in respect to supposed waste committed by the husband of the appellant upon the premises in question. *First*, there was nothing in the pleadings which charges her with committing any waste; and, *second*, there is no finding that she has committed waste; and, *third*, there is nothing in the evidence which warrants the inference that she is chargeable with having caused any injury to the real estate covered by the Lewis mortgage after she became the owner thereof.

4. The plaintiff had not acquired the legal title to the premises at the time the appellant became the owner of the Lewis mortgage, and he has not, either by his pleadings or by evidence furnished upon the hearing, established facts and circumstances which would charge her with the intentional impairment of the value of the premises upon which the plaintiff's security rests. Our attention is called to *Fates v. Joyce*, 11 Johns. 136. That was "an action on the case" for fraudulently removing the property of a judgment debtor, and converting it "with intent to defeat the judgment." We find nothing in that case which aids the respondent.

5. The learned counsel for the respondent insists that the mortgagor "cannot pay the mortgage, and keep it alive, for the purpose of securing another debt in lieu of the extinguished liability." We see nothing in that position which aids the respondent, when applied to the facts before us. It is not found as a fact that Eliphalet Manwarring paid Lewis, the executor, the mortgage; indeed, such fact was not proven. And it is found by the trial judge: "The said Charles Lewis assigned said bond and mortgage to Annie E. Manwarring, the wife of Eliphalet F. Manwarring, which assignment was duly recorded," etc. Nor do we think there was any merger. The appellant did not have the legal title to the property covered by the mortgage. At most, she only had an inchoate right of dower therein; and there is no intention that there should be a merger. On the contrary, the intention was very clear that there should not be a merger, and that she might hold the mortgage as a lien upon the property. Such is apparent from the transaction as disclosed by her upon the trial as a witness called at the instance of the plaintiff, and by the facts as they appear in the findings of the trial judge. In *Spencer v. Ayrault*, 10 N. Y. 204, it was said: "It is a well-settled rule that, when a greater and a less estate meet in the same person, equity will preserve them distinct, provided there is an express or implied intent to do so." Judgment reversed on the exceptions, and a new trial ordered, with costs to abide the event. All concur.

WILBER *et al.* v. LEONARD.

(Supreme Court, General Term, Fourth Department. May 2, 1890.)

SALE—RESCISSION.

Plaintiffs agreed to buy, and defendant agreed to sell, a quantity of hops at a certain price, the hops to be delivered at any time the plaintiffs might designate, and defendant to have the benefit of any rise up to June 30, 1886. On June 18th, plaintiffs wrote to defendant that they had examined the hops, and found them in an unsatisfactory condition, that they thought some of the hops would spoil, and that they did not see how they could "accept of them under the circumstances." Subsequently plaintiffs described how they thought the hops might be saved, and said that they did not compare with the sample by which they were purchased, and that they were "very dirty picked." There was evidence that, after the receipt of such letter, defendant had an interview with plaintiffs, in which the latter offered some-

thing to be released from the contract, and defendant declined the offer, and sought and obtained the opportunity, of which he availed himself, to put the hops in a mere satisfactory condition. *Held*, that it could not be said, as a matter of law, that such letter constituted a rescission of the contract so as to absolve defendant from its terms.

Appeal from circuit court, Otsego county.

Action by David Wilber and D. Forest Wilber against Jacob Leonard. In their complaint the plaintiffs allege that on the 28th day of May, 1886, the defendant agreed to and did "sell and deliver to the plaintiffs at the depot in Maryland, N. Y., all the hops then in the hop-house of the defendant in the town of Maryland, N. Y., being about forty-three bales, or 7,925 lbs., of hops: said hops to be delivered at the depot in Maryland, N. Y., at any time that might be designated by the plaintiffs, and that the plaintiffs should pay to the defendant therefor at the rate of eight and one-fourth cents per pound, and give the defendant the benefit of any rise up to June 20, 1886, payable as follows: Ten dollars at the time of making said agreement, and the residue on the delivery of said hops as aforesaid." Also: "It was expressly agreed by the defendant that the said hops so sold to the plaintiffs as aforesaid should correspond in all respects and were the same as a sample then exhibited by defendant to the plaintiffs, and that said hops would be delivered by defendant the same in all respects as the aforesaid sample. That the plaintiffs thereupon paid to the defendant the sum of ten dollars in pursuance of the aforesaid agreement." Plaintiffs further allege that they "duly notified the defendant to rebale and deliver said hops at the depot in Maryland, on the 22d day of July, 1886, at which time and place the plaintiffs would be ready to receive the same, and pay the balance of the purchase price thereof. That on the 22d day of July, 1886, at the depot in Maryland, N. Y., the plaintiffs were ready and duly offered to the defendant to receive and pay for said hops pursuant to the aforesaid agreement, and requested the defendant to deliver the same, and otherwise have duly performed all the conditions of the said agreement on their part. That the defendant refused and neglected to deliver said hops, to the damage of these plaintiffs." In defendant's answer he admits the partnership of the plaintiffs, and alleges that on the 28th of May, 1886, "the defendant agreed to sell to the plaintiffs, and the plaintiffs agreed to purchase from the defendant, the hops mentioned in the complaint," substantially as stated in the plaintiffs' complaint, and also alleges the payment of the \$10 earnest money on said agreement, and also alleges "that prior to June 20, 1886, plaintiffs notified defendant that they would not accept or receive said hops, or any of them, and plaintiffs refused to accept or receive said hops or pay for them under said agreement." Judgment was entered for plaintiffs on a verdict for \$1,626.92, and a motion for new trial was overruled, and defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

E. M. Harris, for appellant. *Burr Mattice*, for respondent.

HARDIN, P. J. From the pleadings and the evidence given at the trial it is conclusively established that on the 28th of May, 1886, there was a valid contract made and entered into between the plaintiffs and the defendant for the hops mentioned in the complaint. Notwithstanding the statute of frauds, that contract was valid and binding between the parties. *Jackson v. Tupper*, 101 N. Y. 515, 5 N. E. Rep. 65. It is contended by the appellant that, "before the time for the delivery of the hops, the plaintiffs, by the letter of June 18th, rescinded the contract. No contract of sale and purchase remained, and the defendant had the right to treat the contract as rescinded." This position was taken in various modes at the trial, and was raised upon the motions for a nonsuit, and by a request to the court to charge. The hops when sold were represented to be in accordance with the sample delivered to the plaintiffs, taken by them to their place of business, and filed and pre-

served. Prior to the 18th of June the plaintiffs had derived some information or knowledge in respect to the hops in their then condition, and thereupon they addressed a letter bearing date June 18, 1886, to the defendant, which was in the following language, viz: "We have examined your hops carefully and find them very uneven. They are also slack, and some of them the flavor has already changed, and we are sure some of them will spoil when the trying weather comes. We do not see how we can accept of them under the circumstances. We think you can save them by opening them and spreading them upon a dry floor. The hops do not compare with the sample they were bought by, except a few bales; they are very dirty picked, too." It is contended on behalf of the appellant that the words, "we do not see how we can accept of them under the circumstances," amount to a refusal on the part of the plaintiffs to accept the hops, or an intention to rescind the contract, or to refuse to perform the same, or an abandonment of the contract. In considering these questions, the whole language of the letter must be borne in mind; in examining the letter we find that it states that the plaintiffs have examined the hops, and "find them very uneven; they are also slack, and some of them the flavor is already changed;" and then they proceed to state in the letter that as a matter of opinion, that they are "sure some of them will spoil when the trying weather comes;" and then make use in the letter of the words, "we do not see how we can accept of them under the circumstances." A careful inspection of those words indicate that the language used does not convey absolutely a refusal to accept the hops. The plaintiffs were not called upon to accept them on the day of the date of the letter. The time had not expired mentioned in the purchase contract for the defendant to have the benefit of the rise in the hops; nor had the plaintiffs given any notice to the defendant of the time when they desired a delivery to be made. They were not, therefore, called upon to make a definite election of an intention to receive or reject under the contract. They were in a situation where they might kindly and cautiously express an opinion that in the then situation of the hops they would not answer the terms of the contract, inasmuch as they would not respond with the sample exhibited at the time of the sale. That idea seems to be derivable from the words, "we do not see how we can accept of them under the circumstances." The circumstances referred to in that phrase in the letter evidently related to the supposed condition of the hops mentioned in the antecedent portion of the letter.

This construction is favored by the subsequent words found in the letter to-wit: "We think you can save them by opening them and spreading them upon a dry floor." These last words are quite inconsistent with the supposition that the antecedent words were used for the purpose of putting an end to the contract. Before the letter closed the plaintiffs pointed out another circumstance in respect to the hops in the following words: "They are very dirty picked, too." When the defendant received this letter, he sought an interview with the plaintiffs, which took place at their place of business in New York, and, if the testimony which was given in behalf of the plaintiffs correctly narrates that interview, it justifies the inference that the defendant construed the letter as one calling his attention to the circumstances in which the hops were found by the plaintiff, and that he did not regard the letter as an absolute refusal to accept the hops, or as a rescission of the contract, or an abandonment thereof by the plaintiffs. According to the testimony given in behalf of the plaintiffs, after a considerable discussion, in which one of the plaintiffs offered 1 per cent. to be released from the contract, the defendant declined such offer, and sought the opportunity to put the hops in a situation to answer the requirements of the contract. After a considerable conversation and negotiation, the parties evidently acted upon the assumption that the contract had not been rescinded; had not been abandoned; and that the defendant had still further time and opportunity to put the hops in a proper

condition, so that they would answer the requirements of the contract which had been entered into with the plaintiffs in respect to them. He made his selection of one of the skilled and experienced hands of the plaintiffs, and fully completed an arrangement to have him assist in putting the hops in proper condition. In accordance with that arrangement, the selected hand went to the defendant's building, where the hops were kept, and bales were opened, and the hops were treated and dried, and put in a more satisfactory condition. Taking the whole language of the letter, and giving due weight to all the circumstances mentioned therein, and the situation of the parties in respect to the subject-matter of the contract, and their practical construction of the tenor of the letter, we are of the opinion that the trial judge properly refused to hold as a matter of law that the plaintiffs had rescinded the contract, or committed a breach thereof, or that the defendant was absolved from the terms thereof. As already observed, the time for the performance of the contract had not matured at the date of the letter.

In *Parsons on Contracts*, (volume 2, p. 188,) it is said: "If one, bound to perform a future act, before the time for doing it declares his intention not to do it, this is no breach of his contract; but, if his declaration be not withdrawn when the time comes for the act to be done, it constitutes a sufficient excuse for the default of the other party." This doctrine was quoted approvingly by *MULLIN, J.*, in *Crist v. Armour*, 34 Barb. 387. The appellant calls our attention to *Skinner v. Tinker*, Id. 334. In that case the defendant wrote a letter, in its terms clear and decisive, "declining to carry out the agreement on his part." We do not see that the case aids the appellant. Our attention is called to *Cornwell v. Haight*, 21 N. Y. 462. In that case there had been an absolute refusal to deliver the grain, which refusal worked a breach of the contract; and in the opinion it is said: "It is quite clear that the defendant had previously made up his mind not to comply with the contract." We have found nothing in the letter or in the conduct of the plaintiffs which warrants us in using a similar observation in this case. In *Crary v. Smith*, 2 N. Y. 60, "the defendant caused to be served on the complainant a written notice that he should no longer occupy the premises, and should refuse to fulfill the contract," and that was held sufficient to supersede the necessity of a tender of a deed in order to sustain a bill for specific performance. We think the case furnishes no aid to the appellant. *Morange v. Morris*, 32 How. Pr. 178, was a case where a somewhat similar question arose in a court of equity, and in illustrating the rule *SMITH, J.*, said: "A tender of performance need not be made when it would be wholly nugatory. For example, if the vendor in the present case had expressly notified the plaintiff before the 21st of September that he would not convey, and therefore the plaintiff need not tender the payment which the agreement required to be made on that day, he would have been excused from making the tender, as it would have been an idle ceremony."

In *Graves v. White*, 87 N. Y. 463, it was held that a positive and absolute refusal by one of the parties to perform a contract for a purchase and sale of land gives to the other party, as an alternative remedy, the right to assent to such abandonment, and to treat the contract as rescinded. When that case was before this court we held that the defendant practically abandoned the contract, and so lost all claim to enforce its specific performance in equity, or to rely upon it as a defense to his possession; and the court of appeals approved of the doctrine, and said of the rule: "It rests upon a foundation common to all contracts, that two persons who are competent to make a contract are competent to waive or abandon it, and where both concur in such waiver or abandonment their united assent dissolves the contract, and the rights of each under it are ended. This was long ago held as to contracts respecting personal property. * * * A positive and absolute refusal, a deliberate repudiation of the stipulations of the contract, gives to the other party, as an

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alternative remedy, the right to assent to such abandonment, and treat the contract as dissolved. In the present case such refusal was proved." We think that case quite unlike the one before us. Nor do we think *Welsh v. Gosler*, 89 N. Y. 548, aids the appellant. In that case Finlay absolutely refused to receive the sugar which was purchased under a contract requiring it to be shipped in May or June, whereas it was not shipped until July, and the court observed, viz.: "Finlay had refused to accept, and they had refused to accept for him. No contract of sale and purchase remained. The omission to ship in June authorized Finlay to treat it as rescinded." The case is therefore quite unlike the one before us. We think no error was committed by the trial court in refusing, upon the motion for a nonsuit, to hold, as a matter of law, that the letter of the 18th of June rescinded the contract between the parties, or that it was conclusive evidence of an abandonment of the contract on the part of the plaintiffs; nor in refusing to charge the jury as a matter of law that the letter operated *per se* to rescind the contract. We think there is no force in the position taken by the appellant that a new contract was made on the 21st of June, and that that contract was void by the statute of frauds. In considering all the evidence in the case, we think it was not the intention of the parties to enter into a new contract on the occasion of that interview. They seem on either side to have been more concerned with the actual condition of the hops, and of what could be or should be done to them to bring them into such situation as that they would correspond to the sample which had been furnished to the plaintiffs on the occasion of the contract of sale. Indeed, defendant testifies: "There was no second contract; there was nothing, only the old contract;" and he also testifies that in the interview of the 21st of June one of the plaintiffs told him how he could put the hops in condition to answer the contract, and that he would send a man over where the hops were, to show him how to place them in proper condition, and that the defendant added, viz.: "If they open all right and satisfactory to me, I will take them at the old price. * * * I made no reply to Wilber's saying if the hops were opened and dried and proved to be satisfactory they would take them. I said I would have them opened, and save what I could out of them." In the course of the charge delivered to the jury, it was said that if a new contract was made, as nothing was paid thereon, it was void, and that if the jury so found their verdict should be for the defendant. That instruction was quite as favorable as the defendant was entitled to, and we may properly assume from the verdict that the jury found that there was no such new contract made upon the occasion of that interview. As we have already said, we are of the opinion that the evidence is entirely sufficient to warrant the jury in finding that no new contract was made. We have looked at the rulings made upon the trial, and find no prejudicial error therein. We think the verdict should stand. Judgment and order affirmed, with costs. All concur.

MURPHY v. ROME, W. & O. R. Co.

(Supreme Court, General Term, Fourth Department. April, 1890.)

1. CARRIERS—INJURIES TO PASSENGERS.

A railroad company is bound to give passengers a reasonable opportunity to leave trains at stations where they stop.

2. APPEAL—REVIEW.

The fact that plaintiff's testimony is in contradiction to her testimony given on a former trial is not sufficient to overthrow a verdict in her favor.

Appeal from circuit court, Jefferson county.

Action by Rosanna Murphy against the Rome, Watertown & Ogdensburg Railroad Company. It is alleged in the complaint that on the 12th of May, 1888, the plaintiff, a widow, about 38 years of age, took passage in defendant's passenger train at Watertown for Felt's Mills, paying her fare; and

upon arriving at Felt's Mills station, after the train stopped, as she was about to step down upon the platform, with one foot on the steps of the car leading down, and the other just upon or about being placed upon the platform in making her exit from the coach in which she rode, the train started up, throwing the plaintiff down under the cars, whereby she was injured, without her fault; and the complaint alleges negligence in the defendant in suddenly starting up the train without giving sufficient time for the plaintiff to alight, and that she was injured without her fault. The answer admits the incorporation of the defendant, and that it was "engaged, as such, in the carrying of freight and passengers over its various lines; and, as such, on the 12th day of May, 1888, it ran and operated trains from Watertown * * * for the conveyance of passengers for hire;" and it denies the other allegations of the complaint. There had been a previous trial of the action, and the jury disagreed. In the course of the charge the trial judge, in dealing with the question of whether the plaintiff was guilty of contributory negligence or not, observed, viz.: "Taking this woman just as she was, you are to determine just what she did, and how she acted; and then the test is whether, in just what she did, she exercised as much care and caution as an ordinarily careful and prudent person would do. * * * If you find that under just the circumstances in which she was placed, and just as she was there, she acted as carefully and prudently as an ordinarily careful and prudent person would act, then she was not guilty of contributory negligence." Upon the question of whether the defendant was guilty of negligence, the trial judge observed: "As to whether the neglect by defendant of a duty imposed upon it by law caused this accident to occur, if you find that it was not negligent, or that the negligence did not cause the accident, then the plaintiff cannot recover. But if you find that the defendant was negligent, and that its negligence caused the accident, then you pass to examine the other question,—of the presence or absence of contributory negligence on the part of the plaintiff; because the law has long been settled in this state that, no matter how negligent a defendant may be in an action of this kind, the plaintiff must come into court with clean hands." In delivering the charge, the trial judge very extensively commented upon the facts bearing upon the two questions which are embraced in the quotations already made from his charge. Judgment was entered on a verdict for plaintiff for \$2,000, and a motion for a new trial on the minutes was denied, and defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Edmund B. Wynn, for appellant. Wilbur F. Porter, for respondent.

HARDIN, P. J. Carefully and cautiously the trial judge laid down the rules of law applicable to the principal questions presented by the evidence in this case. He kept carefully within the principles laid down by the court of appeals (second division) in *McDonald v. Railroad Co.*, 22 N. E. Rep. 1068. In that case it was held, viz.: It is the duty of a railroad company to give passengers a reasonable opportunity to leave its train at stations where it stops; and reasonable diligence on the part of its passengers is also required. A passenger has the right to assume that he will have reasonable opportunity to get off the train before it is started. We are satisfied, upon a careful perusal of the evidence, that it required that the trial judge should submit to the jury the question of whether or not the plaintiff was guilty of negligence which contributed to the injury. *Suiter v. Railroad Co.*, 7 N. Y. St. Rep. 687. The language of RUGER, C. J., in *Parsons v. Railroad Co.*, 113 N. Y. 364, 21 N. E. Rep. 145, is pertinent and applicable. He says: "The question is whether the injured party, under all of the circumstances of the case, exercised that degree of care and caution which prudent persons of ordinary intelligence usually exercise under like circumstances. This rule must in all cases, except those marked by gross and inexcusable negligence, render the

question involved one of fact for the jury. We think the jury could properly find that the deceased did, under the circumstances of this case, exercise such care and caution as exempted him from the imputation of negligence."

The learned counsel for the appellant has brought in juxtaposition in his points the evidence which he supposes the plaintiff gave on the former trial and the evidence which she gave upon the trial now before us; and, because of the difference found in the evidence of the plaintiff on the two occasions, he argues that it "should of itself utter a discredit to the second version." Such an argument was a proper one to press upon the attention of the jury. It cannot, however, be allowed to persuade us to overturn the verdict. It was for the jury to determine what credence should be given to the plaintiff's evidence as it appeared upon the trial now before us. In *Cleveland v. Stearns Boat Co.*, 7 N. Y. Supp. 28, a somewhat similar question was considered by this court, and we there held, viz.: The mere fact that there are some contradictions in plaintiff's testimony, when compared with that given by him at a former trial, does not, as matter of law, discredit him as a witness. We think the evidence abundantly supports the verdict of the jury in finding that the plaintiff was not guilty of contributory negligence, and in finding that the defendant was guilty of negligence which caused the injuries which the plaintiff received on the occasion when she attempted to alight from the passenger train of the defendant at Felts Mills, and that the case properly falls within the principles laid down in *McDonald v. Railroad Co.*, *supra*. Judgment and order affirmed, with costs. All concur.

PERKINS v. BUFFALO, R. & P. R. Co.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

1. RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS.

Plaintiff's intestate, injured at a railroad crossing by collision with defendant's locomotive, was obstructed in his view of the locomotive by several objects, among which was a box-car which defendant had projected into the highway. There was evidence that, as decedent passed the car, he stood up in the sleigh in which he was riding. His ears were muffled, but he could hear ordinary conversation. *Held*, that the question as to whether he was negligent was properly left to the jury.

2. SAME—SIGNALS.

Evidence that persons observing the locomotive by which plaintiff's intestate was struck did not hear the bell rung or the whistle sounded is sufficient to justify a finding that no such signals were given.

Appeal from circuit court, Wyoming county.

Action by Charles H. B. Perkins, administrator, etc., against the Buffalo, Rochester & Pittsburgh Railroad Company. Judgment was given for plaintiff and defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

H. G. Danforth, for appellant. M. E. & E. M. Bartlett, for respondent.

MACOMBER, J. The injuries to the plaintiff's intestate, Chauncey H. Perkins, to recover damages for which this action is brought, were received by the intestate on the 21st day of February, 1889, at a railroad crossing in Middlebury, and resulted in the death of the injured man shortly after the accident. The deceased was a man nearly 71 years of age. He was driving a horse attached to a sleigh. He sought to cross the defendant's track upon the highway, which runs at a right angle across the railway property. The locomotive with which the horse collided was approaching from the south. The deceased was upon the west side of the railroad. From the highway approaching the railway tracks were obstructions to the sight, consisting, first, of an ice-house, and near by a coal-shed, and directly east of that a restaurant or hotel. The defendant's agents had projected into the highway a box-car and left the same standing there so near to the center of the highway as

it might be touched by a person passing along the beaten track. The deceased was obliged to pass this car, and until he had done so there was a serious obstruction to the view to his right. The engineer testified that he, although looking, did not see the horse until just as he was passing the hotel, when the horse's head emerged from behind the car.

The evidence to charge the defendant's employes with the omission to ring the bell or sound the whistle was such as to justify the jury in their conclusion upon that part of the case. Witnesses whose attention was called to the matter testify that, though observing the locomotive, none of the signals were given.

In respect to the other branch of the case, namely, the proof that the deceased was not guilty of any negligence which contributed to the commission of the injuries, is mainly circumstantial, though not wholly. One witness testified that, as the deceased was passing the car, "he rose up in the sleigh, apparently for the purpose of ascertaining if any locomotive was approaching." It is true that the ears of the deceased were somewhat muffled; but the muffling did not appear to prevent his hearing ordinary conversation, for but a moment previous to the accident he had been conversing with an acquaintance upon matters of business. On the whole, we think the jury was justified in reaching the conclusion that he exercised proper care for his own safety in approaching this crossing. A perusal of the testimony, and an examination of the map, leaves a very strong impression upon the mind that the obstruction to the highway by the presence there of a freight-car was the approximate cause of the collision between the locomotive and the horse of the deceased. Judgment and order appealed from should be affirmed. All concur.

CLARKE v. SHELDON, County Treasurer.

(*Supreme Court, General Term, Fifth Department. June 30, 1890.*)

1. TOWNS—MUNICIPAL AID TO RAILWAYS—REDEMPTION OF BONDS.

Laws N. Y. 1869, c. 907, § 4, as amended by Laws 1871, cc. 283, 925, provides that all taxes, except road and school taxes, collected and paid over to the county treasurer, on the assessed valuation of any railroad in any town, village, or city, which has issued bonds to aid in the construction of such railroad, shall be used by the treasurer to purchase such bonds, in order that they may be canceled. *Held* that, though part of the taxes of a town, thus collected, have been paid over to the town in violation of the above provision, and used by it for other purposes, the county is not liable therefor, and the treasurer can only be compelled to use the balance of such taxes remaining in his hands for the purchase of such bonds.

2. COUNTY TREASURER—EXCUSABLE NEGLIGENCE.

Prior to the time of the demand made on the treasurer to use the moneys in question for the purchase of bonds, the act above cited, on which this proceeding was based, had been declared unconstitutional by the general term, but it was afterwards held constitutional by the courts of appeals. *Held*, the refusal of the treasurer to comply with the demand was not such a willful neglect of a plain duty as would charge him with interest upon such moneys.

3. TAX-PAYER—RIGHT TO SUE.

The plaintiff, being a resident and tax-payer of the town, is affected in his property rights by a refusal to appropriate the tax to the purpose provided, and can therefore maintain the action in the town's behalf.

Appeal from Wayne county court.

Action by Lewis H. Clarke, as a tax-payer of the town of Sodus, Wayne county, to require Andrew F. Sheldon, as treasurer of Wayne county, to purchase the bonds of the town issued to aid in the construction of the Sodus Point & Southern Railroad and the Rome, Watertown & Ogdensburgh Railroad. Laws N. Y. 1869, c. 907, § 4, as amended by Laws 1871, cc. 283, 925, provides, among other things, that "all taxes, except school and road taxes, collected for the next 30 years, or so much thereof as may be necessary, in any town, village, or city, on the assessed valuation of any railroad in said town, village, or city, for which said town, village, or city has issued or shall is-

sue bonds to aid in the construction of said railroad, shall be paid over to the treasurer of the county in which said town, city, or village lies. It shall be the duty of said treasurer, with the money arising from taxes levied and collected aforesaid, which has heretofore been or shall hereafter be paid to him, including the interest thereon, to purchase the bonds of said town, issued by said town to aid in the construction of any railroad or railroads, when the same can be purchased at or below par; the bonds so purchased to be immediately canceled said treasurer and the county judge, and deposited with the board of supervisors."

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.
Charles H. Roys, for appellant. . *J. Wellng*, for respondent.

MACOMBER, J. The town of Sodus, prior to the year 1871, issued its bonds in the amount of \$113,000, under chapter 811 of the Laws of 1868, to aid in the construction of the Lake Ontario Shore Railroad, now known as the Rome Watertown & Ogdensburgh Railroad, and also issued bonds in the sum of \$77,000, under chapter 907 of the Laws of 1869, to aid in the construction of the Sodus Point & Southern Railroad; the two railways passing through said town, and crossing each other. Since the construction of these railways, respectively, the taxable property thereof has been assessed, and these companies have paid taxes so assessed in the same manner as in cases of other taxpayers. The petition in this proceeding was filed in the month of February, 1882, praying for an order from the county judge, under chapter 907 of the Laws of 1869, as amended by chapter 283 of the Laws of 1871, requiring the county treasurer of Wayne county to execute the provisions of these acts investing the sum of \$427.69, the amount of taxes other than school and real estate taxes received by him for the years 1881 and 1882, collected on the assessment of the two railways in that town under the assessment of 1881, to aid in the construction of which the town had issued its bonds. Upon a hearing before the county judge the petition was dismissed, and the order on such dismissal was subsequently affirmed by the general term of this court. 34 H. 623. On appeal, however, to the court of appeals, these decisions were reversed, with directions to the county judge to proceed under the petition. It was held by that court that, by the scheme of raising a sinking fund under these statutes, other portions of the county did not have imposed upon them any additional tax for the benefit of the town of Sodus, and that the provision of the state constitution, (section 8, art. 7,) prohibiting the payment out of the treasury of the state of any moneys excepting in pursuance of an appropriation, was not violated thereby, inasmuch as the fund realized from such taxation does not belong to the state, or go into its treasury. It was then further held that the law was not repugnant to section 20, art. 3, of the constitution, declaring that every law which imposes a tax shall distinctly state the tax and the object to which it is to be applied. 106 N. Y. 104, 12 N. Y. Rep. 341. At its annual session in 1881, the board of supervisors of Wayne county levied upon the taxable property in the town of Sodus, including the two railways, a total tax of \$33,686.97, for town, school, county, and state purposes. The amount of such total tax of that year paid by the Rome, Watertown & Ogdensburgh Railroad was \$2,231.38, and by the Sodus Point & Southern Railroad the sum of \$370.71, amounting in the aggregate, upon both railways, to the sum of \$2,602.09. The tax of \$370.71 was paid by the Sodus Point & Southern Railroad to the town collector, and by the collector to the defendant, on the 13th day of February, 1882, which was three days after the proceeding was begun. The tax upon the Rome, Watertown & Ogdensburgh Railroad of \$2,231.38 was paid by the company, January 30, 1882. The tax of both railroads so paid to the county treasurer were placed by him to the credit of the collector of the town of Sodus for the objects and purposes for which they, with other taxes from the same town, were appropriated by other

than the sinking fund statutes. Since the decision of the court of appeals in this case, the defendant has amended his answer by setting up the fact that none of the taxes of that year paid by the railroads remained in his hands. This allegation of the answer was sustained by the proofs, and by the findings of the county judge.

At least one modification of the report of the county judge must be made. This is substantially concealed by the counsel for the respondent. There has been allowed to the respondent costs of the proceedings before the county judge. Costs were properly allowed to him in this court, and in the court of appeals, under the decision already mentioned. But we know of no statute which permits the allowance of costs as in an action where the special proceedings are instituted, not before the court, but before the judge at chambers. *Patterson v. Burnett*, 4 N. Y. Supp. 921; *Hill v. Sheldon*, 8 N. Y. Supp. 399. The amount of such costs, namely, \$152.35, must consequently be deducted from the final order.

In another respect we are of the opinion that the report must be modified, and that the allowance of interest upon the sum so received by the county treasurer should not have been made by the final order herein. Up to the time of the decision of the court of appeals hereinbefore mentioned, the act of 1869 had been practically unenforced throughout the state. The general term, in what was then the fourth department, in the case of *Phelps v. Williams*, 5 Alb. Law J. 204, which was decided prior to any demand made upon the defendant in these proceedings, held that the provision of the act upon which this proceeding was founded was unconstitutional and void. The question, therefore, is whether or not, under the law as it was then deemed to be, the defendant has been guilty of any unreasonable refusal to comply with the demand made upon him in the year 1882 for setting apart these funds. Undoubtedly, public officers who fail to pay over money in their hands according to their well-defined and legal duty will be charged with interest from the time they should have paid the same. *Supervisors v. Clarke*, 25 Hun, 282. But where such duty is not well defined, and where the officer has acted in good faith, and without fault on his part has parted with the moneys, and they have neither actually nor constructively earned any increase, we think interest should not be imposed.

There should, besides, be made another substantial deduction, namely, \$1,999.11, being the sum in excess of the amount claimed in the petition, and in excess of any moneys for which the defendant could properly be held accountable under the facts as disclosed under the amended answer. The sum demanded in the petition was \$427.69. The sum allowed is \$2,426.85, as stated in the final order. This additional sum of \$1,999.11 is made up of taxes collected from the railroads for town purposes, and which were received and applied by the town officers of such town exclusively to town purposes about four years before the decision of the court of appeals in this action. It stands as conceded in the case that the town taxes of the year 1881, to the amount of \$24,781.89, were received by the town officers of the town of Sodus to whom they were directed to be paid. The town received from the railroad companies \$2,018.45, which sum was used by the town for its own purposes. The county of Wayne ought not to be held liable beyond the amount of money which it has actually received or appropriated. All moneys to pay charges of the town, and which were in fact turned over by the collector to the supervisor, overseer of the poor, and railroad commissioners of the town, ought not to form a basis of recovery in this action. If the town has received back this money which the railroad companies have paid, it cannot complain of the board of supervisors for not putting it into the sinking fund.

The following computation will show the amount and proportion of taxes paid by the railroads for exclusively town uses, and which the town has act-

ually had and used, and which never in fact came into the county treasury. The figures in the official schedule of taxes of 1881 appear on page 195 of the proceedings of the board of supervisors, and are printed in the case. They show the specific purpose for which the taxes, including those received from the railroads, were expressly levied and appropriated.

Total amount levied upon the town of Sodus, \$33,636.97, made up as follows:

School tax,	-	-	-	-	-	-	-	-	\$ 2,015 3
County tax,	-	-	-	-	-	-	-	-	3,566 9
State tax,	-	-	-	-	-	-	-	-	1,962 3
Town tax,	-	-	-	-	-	-	-	-	26,092 3

Total, - - - - - \$33,636 9

This town tax of \$26,092.36, which the town has already received, was made up of the following items and charges:

Town contingent fund,	-	-	-	-	-	-	-	\$ 2,545 7
Roads and bridges,	-	-	-	-	-	-	-	250 0
Special town tax for the railroad commissioners,	-	-	-	-	-	-	-	21,986 1
Reassessed on town,	-	-	-	-	-	-	-	6 9
Supervisors' audits,	-	-	-	-	-	-	-	816 3
To reimburse county poor fund,	-	-	-	-	-	-	-	487 2

\$26,092 3

It is established that, out of the total \$33,636.97 of the taxes collected by the collector of the town, there have been paid to the town officers, for the use of the town, the following sums:

To supervisors, contingent fund,	-	-	-	-	-	-	-	\$ 2,545 7
To highway commissioners,	-	-	-	-	-	-	-	250 0
To reassessed on town,	-	-	-	-	-	-	-	6 9
To town railroad commissioners,	-	-	-	-	-	-	-	21,986 1

Total, - - - - - \$24,788 8

To this should be added the sum of \$816.35 for supervisors' audits and charges against the town, audited by the board of supervisors instead of the town board, and the sum of \$487.20 to reimburse the county poor fund, being the debt of the town of Sodus for the care of its town poor. These last items came into the county treasurer's hands by the warrant of the board, and were paid out by him for the benefit of the town; and they, added to the foregoing \$24,788.81, make up the total of the town tax as above, \$26,092.36. The proportion of the taxes levied upon the town for all purposes to those levied upon the town for its own use is the proportion of the total taxes paid by the railroads to the part thereof paid for town purposes. By computation it shows that, out of the \$2,602.09 paid by the two railroads as taxes levied in 1881, the town received, (not the county,) and applied to its own use, the sum of \$2,018.45. These taxes should be deducted from the sum for which the defendant is held liable for the final order appealed from. The county judge, however, has allowed \$19.34 thereof paid by the railroads as road taxes, so that the actual deduction should be \$1,999.11. Deducting this amount from the \$2,426.85, there remained the sum of \$427.74, for which the defendant is liable, being five cents more than is demanded in the petition. The slight discrepancy arises from the fact that the petitioner has given the county credit, as the sum received from the railroad companies, for \$2,018.50, whereas it should have been \$2,018.45.

We know of no reason why the foregoing basis of computation and principle of liability should not apply to this petitioner. It is true that the respondent is not the town of Sodus, but only one of its inhabitants and tax-payers. His right, however, to bring this action, is derived from the fact that un-

certain circumstances a tax-payer is permitted to place himself in the place and stead of the municipal body, and claim for such municipality a restoration of its funds. He represents and speaks for the town, but his rights cannot be greater than those of the town. The town, having received and used for proper town purposes the moneys which ought to have gone into the sinking fund, should be deemed estopped to claim a repayment of such moneys, either directly or indirectly. In *Strough v. Supervisors*, 3 N. Y. Supp. 110, affirmed in 23 N. E. Rep. 552, and in *Wood v. Supervisors*, 2 N. Y. Supp. 369, (not affected in this respect by the decision of the court of appeals,) no claim or recovery was had except for the county and state taxes. In *Hill v. Sheldon*, 8 N. Y. Supp. 399, (decided by this court,) the county judge refused to find that the taxes raised for town purposes were all expended by the town itself for its own purposes, and the case itself was not clear and specific on that question, while in the case now before us the fact stands undisputed that the town of Sodus has had the benefit of all such moneys. In the *Hill Case* the petitioner asked that such moneys, as well as the county and state taxes, be turned into the sinking fund, while in this case the claim was made for the state and county taxes only. The final order of the county judge should be modified in the particulars mentioned, and as so modified affirmed, but without costs of either party on this appeal.

CORLETT, J., concurs in result. DWIGHT, P. J., not voting.

CARR v. HUFF et al.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

GUARDIAN AND WARD—ACTION IN NAME OF GUARDIAN.

Where an action is brought by a general guardian in his own name, as guardian for the infant named, and the recovery was for the infant's sole benefit, she is estopped, on coming of age, from suing on the same cause of action, though under Code Civil Proc. N. Y. §§ 463, 469, and 1684, the better practice requires the action to be brought in the infant's name by a guardian *ad litem*.

Appeal from special term, Monroe county.

Suit by Louisa Carr against David C. Huff and others. The court below dismissed the complaint, from which plaintiff appealed.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

George D. Forsyth, for appellant. D. B. Beach and Arthur E. Sutherland, for respondents.

MACOMBER, J. The plaintiff, having attained her majority on the 28d day of April, 1889, brought this action to charge certain lands, particularly described in the complaint, with the payment of a legacy of \$2,000 given to her by the will of her father, William G. Huff, who died in the town of Gates, Monroe county, N. Y., January 14, 1879, leaving a last will and testament bearing date three days before his death, and which was subsequently duly probated in the surrogate's court of Monroe county. By this will the plaintiff was bequeathed the sum of \$2,000, and the defendant David C. Huff was appointed not only the executor thereof, but also the testamentary guardian of the plaintiff. The testator died seised in fee of 3 acres of land in Gates, an undivided ninth part of 54 acres, an undivided one-half of $3\frac{1}{2}$ acres, and an undivided one-half of a 6-acre parcel in the town of Chili. In the month of January, 1880, the defendant David C. Huff brought an action in the court individually, and as executor, and also as testamentary guardian of this plaintiff, for the purpose, among other things, of charging the lien of the plaintiff's legacy upon the real estate of the testator, and procuring a sale of the lands owned by him at the time of his death. This resulted in a judgment, in December of that year, adjudging that this plaintiff had a lien upon the real es-

tate for the payment of such legacy, and directing a sale thereof; upon w sale, which was thereafter had, the net sum of \$1,023.51 was realized plicable to the payment of such legacy, and was put into a mortgage o purchaser of a portion of the premises, with directions by the court that deposited with the surrogate of Monroe county to await the coming of a this plaintiff.

The case is silent as to what has been done with the income of this sec from 1880 until the beginning of this action. There is nothing, howeve show that the plaintiff has, since she attained her majority, estopped he from making the claim now set up by her in this action by having rece the proceeds of such sale so procured in the action of David C. Huff. Un therefore, she is bound by the judgment procured in the suit of David C. H instituted in her behalf by him, as testamentary guardian, her right to rec in whole or in part, in this action is indisputable. Very little need be sa touching the three acres of land in the town of Gates above mentioned cause whatever claim the plaintiff may have had therein was entirely ex guished by the foreclosure of the Crittenden mortgage, in which action plaintiff was made a party, and was properly represented therein by a g uian *ad litem*, duly appointed. In respect to the other lands mentioned in complaint, the plaintiff's rights have not been foreclosed, except as a mentioned, by the action of David C. Huff. The argument of counsel the appellant is that the action of David C. Huff, although he was the t mentary guardian of this plaintiff, was not a bar to the maintenance of action, for the reason that the plaintiff herein was not represented in action by a guardian *ad litem* or otherwise than by David C. Huff, the t mentary guardian. Inasmuch as the action of David C. Huff, which res in the above-mentioned judgment, was, in reality, for the benefit of this p tiff, the objection so made by the counsel for the appellant is technical, therefore unavailing, unless there is some positive statute which renders judgment so taken in the year 1880 nugatory. The title of that action as follows: "David C. Huff, and David C. Huff as executor of the last and testament of William G. Huff, deceased, and as testamentary guar of Louisa Huff, a minor, plaintiff, against Ferdinand Huff and others." recovery therein was solely for the benefit of this plaintiff.

The general rule now is, undoubtedly, that, where an infant has a rig action, he is entitled to maintain suit thereon immediately, without dela account of infancy; and that, before such action is brought, a competent responsible person must be appointed and appear as guardian, for the purp of the action, of such infant. Sections 468, 469, 1686, Code Civil Proc. the case of *Perkins v. Stimmel*, 114 N. Y. 359, 21 N. E. Rep. 729, while stated that the theory of the Code is that all actions for an infant shou brought in his own name by a guardian *ad litem*, yet such had not be fixed and unalterable rule, so as to render null actions brought by a testam ary guardian designed solely for the benefit of the infant, and where it apparent that the same was brought directly in the interest of such in In the same case, at general term, (42 Hun, 520,) it was held that the a was properly brought, but permission was given to change the same so make it distinctly in the name of the infant. In the case of *Coakley v. Ma* 36 Hun, 157, it was held that an action brought by the plaintiff, as ge guardian of one Sarah Mahar, to recover one-half of the rent of the pre owned by the infant and the defendant in that action, as tenants in com was authorized and properly brought in the name of the general guardia the infant. The same principle is in a negative way recognized by the of *Segelken v. Meyer*, 14 Hun, 593, and in the same case on appeal, (9 Y. 473,) where it was held that an action to recover money or personal p erty belonging to an infant may be brought in the name of the infant b guardian *ad litem*, although he has a general guardian.

On the whole, while we agree that the better practice is at present to bring an action designed for the protection or the recovery of an infant's property in the name of the infant, represented by a guardian appointed for the purposes of the action in hand, yet an action brought by the general guardian where, by the title and the averments in the complaint, it is plain to see that the same is solely in behalf of the infant, and where the recovery is for his benefit, is, in the absence of fraud or collusion, binding upon the infant. By the statute, 2 Rev. St. p. 150, § 3, the guardian is required to take the custody and management of the personal estate of the minor, together with the profits of his real estate, and is authorized to bring such action in relation thereto as guardian in socage might by law. We perceive in the provisions of the Code no language which works a repeal of this statute, and consequently the same must be deemed in force, although, as above stated, under the general scope and purpose of the Code of Civil Procedure, an infant should be represented by a person specially designated by the court or judge to take care of his interests in each particular action. The judgment appealed from should be affirmed, with costs. All concur.

KINGSTON v. KOCH.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.

A debtor prepared and placed in the hands of his attorney, who was defending a suit against him, an assignment for the benefit of creditors. On the day of the trial the debtor instructed the attorney that he should not deliver the instrument that morning. No subsequent directions were given, and there was no evidence of any directions having been given to deliver the instrument at any particular time. After judgment was entered in the suit against the debtor, the attorney, without consultation with the client, delivered the assignment to the assignee. *Held*, that the assignment never became effective as against creditors.

Appeal from judgment on report of referee.

Action by George L. Kingston, assignee, etc., against Harriet N. Koch, administratrix, etc. Judgment was given dismissing the complaint upon the merits, and plaintiff appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Edmond J. Plumly, for appellant. *Seward A. Simons*, for respondent.

MACOMBER, J. The plaintiff, as assignee for the benefit of the creditors of one George Southwick, brought this action to recover the value of certain property which he claimed under such assignment, and which had been seized by the defendant's intestate, as sheriff of Erie county, under a judgment and execution issued against the assignor in behalf of one Houghtaling. The action of Houghtaling was begun in the municipal court of Buffalo, November 28, 1884, and the summons therein was made returnable at 10 o'clock A. M. on the 5th day of December of that year. An unverified answer was attempted to be filed by the defendant in that action, but the same was finally rejected, but such effort resulted in a delay in the proceedings of a few hours. Early in the afternoon, however, a judgment was taken, a transcript was immediately issued and filed with the clerk of Erie county, and at 10 minutes past 3 o'clock of that day an execution was delivered to the sheriff. A levy was actually made upon the property in question on the 8th day of December, 1884. The debtor, Southwick, had prepared and had signed and placed in the hands of his attorney, prior to the entry of such judgment against him, the general assignment for the benefit of creditors under which the plaintiff claims. This instrument was put into the safe of the attorney, and there remained until the judgment above mentioned was procured, when the attorney, who had been defending the case in the municipal court, went hurriedly to his office, and, without any further communication with the assignor, took

the assignment from the safe, and gave it to the plaintiff, the assignee then named. We are of the opinion that this assignment never became effective as against creditors. When the assignor executed the same he had no intention of having it delivered as an effective instrument, but intended the same to be used only as a shield, in case of necessity. The last positive instructions which the case shows that the assignor made to his attorney was to the effect that he should not deliver that instrument in the morning of the day above mentioned. There is no evidence of any instruction that he should deliver it at a particular time, or in any particular event, though it is a fair inference that the same was designed to be delivered or withheld from delivery according to the course pursued in the action in the municipal court. There is no evidence of any subsequent direction of the assignor to the attorney to deliver the instrument to the assignee. The assignor kept within his own control, save as above-mentioned, the entire matter. Southwick pursued his business as theretofore, without any change, and as though the instrument that he had executed was not outstanding. It was, in fact, a provisional execution of a general assignment, not to become operative until further orders had been given to the attorney. There was therefore reserved to the assignor the right to withhold the delivery of the assignment, and the right to revoke it and render it void. Until delivery, an assignment is nullity, and unless the assignor has, by his acts, authorized a delivery, the instrument is inoperative. *Reichenbach v. Winkhaus*, 67 How. Pr. 5; *McIlhargy v. Chambers*, 23 N. E. Rep. 1144; *Chapin v. Thompson*, 89 Y. 270. The referee has found as a fact that the assignment was made for the purpose of defrauding creditors, and particularly creditor Houghtaling, and is therefore void. This conclusion is abundantly sustained by the evidence, and is fortified by the following authorities, which show that it is the intent of the assignee, but rather the intent of the assignor, before the delivery of the assignment, which is to govern: *Cuyler v. McCartney*, 40 Y. 221; *Talcott v. Hess*, 31 Hun, 282. The judgment should be affirmed with costs. All concur.

CLEMENT v. BURTIS *et al.*

(Supreme Court, General Term, Second Department. May 12, 1890.)

Appeal from special term, Kings county.

Foreclosure by Amelia P. Clement against Nathaniel W. Burtis and Mrs. L. Burtis, his wife. At the sale, Edward J. O'Flynn became the purchaser, but subsequently refused to complete the purchase because one of the deeds in the chain of title contained the following clause: "Upon the express condition, nevertheless, that the said party of the second part, his heirs or assigns shall not at any time or times hereafter erect, place, or permit, or suffer to be erected, placed, or put, or remain in or upon the said premises, or any part or parcel thereof, any building or erection, or carry on any business, which shall or may cause or become a nuisance to others owning lands or contiguous thereto." Plaintiff's motion to compel O'Flynn to complete his purchase was granted, and O'Flynn appeals.

Argued before BARNARD, P. J., and DYKMAN, J.

H. C. Conrady, for appellant. H. C. M. Ingraham, for respondent.

No opinion. Order affirmed, with costs.

ADAMS v. SPEELMAN.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

ATTACHMENT—LEVY.

Code Civil Proc. N. Y. § 649, subd. 2, directing that a copy of a warrant of attachment, and the affidavit upon which it was granted, shall be delivered without de-

to the person from whose possession the property is taken, is directory merely; and a failure to comply therewith is a mere irregularity, which will not of itself invalidate a levy. Following *Adams v. Speelman*, 89 Hun, 85.

Appeal from circuit court, Yates county.

Action by Isaac M. Adams against Charles M. Speelman. Plaintiff appeals from an order denying his motion for a new trial made on the minutes of the court.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

William T. Morris, for appellant. *John T. Knox*, for respondent.

MACOMBER, J. This action was brought to recover damages for the wrongful taking and detention of certain personal property, consisting of two colts three years of age, one set of double harness, a yoke of oxen, and one pair of bob sleighs. The answer justifies the taking and withholding of such property by virtue of a levy under attachments against the property of one Perry Adams, the father of the plaintiff, and one John Adams, sued out at the instance of the First National Bank of Penn Yan, and that such property was then owned by the defendants in that action, and not by this plaintiff. On the first trial of this action, the orders of attachments, by which the defendant claimed to have levied upon the property, were excluded by the court. On appeal from an order denying the defendant's motion for a new trial, this court held (89 Hun, 85) that the levy under the warrants of attachment was sufficient under subdivision 2, § 649, of the Code of Civil Procedure; and that the direction of the Code that a delivery of a copy of a warrant, and the affidavits upon which it was granted, should be made without delay to the person from whose possession the property was taken, was directory only, and a failure to comply therewith was a mere irregularity, which did not destroy the effect of a levy, if otherwise valid. The question there decided has been again reargued in the briefs, but we must adhere to the former conclusion of the court thereupon. Upon the trial which we are now called upon to review, there was presented a question of fact for the consideration of the jury, and their determination of it appears to have been well sustained by the evidence. We have examined in detail the several exceptions taken by the plaintiff during the trial, but find in them nothing which goes to the merits of the case, or which would warrant the court in granting a new trial. The order appealed from should be affirmed, with costs. All concur.

SMITH v. SHERIDAN.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

MASTER AND SERVANT—CONTRACT OF HIRING—EVIDENCE.

In an action for wages, where plaintiff relies on a contract of hiring at current wages, and defendant sets up a contract by which he was to give plaintiff such compensation as he should see fit, evidence as to any custom in defendant's neighborhood with regard to hiring plaintiff was properly excluded.

Appeal from Seneca county court.

Action by Henry Smith against Norman Sheridan. A judgment entered on a verdict in the justice's court in favor of plaintiff was affirmed by the county court, and defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

John M. Barrett, for appellant. *Richard G. Müller*, for respondent.

MACOMBER, J. This action, which was brought to recover for wages under a contract of hiring, was tried before a justice of the peace and a jury, and resulted in favor of the plaintiff. The judgment entered upon such verdict having been affirmed by the county court, an appeal was taken by the defendant to this court. The proposition relied upon to sustain this appeal

is that the justice erred in excluding evidence offered in behalf of the defendant. The plaintiff relied upon an affirmative contract of hiring at current wages. The defendant, under a general denial, set up a different contract, namely, that the plaintiff was to work for such compensation as the defendant saw fit to make to him. This issue presented a question of fact for the jury, and their determination must be deemed to be conclusive upon the rights of the parties, unless the exclusion of the evidence above mentioned is error for which the judgment should be reversed. Upon the question of *quantum meruit*, many witnesses were examined, a large majority of whom gave evidence which clearly sustained the sum awarded the plaintiff as compensation for his labor. The question propounded to the witness Lambert, namely, "What was the custom with regard to hiring the plaintiff in your neighborhood?" was clearly irrelevant to any issue presented by the pleadings or the proof. An answer to it would not have diminished the force of the evidence establishing the contract as claimed by the plaintiff, nor would it have supported the claim made by the defendant. Both parties relied upon a special contract, but differed as to the terms of such contract. Under these circumstances, what the plaintiff had received in the neighborhood, if such, indeed, was what was designed to bring out by the question, when working without a special contract, was wholly irrelevant, and was properly excluded by the justice. The judgment appealed from should be affirmed, with costs. All concur.

WASHBURN v. NATIONAL ACO. SOO.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

1. LIFE INSURANCE—SUICIDE—EVIDENCE.

In an action on a life insurance certificate, which prohibited a recovery for death of the assured caused by suicide, it appeared that assured's dead body was found near a highway, in a cleared space surrounded by underbrush, with a bullet hole through the back of his head. The bullet had entered his head $1\frac{1}{4}$ inches back of his right ear, and passed upward towards his left eye. He was 21 years of age, temperate, cheerful, industrious, and honest, was on good terms with all members of his family, and had given them a portion of his earnings. He had been out of employment for a while, and about a week before his body was found told his parents that he was going away. When found, his right hand was lying by his side, unclenched, and a revolver with one chamber empty lay between his legs. The bullet in his head was of the same caliber as this revolver. There was no evidence of a struggle. Five cents, a silver watch, a neck-tie pin, and a receipt for payment of premium to defendant were found on his person. One witness testified that the hair on the back of his head was singed, but this was denied, and it was shown that insanity had never existed in his family. No motive for committing suicide was shown. Held, that whether he had committed suicide was a question for the jury.

2. SAME—EXPERT EVIDENCE.

Testimony of a physician that, in cases of instantaneous death, there is an involuntary and immediate rigidity of the muscles, which would have caused the hand to cling to the revolver, and rendered it impossible for deceased to place the revolver between his legs after shooting himself, was admissible.

Appeal from circuit court, Cattaraugus county.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

C. D. Davis, for appellant. Stephen W. Collins, for respondent.

MACOMBER, J. This action is brought to recover of the defendant, which is a life and accident insurance company, organized upon the co-operative assessment plan, the sum of \$5,000, in pursuance of a certificate of membership issued to one Charles S. Washburn, of Carlton, N. Y., for the benefit of the plaintiff, who is the father of the assured. The policy was issued on the 3d day of November, 1886. On the 5th day of November, 1887, in the vicinity of Cooperstown, Pa., near a highway, in the center of a cleared space which was surrounded by underbrush, the body of the assured was found with a bullet hole through the back of his head, which had caused his death. The bullet entered the skull an inch and a half back of the right ear, and

passed through the brain, and its course inclined a little upward and forward, nearly in the direction of the left eye. The deceased was 21 years of age, and for a while, and immediately preceding his death, was out of employment. He had previously, however, been engaged as a salesman and book-keeper in a country dry-goods store at West Branch, N. Y. He was shown to have been a young man of temperate habits, no evil associations, of a cheerful disposition, industrious, and honest. He was on the best of terms with all members of his family, and had given, at times, a portion of his earnings to his mother and his sister. After leaving his employment he notified his father and mother that he was going away, but did not tell them whither he was going. This was one week before his body was discovered. When found, his right hand was lying by his right side unclenched, and between his legs lay a thirty-two caliber revolver with one chamber empty. The bullet found in his head corresponded to the caliber of the revolver. There was no evidence of a struggle, his clothes being free from dirt; his hat was placed a little to one side of him. The sum of five cents only was found upon his person, together with a receipt of payment of a premium to the defendant, a silver watch, and a neck-tie pin made of a dollar gold piece. At the close of the evidence, the learned judge at the circuit directed a verdict for the defendant, upon the ground that the evidence, as viewed by him, conclusively established the fact that the deceased died by his own hand, and that the payee of the policy could not recover thereon; for by its terms no recovery could be had in case of suicide by the assured, whether sane or insane. This is the only question before us upon the merits of the case.

We are of the opinion, under all the circumstances attending the case, that the learned judge erred in withdrawing the consideration of the facts from the jury. The evidence was not altogether uncontradictory. One witness testified that there were marks of singeing of the hair on the back of the head, indicating that the revolver was placed close to the skull when fired. Another witness, the undertaker, testified that he examined particularly to see in regard thereto, and found no marks of singeing of the hair by gunpowder or otherwise. It was also shown that insanity had never existed in the family of the deceased, either upon his father's or mother's side. This fact distinguishes this case from that of *De Gogorza v. Insurance Co.*, 65 N. Y. 282. There was no motive shown why he should take his own life. He had had no trouble with his employers, nor with any other person. They had paid him fair wages, and he was well liked by them. It is contended on the part of the defendant that the location of the wound and attitude of the body indicated suicide, and it is urged with equal force, on the other side, that the same matters indicated the contrary. We think the inference to be drawn from all of the evidence was one of fact, and that the case did not present a question of law, arising, as was supposed by the learned judge at the circuit, upon undisputed facts. The presumption of law is against the assumption of suicide, where it appears that a violent death was the result either of accidental injuries or a suicidal act. *Mallory v. Insurance Co.*, 47 N. Y. 52.

It was purely the province of the jury to interpret the facts, and to pronounce the conclusion thereon. Undoubtedly different inferences may be drawn from such evidence, but this does not make the case one for the interposition of the court against the province of the jury. If the conclusion from all of the facts is doubtful, it is error for the court to dispose of the same as a question of law. *Powell v. Powell*, 71 N. Y. 71; *Belton v. Baxter*, 58 N. Y. 411. In the case of *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. Rep. 1360, the provision in the policy was substantially the same as in this one, namely, an insurance against death from external, violent, and accidental means, and on which no recovery could be had in case of suicide by the assured, whether he was sane or insane. It was held that death from external violence, shown by proof of a pistol shot through the heart of the de-

ceased, raised a question of suicide or accident for the jury. In that case, however, the question was one, apparently, not of suicide or accidental shooting, but of suicide or murder. And it is contended by the learned counsel for the respondent that, under the terms of the policy before us, if the deceased was murdered, he cannot recover; for the provision of the policy is that, in case of "intentional injuries inflicted by the insured, or other person, * * * no recovery can be had." The evidence disclosed by the printed case does not, in our judgment, call upon us to express any opinion as to the right of the plaintiff to recover in the case of the actual murder of the son. The case of the plaintiff upon the question of suicide was sought to be strengthened by an offer of testimony by a physician to the effect that, in cases of instantaneous death, as this was claimed to be, there is an involuntary and immediate rigidity of the muscles which would cause the hand to cling to the revolver; rendering it impossible for the deceased, if he was a suicide, to place the weapon between his legs after the shooting. This was objected to, and the objection sustained, to which an exception was taken. This evidence was within the realm of expert testimony, and should have been admitted. *Eygler v. People*, 56 N. Y. 642. The order appealed from should be reversed, and a new trial granted, with costs to the plaintiff to abide the event.

CORLETT, J., concurs. DWIGHT, P. J., concurs on ground secondly stated in the opinion.

ARTHUR *et al.* v. WRIGHT *et al.*

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

1. SALE—DELIVERY.

A shipment of wheat on June 18th is not a compliance with a contract entered into on May 25th, which calls for the delivery of the wheat at a certain place "as soon as possible" by lake transportation, though vessels for transportation are difficult to obtain, where the usual time of lake transportation is six days, and but a few hours are required to load the wheat for shipment, and where the sellers knew at the time of making the contract that vessel-room was difficult to obtain, and shipped wheat to third persons between the date of the contract and the date of shipment, some of it being on other contracts made after that in question.

2. APPEAL—REVIEW—HARMLESS ERROR.

Error in excluding testimony on direct examination of a witness is cured where he states the facts called for on his cross-examination.

Exceptions from circuit court, Erie county.

Action by Charles H. Arthur and others against Alfred P. Wright and others. The complaint was dismissed, and plaintiffs move for a new trial on exceptions, which motion is heard at the general term in the first instance.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

H. C. Day, for plaintiffs. *Frank Brundage*, for defendants.

MACOMBER, J. Counsel for the respective parties at the close of the evidence asked the court to withdraw the case from the consideration of the jury and to direct a verdict. The only question, therefore, is whether, upon any reasonable view which may be taken of the facts of the case, the judgment can be sustained. If there be contradictory evidence, or if contrary inferences can be drawn reasonably from the uncontradicted facts, we must assume that the version thereof which leads to an affirmance of the judgment is correct. *Fargo v. Milburn*, 100 N. Y. 96, 2 N. E. Rep. 278; *Kirts v. Peck*, 113 N. Y. 226, 21 N. E. Rep. 130. This action is to recover upon a contract made May 25, 1887, between the plaintiffs, who are dealers in wheat in Duluth, Minn., and the defendants, who are forwarders, and at times purchasers, of wheat at Buffalo, N. Y. The agreement, which was evidenced by telegrams from the respective parties, and subsequently embodied in a letter

from the defendants to the plaintiffs, was that the plaintiffs should sell to the defendants 50,000 bushels of No. 1 hard wheat, at 91 cents per bushel, delivered in Buffalo as soon as possible, as stated in the complaint, by lake transportation. The wheat was to be shipped from Duluth to Buffalo by lake. The usual time for transportation of freight between these two ports is six days. It required but a few hours to load into vessels this amount of wheat. Had the same been shipped from Duluth on the 26th of May, 1887, the day after the contract, it would have been delivered in due course of transportation to the defendants on the 1st day of June of that year. But the plaintiffs did not ship any part of the cargo until the 18th of June, and the wheat did not arrive in Buffalo until the 18th day of that month. The defendants refused to receive the cargo, and the same was subsequently sold in the interest of the plaintiffs, and this action is brought to recover the sum of \$4,500, the difference between the contract price and the amount realized at such sale.

The contract, as stated in the complaint, was that this wheat should be delivered in Buffalo harbor as soon as possible. There was no time mentioned for its delivery in the correspondence constituting the contract, and hence the plaintiffs had a reasonable time in which to fulfill their part of the agreement. *Wright v. Bank*, 110 N. Y. 287, 18 N. E. Rep. 79; *Colt v. Owens*, 90 N. Y. 368. By the evidence of one of the plaintiffs, it is established without contradiction that vessels for the transportation of freight from Duluth eastward were at this time in great demand, and were consequently difficult to obtain. It was also shown by the same witness that the plaintiffs actually procured vessels for the transportation of like freight between these two ports, in pursuance of contracts made prior to the 25th day of May, but which were executed after the agreement with the defendants. Between the 25th day of May and the 18th day of June, inclusive, the plaintiffs actually shipped from Duluth 250,000 bushels of wheat, of which shipments 200,000 bushels were to fill contracts made prior to May 25th, with parties other than the defendants. Such shipments were made May 26th, May 27th, June 2d, June 3d, and June 11th. When the contract was made with these defendants, the plaintiffs knew that vessel-room upon the upper lakes was difficult to obtain. Such delay of the plaintiffs in delivering the wheat at Buffalo was, under these facts, inexcusable. The delivery was not made within a reasonable time. It was the duty of the plaintiffs under this contract to obtain the wheat and ship the same from Duluth with all reasonable dispatch, and to deliver the same in Buffalo in the usual course of lake navigation. So long as they omitted either to obtain transportation or to load the vessel, they failed of their duty to the defendants under the contract. The known difficulty of procuring transportation could furnish no excuse for delay. The defendants were entitled to an exact performance by the plaintiffs of their contract to ship promptly, and to deliver within a reasonable time. Failing in this, they have no ground of complaint against the defendants for refusal to accept the wheat on the 18th day of June. *Tobias v. Lisberger*, 105 N. Y. 404, 12 N. E. Rep. 13.

The exceptions taken to the exclusion of the testimony of the witness Arthur upon his direct examination, touching the contracts which the plaintiffs had on hand on the 25th day of May, 1887, for the delivery of wheat, is not available on this appeal, for the reason that the witness on cross-examination gave all the facts called for on his direct examination. The motion of the plaintiffs for a new trial should be denied, and judgment should be ordered for the defendants upon the order of the circuit dismissing the complaint of the plaintiffs.

DWIGHT, P. J., concurs. CORLETT, J., not voting.

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TALCOTT *et al.* v. CITY OF BUFFALO *et al.*

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

MUNICIPAL CORPORATIONS—MISCONDUCT OF OFFICERS—STREET LIGHTING.

Laws N. Y. 1881, c. 531, as amended by Laws 1887, c. 678, entitled "An act for protection of tax-payers," provides that the act shall apply as well to those in which the officer or board has not, as to those in which he or it has, jurisdiction over the subject-matter of its action. A complaint in an action to restrain municipal authorities from substituting electric lighting for gas lighting in a certain street alleged that the erection of poles for electric lighting would impair the value of the land along the street, including plaintiffs'; that the contract price for electric lighting was exorbitant, and largely in excess of the value thereof, and the price paid by other municipalities therefor; that the cost would be much greater than that of gas lighting; that the change would render useless many lamps, etc., owned by the city; and that gas lighting was economical, satisfactory and such as was desired by a majority of the people of the city, and of tax-payers on the street. *Held*, that the allegations were sufficient, on demurrer, to warrant granting relief to the tax-payer, under the statute, though the municipal authorities had full control of the subject of street lighting.

Appeal from special term, Erie county.

Action by Anna Talcott and others against the city of Buffalo and others. Defendants appeal from an order overruling demurrers to the complaint. The demurrer of the city of Buffalo, and all of the defendants except the comptroller, are upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and that the common council of the city of Buffalo should have been made a party defendant. The demurrer of the comptroller is upon the sole ground that the complaint does not state facts sufficient to constitute a cause of action. The United States Electric Light & Power Company is a defendant, but its demurrer was sustained at special term, and no appeal has been taken from that part of the judgment.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Frank C. Laughlin, for appellants. *Norris Morey*, for respondents.

MACOMBER, J. The appellants, other than the city of Buffalo and the comptroller, are the aldermen, constituting the common council of the city. There seems to be no merit in that part of the demurrer alleging that the common council, by name, is a necessary party under chapter 519 of the Laws of 1870, which constitutes the charter of the city of Buffalo. We do not understand that the common council has any corporate existence, but only a name to designate a body of aldermen of the city. The grave question is whether the facts alleged in the complaint constitute a cause of action against the defendants who have appealed.

The case is brought to restrain the authorities of the city of Buffalo from substituting electric street lighting for that of gas in Bouck avenue, between Niagara street and Chapin place. Under the ordinances of the common council of the city, the Buffalo Gas-Light Company, in the year 1875, placed a portion of this avenue gas lamps and mains and service pipes, and the expense thereof was borne by the city, but the same were received back by the city under local assessment upon the property of the persons benefited thereby. Extensions of these mains and increase of the lamps were made subsequently, so that in 1885 this entire avenue between the points stated was sufficiently supplied with gas for the proper lighting of the street, to the satisfaction of the city, and particularly of the residents along this avenue. The complaint further shows, at some length, that an alleged majority petition of these inhabitants was presented to the common council for the exchange of this gas lighting to electric lighting, and a resolution granting the prayer of the petition was passed by that body on May 7, 1888. Subsequently a new petition was presented against the electric light, and in favor of gas lighting,

presented to the common council, which, it is said, contained a majority of the names of the tax-payers, both in number of persons and in value of property, but that the same was disregarded by the aldermen. There are other allegations in the complaint to the effect that the resolution as originally passed, and as subsequently adhered to, notwithstanding the veto of the mayor thereof, was passed in violation of the rules established by the common council for its guidance. In the charter of the city of Buffalo, however, we do not find any provision which requires the common council to act in the matter of street lighting in accordance with the request of the majority of the tax-payers; nor do we find therein any law which prohibits the council from suspending its own rules, which, like those of all other parliamentary bodies, are enacted for its own guidance, the suspension of which cannot form the basis of any complaint from outside parties, unless the same is resorted to for the purpose of deceit, of which there is no pretense in this case.

But there is a serious question presented by the complaint, going directly to the question of abuse or misuse of official authority by the common council, by which the corporate property and moneys are so improperly and im-providently expended as to constitute a waste of public funds, under chapter 581 of the Laws of 1881, as amended by chapter 678 of the Laws of 1887, entitled "An act for the protection of tax-payers." The present statute is aimed to prevent any illegal official act on the part of municipal officers, and to prevent waste or injury to property, funds, or estate of a municipality, and to make good the loss, if any such has happened. The most important addition to the original law is the last clause of the present statute, which is as follows: "The provisions of this act shall apply as well to those cases in which the body, board, officer, agent, commissioner, or other person above named has not, as to those in which it or he has, jurisdiction over the subject-matter of its action." Beyond question, the common council of the city of Buffalo had, under its charter, full power and control over the lighting of the streets of that city. Under this amendment, however, the members of that body cannot prevent the interference of a court of equity upon the ground that, having jurisdiction of the subject-matter, their action has the protection accorded to legislative discretion, and is therefore not reviewable by the courts. Some cases, not necessary now to be referred to, had, with greater or less distinctness, intimated the existence of such a rule under the act as it originally stood; and this amendment was doubtless supplied with a view of enabling the courts to interpose by injunction, where the contemplated action by the common council, though within its jurisdiction, was likely, through improvidence or carelessness, as well as through fraud and corruption, to result in the waste or injury to the funds of the municipality. It is not longer necessary for the tax-payer, in order to maintain his action, to allege and prove actual fraud or actual corruption on the part of the common council, or of any other municipal officer, as a basis of relief. The proof of such corruption and fraud, even where there exists a moral certainty of its existence, is a difficult matter to establish. This act, so passed for the protection of the tax-payer, should be liberally construed by the courts, in order to make effective the effort of the legislature to check the evils of careless, improvident, reckless, fraudulent, or corrupt action by the persons in charge of the administration of the affairs of municipal corporations. The language of Judge ALLEN, in the case of *Ayers v. Lawrence*, 59 N. Y. 192, though given in a case arising under the Laws of 1872, is, in its generalization, applicable to the statute as it now stands, and it has frequently been made the subject of judicial approval.

If these demurrers were interposed for the purpose of presenting to the court the question whether it was competent for the common council to dis-pense with the lighting of the public streets by gas, and substitute electricity, even at a material increase of expense, they fail of their purpose. Had an-

swers, instead of demurrers, been interposed, and the plaintiffs put to their proofs, doubtless many of the allegations contained in the complaint would have failed of substantiation, while others might probably be easily disproved by the defendants; but we can take no judicial notice of the likelihood of such a result at the trial. All of the material allegations of fact are admitted by the demurrers. The sole question, therefore, is whether or not such facts are sufficient, when conclusively proved, to afford relief to the tax-payer.

The complaint alleges that the construction of the poles for electric lights would impair the value of the land along this street, including that owned by the plaintiffs. It further alleges that the contract price, namely, \$164.25 per light, for lighting that avenue by electricity, "is unreasonable, excessive, and exorbitant, and largely in excess of the price at which said electricity could profitably be furnished to said city for lighting said street; that the said price of \$164.25 is fixed pursuant to an agreement and combination of the persons and corporations, or alleged corporations, owning or having control of the different electric-light plants in said city of Buffalo, and is largely in excess of the value and of the cost of such light and for the price paid for lighting streets by electricity by other municipalities in the vicinity of Buffalo, and in other parts of the state of New York, and in other places in the United States; and that the cost of lighting Bouck avenue by electricity, as proposed and determined by the common council of said city, as aforesaid, will greatly exceed the cost of lighting said streets, as heretofore, by gas; that such proposed lighting of Bouck avenue by electricity will displace 49 lamps now used for lighting said street by gas, and that thereby the said city of Buffalo will lose the use, and will substantially lose the value, of said 49 lamp-posts and connections; that the said 49 lamp-posts and connections cost the city of Buffalo about the sum of \$1,960; that the cost of lighting said Bouck avenue by electricity with twelve electric lights, as proposed by the said resolution and determination of the common council, will be \$1,971 per annum, and the cost of lighting the same portion of Bouck avenue by gas at the price proposed by the gas-light companies, and accepted by the city aforesaid, amounts to only the sum of \$1,071.68 per year, making an increased annual expense of lighting the said portion of Bouck avenue by electricity with said twelve electric lights of \$899.37." There are other allegations to the effect that this avenue is now lighted by 60 lamps, at an expense per year of \$27.81 per lamp; that such gas lighting is sufficient and economical, and such as is desired by a large majority of the people of Buffalo, and of tax-payers owning lands upon this avenue; "that lighting by gas diffuses the light upon the street much more equally and uniformly than lighting by electricity, and is better adapted to, and furnishes a better and more satisfactory light for, a residence street," which Bouck avenue is shown to be exclusively. If all these allegations in the complaint were established as matters of fact, as they must be deemed to be under the demurrers, and for the purpose of this appeal, the judgment to be pronounced by the court would be unmistakable. They present a case literally within the language of the act above referred to. The interlocutory judgment appealed from should be affirmed, with costs. All concur.

BYAM v. HAMPTON.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

1. SALE—WHEN TITLE PASSES.

The owner of certain chattels agreed to "sell, assign, transfer, and set over unto" another all his right, title, and interest therein, in consideration of the purchaser's agreement to pay certain notes due by the seller. The chattels were delivered to, and remained in possession of, the purchaser. The seller repeatedly declared, and once testified in supplementary proceedings against the purchaser, that the chattels belonged to the latter, and the purchaser's financial reputation was good. *Held*,

that title passed at once, and the sale was not conditioned on the purchaser's payment of the notes, though, on sale of the chattels under execution against him, the seller claimed them.

2. TROVER AND CONVERSION—WHO MAY MAINTAIN.

One who has sold and delivered a chattel, reserving the privilege of repurchasing it within a specified time at the same price, but who has done nothing towards regaining it, has not sufficient interest to enable him to maintain trover against a sheriff who has sold it under execution against him, on the ground that it is exempt.

Appeal from Livingston county court.

Action by William J. Byam against Fremont Hampton. Complaint dismissed, and plaintiff appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

William J. Byam, pro se. Charles J. Bissell, for respondent.

MACOMBER, J. This action was brought to recover the value of a portion of the plaintiff's law library, together with an iron safe, which the defendant, as sheriff, sold under an execution issued against the plaintiff's property. The value of the books so sold was \$247.25. The plaintiff, being a practicing attorney and counselor at law, claimed these books as exempt under the statute, and forbade the sale upon that ground. Some time before the levy and sale already mentioned, the same books had been levied upon by the defendant under an execution issued against the property of one Guthrie. At that sale this plaintiff appeared, and claimed that the books did not belong to Guthrie, but to himself. The sheriff, however, proceeded to sell all the interest of Guthrie in the same. Guthrie's interest in or ownership of the books was derived under a written agreement bearing date the 3d day of December, 1887, by which this plaintiff, in consideration of the agreement of Guthrie to pay two certain promissory notes—one of them being for \$221.50, and the other for \$750—upon which this plaintiff was the principal debtor, and of which Guthrie was indorser for the accommodation of the maker, "agreed to sell, assign, transfer, and set over unto the party of the second part [Guthrie] all the right, title, and interest which the party of the first part has in and to all the text-books in his law library, now stored in the office of the party of the second part hereto, and also all the following law reports in his said library," viz., (giving a catalogue of the same.)

It is now claimed by the plaintiff that this written instrument was merely an executory contract of sale, and that the transfer of the title of the books to Guthrie was conditioned upon the previous payment by the latter of the two promissory notes above mentioned. In this we think he is in error. The instrument itself bears inevitable evidence that it was the intention of the parties that the title to this property should pass to the purchaser. The property being already in the custody of the purchaser, there remained no act of delivery to be performed by the seller to make the transaction complete. The purchaser had the same rights under this agreement, and under this established fact of the actual possession of the property, as he would have had if actual and manual delivery accompanied the agreement. The instrument contains no clause showing that there was any retention by the plaintiff of title or the right to the possession of the property, until the payment of the two promissory notes had been made. The purchaser undertook, by his part of the agreement, not only to pay the promissory notes, but to indemnify and save harmless the maker from liability thereon. This was the consideration of the purchase. Whether this transaction is to be deemed an executed, or merely an executory, agreement is to be determined by the real intention of the parties, as manifested by the language of the agreement, and by the attending circumstances. *Decker v. Furniss*, 14 N. Y. 619; *Hurd v. Cook*, 75 N. Y. 454; *Terry v. Wheeler*, 25 N. Y. 525, and other cases cited in note; *Benj. Sales*, (3d Amer. Ed., notes by Kerr,) § 348. Had this agreement

been made, and the property not delivered thereunder, the question would be essentially different. We regard the fact of the continued and uninterrupted possession of this property by Guthrie as such a controlling circumstance as to render it unnecessary to consider the authorities bearing generally upon the question of what is and what is not an executed agreement. That this is the view entertained by the vendor up to the time when it became desirable for him to make a contradictory claim admits of no doubt. When examined in proceedings supplementary to execution, he testified that he had sold and delivered this property to Guthrie, and that he himself had no interest therein. Before the levy was made upon the property, he told Mr. Taylor, an attorney at law, that the property was not his, but Guthrie's. After the levy, he told the deputy-sheriff that the property belonged to Guthrie, and he had no interest in it. At the time of the sale, however, as he now claims, he had received further light upon the construction of the agreement, and put forth the claim that by its terms the title of the property did not pass to Guthrie, but remained in himself, until the two promissory notes were paid. These notes not having been paid, he insisted then, as now, that the title remained in himself. The case shows that Guthrie, at the time of making the agreement, was a banker in good standing, and of excellent financial reputation. The likelihood, therefore, of his failure to meet these notes could not have been in the mind of the plaintiff at the time of the execution of the agreement, and of the retention of the possession of the property by the purchaser. We are of the opinion, therefore, that the sale of this property under the execution issued against the property of Guthrie was valid, and transferred a clear title to the purchaser under such sale. This renders it unimportant to consider the rights of the parties as they were attempted to be adjusted by the sale of the plaintiff's interest in these books at a time subsequent to the sale thereof under the execution against Guthrie. At the sale of Guthrie's property, the plaintiff claimed to own these books; and, when his interest therein was offered for sale under an execution issued against his own property, he claimed them to be exempt under the statute, having, as he said, transferred all of the rest of his library to his wife. For aught that appears in the case, the sheriff would not have levied upon these books under the execution against Guthrie's property had not this plaintiff represented, both under oath and otherwise, that Guthrie was the true owner, and that he had no interest in the property. The courts are properly reluctant to effect the transfer of property by mere admissions; but at what time is a party permitted to recede from his representations? Even though the appellant is not technically estopped to assert this claim at the present time, yet it is but right that we insist that there shall be an end of representations designed to induce an affirmative action on the part of other persons.

The only remaining question relates to the iron safe, which was used for the keeping of the plaintiff's register and other valuables. On the testimony of the plaintiff himself, who alone is called as a witness on that question, he was not entitled to its exemption under the statute, (2 Rev. St. p. 367, § 22; 3 Rev. St., 6th Ed., p. 626, §§ 22, 25,) for the reason that he did not own it, or have the possession of it. He testified that he had transferred it to another person under an agreement that it should belong to that person who had paid the plaintiff therefor, with the privilege reserved to the plaintiff to regain the property within a limited time, and for the same price. At the time of making claim to exemption for the safe, it was not in the plaintiff's possession, but in the possession of the purchaser; and the plaintiff had done nothing towards purchasing or regaining possession of the same, even down to the time of the trial of this action. A mere equitable interest in personal property, where the legal title and the actual possession are in another, is not sufficient to enable a party to maintain trover for the conversion. The judgment should be affirmed. All concur.

KIBLER v. HUVER *et al.*

(Supreme Court, General Term, Fifth Department. June 30, 1890.)

1. WILLS—CONSTRUCTION—ESTATE.

A will gave to the wife of the testator all his property, real and personal, for the wife's "sole use and benefit during her natural life," authorized her to lease, sell, give, and devise the whole or any part of the property, and provided that after her death the residue, "if any there should be," should be distributed, etc. *Held*, that the wife took a life-estate only in the property unless she disposed of it during her life, or provided for such disposition by will.

2. TESTAMENTARY POWERS—EXECUTION.

1 Rev. St. N. Y. p. 787, § 126, provides that lands embraced in any power to devise shall pass by a will purporting to convey all the real property of the testator, unless the intention that the will shall not operate as an execution of the power shall appear expressly or by implication. *Held*, that the will of the wife, providing that after the payment of debts and funeral expenses she gave her property to certain persons in equal shares, passed all the property of the husband.

Appeal from special term, Erie county.

Action by Charles Kibler, as administrator, etc., and individually, against John Huver and others. From a judgment dismissing the complaint plaintiff appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Humphrey & Lockwood, for appellant. *B. S. Farrington*, for respondents.

MACOMBER, J. The plaintiff is the administrator with the will annexed of Jacob Grathwohl, and is also one of the legatees under such will, and one of the heirs at law of the testator. The defendant Huver is the executor of the last will and testament of Margaret Grathwohl, deceased, the wife of Jacob Grathwohl, and the other defendants are the legatees under this last-named will. Jacob Grathwohl and Margaret Grathwohl, husband and wife, had resided in the town of Amherst, Erie county, for upwards of 50 years, upon a farm which they tilled until unable to do so by reason of old age, and thereafter lived in a house owned by Jacob in the village of Williamsville. Jacob's property, at the time of the making of his will, and at the time of his death, consisted of money, notes, bonds, mortgages, and other securities, together with this house and lot where he and his wife resided, amounting in all to about \$14,000 in value. His wife, Margaret, at the time of making her will, and at her death, owned a separate estate, consisting of money, notes, bonds, and mortgages, amounting to about \$3,000, which had been under her management and control since her marriage. They both belonged to the same religious order, called "Mennonites." The persons named in the will of Jacob, and to whom he bequeathed and devised all of his estate remaining at the death of Margaret, were his own blood relations and heirs at law, while the persons named in the will of Margaret were her blood relations, and none of them were the same persons named as devisees or legatees in the will of Jacob. That part of the will of Jacob Grathwohl material to this appeal is as follows: "First. After all my lawful debts and funeral expenses are paid and discharged, the residue of my estate, both real and personal, which I own or possess at the time of my decease, I give and bequeath to my beloved wife, Margaret, for her sole use and benefit during her natural life; and I do hereby authorize and empower her to lease, sell, give, and devise the whole, or any part thereof, as also to convey title to real estate as may seem proper to her; and after her decease the residue or remainder, if any there should be, shall be distributed by my hereinafter named executor, as follows, to-wit." The material part of the will of Margaret Grathwohl is as follows: "After the payment of my funeral charges, the expenses of administering my estate and

my lawful debts, I give, devise, and bequeath my property as follows." Thence follow gifts to each of her five brothers and sisters, in equal shares. The case discloses the fact that Margaret had kept a bank account in the Erie County Savings Bank, which was opened in the year 1855, against which, by her direction, her husband drew, as well as herself, and he also made deposits therein to her account. The only bank account of these two persons was kept in Margaret's name. After Jacob's death Margaret opened an account with this bank, as executrix, drawing from her individual account the sum of \$1,218, and putting it into the account of the estate. This last-named account was opened in February, 1874, and was closed in 1882 by transferring the balance thereof back into Margaret's individual account. Margaret also collected all of the moneys due the estate of Jacob, the greater portion of which was transferred to her own name, though a few notes and mortgages were renewed by her and remained in Jacob's name at her death. She died in the month of April, 1883. She owned no real estate aside from the house and lot above mentioned, which stood in the name of her husband at the time of his death.

The right of the plaintiff to recover depends primarily upon the construction to be placed upon the will of Jacob Grathwohl. There seems not to have been given to Margaret, by the terms of Jacob's will, an absolute power of disposal; but, on the contrary, there appear qualifying words, such as "for her sole use and benefit during her natural life." There is, besides a complete bequest, a devise over to certain persons named of all the property, both real and personal, which should remain undisposed of at the time of the death of Margaret. These qualifying words, and the clear devise and bequest of the remainder which should be left at the death of Margaret, indicate with reasonable certainty that the intention of the testator was to give his wife a life-estate only in the property, unless she disposed of the same during her lifetime, or provided for such disposition by the terms of a last will and testament. The language of the will is significant: "And after her decease the residue or remainder, if any there should be, shall be distributed," etc. It is true that the word "devise" here used commonly applies to the gift of real estate, but not always. It is frequently used in the same sense as "bequeath," and among unprofessional persons applies to all kinds of property,—real, personal, and mixed.

Having been given the power to dispose of her husband's estate by will, the next question is whether or not, by the instrument already mentioned, she has succeeded in so disposing of it as to deprive the plaintiff of any rights as a remainder-man or otherwise under the will of Jacob. The provision of the Revised Statutes applicable to this case is as follows: "Lands embraced in a power to devise shall pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power shall appear expressly or by necessary implication." 1 Rev. St. p. 737, § 126. Under this statute it required no special mention of the property which she had received under her husband's will in contradistinction to the property which she held as a separate estate at the time of her husband's death. In the cases of *Bolton v. De Peyster*, 25 Barb. 539, and *White v. Hicks*, 43 Barb. 64, the language of the will was of a most general character, as in this case, and it was held that such wills were effective as an execution of a power to pass property by will. There is not observable in the case any evidence from which an intent on the part of Margaret is disclosed not to devise and bequeath all of the property which she could so devise or bequeath. By her will she had directed the payment of the expenses of her funeral and of the administration of her estate and of all her lawful debts, and then devised and bequeathed all of her property. The case, in this respect, strongly resembles that of *Mott v. Ackerman*, 92 N. Y. 549, where general words of gift in a will were held sufficient to convey all the property

and rights capable of being disposed of by will. The judgment appealed from should be affirmed.

DWIGHT, P. J., concurs. CORLETT, J., not voting.

PEOPLE *ex rel.* FARGO *et al.* v. MURPHY *et al.*, Assessors.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

TAXATION—REDUCTION OF ASSESSMENT—OVERVALUATION.

In an action to reduce an assessment on the ground of an overvaluation, the burden is on the property owner to show that the assessors have not complied with 2 Rev. St. N. Y. (8th Ed.) p. 1098, § 17, providing that they shall assess property at its full and true value.

Appeal from special term, Erie county.

Proceeding by the people on the relation of James C. Fargo and others against James S. Murphy and others, assessors of the city of Buffalo, to reduce an assessment. From a judgment reducing the assessment, and from an order denying defendant's motion to quash the writ of *certiorari*, defendants appeal.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Frank C. Laughlin, for appellants. Ansley Wilcox, for respondents.

MACOMBER, J. William G. Fargo, the former owner of the premises in question, died in the year 1881, leaving a last will and testament, whereby, among other things, he gave the use of such property, during her life, to his wife, Anna M. Fargo, with a provision for the payment of taxes and assessments thereof to be made by his executors out of the other property of his estate. These premises consist of 5½ acres of land. William G. Fargo had erected thereon a large and expensive dwelling-house near the center of the land, together with stables and other buildings, at a cost of \$350,000. At the time of the erection thereof, and for several years thereafter, it was supposed that the locality was desirable for large and expensive residences of like character, but the course of improvements in the city of Buffalo has not fully verified such expectations. The assessors for the year 1889, as they had theretofore, fixed the value of the land alone at \$78,375, and the value of the improvements thereon at \$144,000. The learned judge at the special term has found as a fact that the true value of the property, taken as a whole, does not exceed the sum of \$180,000.

This appeal does not present any question of moment except one of fact. The claim made by the plaintiffs was solely one of overvaluation, and a prayer for the reduction of the same to the actual value of the property. Practically the inquiry is narrowed down to the question of the value of the relator's property, for it was stipulated at the trial that no property included in the assessment roll, other than that in question here, was overvalued by the assessors. No question of inequality of assessment is before us. In making up the roll the assessors separated the value of the land from that of the improvements, estimating the former at \$78,375 and the latter at \$144,000. It is true that the statute does not require that there should be such separation in assessment rolls of the value of the lands from the value of the improvements thereon, nor can the assessors of the city of Buffalo be deemed to be estopped to claim now that the land was worth more than the sum placed in the column; yet the fact that the assessors have thus placed the value of the land in a separate column at a certain figure is a circumstance to be taken into the account, but as evidence only of their estimate. The clear preponderance of the evidence is to the effect that the whole property as it now stands, taking into the account the original expenditure thereon as well as all the other circumstances attending the case, is not worth to exceed the sum of

\$180,000. It was the duty of the assessors to assess the property at its full and true value as they would appraise the same in the payment of a just debt due from a solvent debtor. 2 Rev. St. (8th Ed.) c. 13, tit. 2, art. 2, § 17, p. 1098. Every proper presumption must be indulged that they have in this instance so estimated the value. The burden was upon the relators, therefore, to show by reliable evidence that there was in this instance an actual over-valuation. Upon an examination of the whole case we are of the opinion that the learned justice at the special term was correct in his conclusion upon the evidence. No point is made by the appellant, separate from his argument upon the merits, against the order denying the motion to quash the writ of *certiorari*. It follows, therefore, that the judgment and order should be affirmed, with costs. All concur.

TOWNSEND v. TOLHURST.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

EXECUTION—TIME OF ISSUANCE—LIMITATION.

Where a transcript of a justice's judgment is filed in the county clerk's office six months after its rendition, Code Civil Proc. N. Y. § 382, subd. 7, barring an action on a justice's judgment after six years from its rendition, does not affect section 1877, which permits an execution to issue on a judgment after the lapse of five years from its docketing, on an order of the court. Distinguishing *Davidson v. Horn*, 47 Hun, 51.

Appeal from Niagara county court.

Action by Theodore Townsend against Thomas Tolhurst. From an order granted November 23, 1889, permitting plaintiff to cause an execution to be issued, defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Charles Hickey, for appellant. Henry M. Davis, for respondent.

MACOMBER, J. The affidavit upon which the order of the county judge was granted shows, without contradiction, that a money judgment was recovered by the plaintiff against the defendant in the court of the justice of the peace on the 23d day of May, 1878, and that on the 23d day of November of that year a transcript thereof was filed with the county clerk of Niagara county, and its judgment duly docketed; that no execution had been issued upon such judgment, and that no part of the judgment had been paid; and that more than five years had elapsed since the docketing of such judgment. These allegations clearly bring the moving party within the provisions of section 1877 of the Code of Civil Procedure, which permits an execution to be issued upon application to the court and upon due notice, provided that the judgment so docketed in the county clerk's office had, at the time of the granting of the motion, a valid existence. It is contended by counsel for the appellant that the order was erroneous, inasmuch as an action upon a justice's judgment is barred after the lapse of six years from the time of its rendition, under subdivision 7, § 382, Code Civil Proc. This proposition, however, was distinctly repudiated in the case of *Waltermire v. Westover*, 14 N. Y. 16, where it was held that the statute of limitations, as it existed under the Revised Statutes, (2 Rev. St. p. 295, § 18,) which is now embodied in the subdivision of section 382, already noted, did not extinguish or destroy the lien created by the judgment as docketed in the county clerk's office. The obligation of the defendant to pay a debt was not obliterated by a lapse of time; for the statute acts only on the remedy, and not upon the obligation to pay. *Johnson v. Railroad Co.*, 54 N. Y. 424. There is nothing in the case of *Davidson v. Horn*, 47 Hun, 51, which controverts the foregoing proposition; for in the last-named case the statute of limitations had run against the justice's judgment before the transcript thereof had been filed in the county clerk's office, while in the case before us six months only had elapsed between the render-

ing of the judgment by the justice of the peace and the record of the same in the county clerk's office. Much reliance has been placed in this appeal upon the case of *Dieffenbach v. Roch*, 112 N. Y. 621, 20 N. E. Rep. 560; but that decision is simply to the effect that a judgment of a justice of the peace docketed in the county clerk's office is not a judgment "rendered" in the county court, but remains "a judgment * * * rendered in a court not of record," within the meaning of the provision of subdivision 7, § 382, Code Civil Proc., declaring that an action upon such a judgment must be commenced within six years after the final judgment was rendered. That case did not undertake to and did not in fact impair in the slightest degree the decision of the same court in *Waltermire v. Westover*, already referred to. Under these provisions of the Code and these authorities the order of the county court was properly made.

This conclusion renders it unnecessary to consider the question whether or not the order so made is appealable to this court. It was held in *Kincaid v. Richardson*, 25 Hun, 237, that no appeal lies to the general term from an order of the county court granting leave to issue an execution upon a judgment recovered in a justice's court, where a transcript thereof was filed and judgment thereon docketed in the clerk's office of the county. The conclusion of this court in that case finds corroboration in the decision of *Dieffenbach v. Roch*, *supra*. Section 1342 of the Code of Civil Procedure seems to limit the review by this court of orders of the county court, affecting a substantial right, to those cases where the action is brought in or is taken by appeal to that court. This case does not come within that class. But we prefer to rest our decision on the proposition first discussed above. The order appealed from should be affirmed, with \$10 costs and disbursements. All concur.

In re ROCHESTER ELECTRIC RY. CO. et al.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

1. EMINENT DOMAIN—THE POWER—STREET RAILROAD COMPANIES.

LAWS N. Y. 1884, c. 252, § 1, relating to street railways, provides that "such corporations shall have all the powers and privileges, and be subject to all the liabilities, imposed by this act," or the act of April 2, 1880, authorizing the formation of railroad companies, and the several acts amendatory thereof. *Held*, a street-railway company organized under the act of 1884 has power to condemn private property to subserve the purposes of its organization.

2. STREET RAILROADS—OCCUPATION OF HIGHWAY—CONSENT OF LOCAL AUTHORITIES.

A public highway which has been acquired by a turnpike company does not cease to be a highway, and, under Laws N. Y. 1850, c. 140, requiring the consent of the local authorities to the construction of railways on any portion of the highways under their control, a grant by such company of a strip from the side thereof, in a town, is invalid unless consented to by the highway commissioner and the local authorities.

3. SAME—MAP OF ROUTE.

LAWS N. Y. 1850, c. 140, § 22, as amended by Laws 1871, c. 500, requires that "every company formed under this act, before constructing any part of their road into or through any county named in their articles of association, shall make a map and profile of the route." *Held*, that street railways are not excepted from this provision, and a map should be filed.

Appeal from special term, Monroe county.

Application of the Rochester Electric Railway Company to acquire the lands of Jennie S. Wilkin, James A. Potter, Mary Tanner, Eliza Patterson, and William Patterson. The land-owners appeal.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

J. & Q. Van Voorhis, for appellants. *James Breck Perkins*, for respondent.

CORLETT, J. The highway from Rochester to Charlotte, which is an extension of Lake avenue, is five miles in length. It has been for a long time

the main thoroughfare from Rochester to the lake. This highway was bounded by a row of shade trees on each side ft. nearly the whole length. In 1880 the Rochester & Charlotte Turnpike Road Company was organized for the purpose of maintaining this highway as a turnpike, with a charter extending 30 years. Soon after, the company, by purchase from the adjoining land-owners, obtained a strip 17 feet wide on each side for a bridle-path, upon which the owners moved back their fences. The language of the deed was: "For value received of the Rochester and Charlotte Turnpike Road Company, a corporation organized under the laws of the state of New York, we, the undersigned, respectively grant and convey to the said corporation, and to its successors and assigns, a right of way in, over, and through a strip of land seventeen feet in width, to be measured and taken off the front of the lands belonging to us, respectively, fronting on and along the highway running from the northerly boundary line of the city of Rochester, Monroe county, and state of New York, to the village of Charlotte, and formerly known as the 'Rochester and Charlotte Turnpike Road,' in the town of Greece, in said county, for the purpose of building and constructing and operating the turnpike road of said corporation about to be built." On the 11th of November, 1887, in consideration of \$6,000, said turnpike company consented to allow the Rochester Electric Railway Company to construct, operate, and maintain its street surface railway along the west side of the bridle-path between Rochester and Charlotte. In August of the same year a map and profile were filed by the railroad company, calling for such strip 12 feet wide on the west edge of the bridle-path. The map which was filed had lines indicating the original lines of the road-way, and the dividing lines between that and the bridle-path. The petition filed described the strip as follows: "The land which it desires, belonging to the land-owners in the present proceeding, was a strip twelve feet wide on the west edge of the bridle-path, and no more." A railroad was built along that route from Rochester to Charlotte. Its motive power was electricity. The present petition was verified on the 15th day of November, 1889. It contains the same phraseology as the one of 1888, except as to dates, parties, and route. It makes no mention of the railroad which had been built, and alleges that it has surveyed a route for its road, and that it has not been able to purchase the same, and describes a strip of land on the eastern edge of the bridle-path 12 feet wide. It also alleges the filing of a map and survey of the route. No map was ever filed except the first one.

An answer was interposed by the objecting land-owners, and a reference was ordered to John A. Carnahan, Esq., to report the facts, with his opinion thereon. He made his report on the 17th day of February, 1890, and decided that the railroad had power to acquire lands without consent in this proceeding; also that the company was under no obligations to file any map. He further held that no consent from any authorities of the town of Greece had been obtained, and that none was necessary. He further reaches the conclusion that the consent of the owners of one-half the value of the property bounded on the highway had been obtained.

This street railroad was built under chapter 252 of the Laws of 1884. Section 1 provides, among other things: "Such corporations shall also have all the powers and privileges granted, and be subject to all the liabilities imposed, by this act, or the act entitled 'An act to authorize the formation of railroad corporations, and regulate the same,' passed April 2, 1850, and the several acts amendatory thereof, except as such acts are herein modified." Section 22 of the act of 1850,¹ as amended by chapter 560 of the Laws of 1871, provides: "Every company formed under this act, before constructing any part of their road into or through any county named in their articles of association, shall make a map and profile of the route," etc. Section 8 of chapter 252 of the

¹ Chapter 140.

Laws of 1884 requires the consent of the local authorities having control of that portion of the streets or highways upon which it is proposed to construct and operate the railroad. The report of the referee was confirmed. From that order the contesting land-owners appeal. The appellants contend, among other things, that a map should have been filed, and that the consent of the local authorities and the highway commissioner of the town of Greece should have been obtained. The appellant also insists that private property cannot be obtained without the consent of the owners.

It is manifestly the design of the act of 1884 to confer power upon street railroads to acquire property belonging to private individuals by condemnation. Section 1 provides, among other things, that a street-railroad corporation shall have the same powers as those conferred by the act of 1850. Section 3, among other things, provides that a street-railroad company may build its road, switches, etc., through, upon, and along any of the streets, avenues, roads, or highways of such cities, towns, and villages, and also through, along, and upon any private property which said company may acquire for the purpose. It thus appears that the same power is conferred upon street-railroad corporations as upon general railroad corporations, except as limited by the act, which contains nothing prohibiting the taking by condemnation proceedings of private property. The consent required by section 3 implies power to take the lands of those who do not consent. The owners of adjoining lands have title to the highways subject to the easement. Aside from this, it will be observed that the power of street railroads to acquire or build roads is not limited to public highways. It may take any land not connected with highways. The want of condemnation power might utterly prevent the building of the most useful of street railroads.

The learned referee, in his opinion, proceeds upon the assumption that the Boulevard Turnpike Company controlled and practically owned the highway, and that the power of the commissioner over it had practically ceased, and therefore his consent was not necessary. In *Walker v. Caywood*, 31 N. Y. 51, it was held that a public highway does not cease to be such because taken by a plank-road company, and that the right of the public to use the highway remains unimpaired. To the same effect is *Benedict v. Goit*, 3 Barb. 459. It thus appears that neither a turnpike company nor a plank-road corporation has power to destroy a highway, or to appropriate it to its exclusive use. The public still have the right to travel upon all its highways until they cease to exist. The diverting of a highway from its ordinary use to railroad purposes necessarily involves matter of grave concern to the public, as well as land-owners. *Craig v. Railroad Co.*, 39 N. Y. 404. The control and oversight of a commissioner of highways does not cease because a turnpike company appropriates some of the roads of the town. He still owes a duty to the public. A continuous obligation rests upon him to see that the highways of the town are protected, and kept for public use and travel. He may be of the opinion that the use of 12 feet of a highway for street-railroad purposes would inflict no injury upon the traveling public, but he may reach the conclusion that the taking of another 12 feet would practically destroy its usefulness. The turnpike company, as the case shows, sold the privilege of use of the highway to the railroad company for a large consideration, which it may be assumed was kept for the use and benefit of the company, and that the town received no advantage therefrom. The reasoning of the learned referee proceeds on the assumption that neither the public officers of the town, nor the public, have any concern in a highway, or the uses for which it is appropriated, after it is turned over to a turnpike corporation. This view cannot be sustained. Its adoption would confer upon turnpike companies and plank-road corporations power to destroy the usefulness of the highways of the town without its consent, or that of its inhabitants or officers.

The learned referee also argues that there is a broad distinction between

the reasons for filing a map in the case of steam corporations and street roads. But it is quite clear that they do not extend to the length state him. Highways are of varying widths. A railroad track might, with serious inconvenience, be placed upon one part of a public highway, but w injuriously affect another. It might be so constructed as to seriously i fere with the owners of land on each side of it, or it might be so built impose no particular inconvenience. The railroad company, therefore, sh file a map clearly pointing out the route so that those interested could mine whether there were good grounds of opposition. The absence of a would frequently prevent that accurate knowledge which would enable ers and those concerned to determine whether to resist or acquiesce. Ne son, therefore, is perceived why a street railroad should be relieved from a map the same as steam corporations. Aside from this, as already sh street railroads may be built through private lands outside of any high and certainly there would be just as strong reasons for the filing of a m such cases as in that of steam roads. In addition to this, section 1 pro that such corporations shall have all the powers, and be subject to all th bilities, imposed by the general railroad act, except as modified. There force in the contention that the obtaining of 12 feet for a railroad co authority to appropriate an additional 12 feet.

There is nothing in the act of 1884 which exempts street railroads filing maps. It is not necessary to determine the question of whethe consents were sufficient, as the conclusions reached as to the highway missioner and the filing a map disposes of the appeal. The order shou reversed. All concur.

LE CROY v. NEW YORK, L. E. & W. R. Co.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

MASTER AND SERVANT—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

In an action for personal injuries sustained by the insufficiency of the bra hold the train, on which plaintiff was a brakeman, while going down a steep defendant relied on printed rules that instructed the brakemen to test all the before leaving a terminal station, which plaintiff had failed to do. Plaiatf never read the rules, and was ignorant of their existence. *Held*, that he w negligent in failing to know rules which had never been brought to his atte

Appeal from circuit court, Chautauqua county.

Action by Frank T. Le Croy, a brakeman, against the New York, Erie & Western Railroad Company, for personal injuries. Judgment for p tiff. Defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

James H. Stevens, for appellant. John G. Record, for respondent.

CORLETT, J. In April, 1887, 40 cars loaded with coal were run by de ant on its track from Brockwayville, in the state of Pennsylvania, north in the direction of Bradford. Johnsonburg was a terminal station o route, where the train stopped two hours, taking a side track. The pla was one of the four brakemen who started with the train, upon which was a conductor, engineer, and fireman. The distance between Brock ville and Bradford was upwards of 60 miles, and the time would be from 48 hours. The defendant's road is down grade, going east, or rather n after leaving Crawford Junction, on an average of from 100 to 102 feet t mile for a distance of 5 or 6 miles; the steepest part being about half a outside of Crawford Junction. But the grade is not uniform,—in some p greater than others. While going down this grade the train went to p and the cars were piled one upon another. A wheel was broken, an plaintiff was severely injured in the disaster. At the time of the acc the train was running at the rate of about 60 miles an hour. In Jan

1888, the plaintiff brought this action, which was tried in May, 1889, at Mayville, and resulted in a verdict for the plaintiff of \$3,500. A motion for a new trial was made on the minutes, and denied. Judgment was entered, and the defendant appealed to this court.

The position of the plaintiff on the trial was that the defendant neglected to furnish safe and sufficient cars and brakes for the use of the train. The defense was based on the assumption that the plaintiff disobeyed the standing rules of the company, which caused the disaster. Those rules, so far as material, are as follows: "Brakemen of freight trains will receive instructions from the division superintendents. They will be under the immediate control, and must obey the orders, of the freight-train conductors. At terminal stations, they must obey the order of the yard-master. They will have the duty of coupling the freight-cars, applying the brakes, using the signals, working the switches where there are no switchmen, assisting in loading and unloading freight, and the care of their cars and caboose of their train while their train is on the road, and will be held responsible for the strict performance of their duties in accordance with the rules of the company, and for prompt obedience to all orders of the conductors. They must report at the terminal stations at the time appointed, and assist in shifting and making up of trains; and before starting they must test the hand-brakes, and see that they are in proper condition, and work easily, and see that the train signals are in good order, and ready for immediate use. They must not leave their brakes while the train is in motion, or take any other position in the train than that assigned by the conductor." By these instructions, it was the duty of the plaintiff, before the train left Brockwayville, to inspect the brakes, if he had knowledge or notice of these rules, and also at Johnsonburg. The evidence shows that the plaintiff made no inspection. There was an implied contract between the plaintiff and defendant, when he entered their employ as a brakeman, that the cars upon which he was to labor should be reasonably safe; also the brakes, and that they should be in working order. The breaches of duty by the defendant alleged on the part of the plaintiff were that there were not a sufficient number of brakes, and that they were not in proper order. The evidence tended to show that these 40 cars loaded with coal required from 30 to 35 brakes to make them safe going down grade, and also tended to show that there were not this number of brakes; also that many of them were defective, and that, in view of the grade, the defendant was negligent in omitting to furnish a sufficient number of brakes; also that it omitted to keep them in proper condition. The general rules of the defendant provide, among other things, that officers, agents, and employes must become familiar with the regulations of the company, and observe the rules and strictly enforce them upon those under their control, and that ignorance of the rules will not exempt or excuse them for neglect of duty. Unless the plaintiff was negligent in omitting to comply with the rules, it is not claimed that he neglected any duty at or before the accident which in any way contributed to its production. The plaintiff testified on the trial that he never read those instructions, that he never received any information of the existence or import of the directions above quoted, and that he was ignorant of their existence. The trial justice charged the jury, in substance, that those instructions were reasonable, and that, if the plaintiff had knowledge or notice of them, it was his duty in all respects to obey. The justice further charged that, unless they were brought to the plaintiff's attention so that he knew or was informed of their existence, or unless put in his possession to be read by him, and that if he was not informed of this book containing instructions as to his duties, and was ignorant of them, or unless it was put where it was accessible to him, they would not bind him, and he would not be guilty of negligence for want of knowledge of what they were; that, if the plaintiff knew his duty, it was manifest he had neglected it by omitting to examine or inspect the brakes.

The result of this appeal depends upon the correctness of the charge of trial justice upon this question. All the rules and regulations of the company must be construed in reference to known facts and obvious surroundings. A brakeman, while an employe, occupies a comparatively subordinate position. It is reasonable to assume that he would not be active or vigilant in acquiring a knowledge of printed or written rules unless his attention is called to them. It is fair to assume that when a brakeman is employed, his duty devolves upon the company of calling his attention to its written printed rules needful to him, and either furnish him with copies, or inform him where he will find them. Ordinary observation teaches that, unless a laborer's attention is called and directed to such matters, their necessity and importance will not occur to him, even though he knows in a general way of their existence. He would naturally assume that they were for the information and instruction of those in position and authority, and that no personal obligations rested upon him to examine and master their contents. It is a matter of universal observation that those employed to perform manual labor upon whom no duty of supervision or direction is imposed, are not vigilant in acquiring knowledge of their own obligations beyond instructions or information distinctly given or conveyed. As to third persons, where life or property is involved, it would not be a reasonable excuse for the company that instructions were printed, and the employes, if vigilant, might have familiarized themselves with their nature and import. The answer would be, with liability turned on that question, that the company's duties required the giving of full and implicit instructions. The question here presented is whether a different rule obtains between the company and the brakeman. In the face of the above suggestions, it ought not to be absolved from liability unless it imparts full and clear information to its employes. It ought not to be allowed to escape on conjecture or possibilities. While the brakeman assumes by virtue of his employment, the risks incident to his vocation, still nature requires the acquisition of a knowledge of written or printed rules was not included among those risks, which should be limited to the ordinary and visible hazards incident to the discharge of his duties. Testing the charge by these rules is not believed that the learned justice fell into an error which requires reversal. In *Ford v. Railroad Co.*, 22 N. E. Rep. 946, and *Byrnes v. Railroad Co.*, 113 N. Y. 251, 21 N. E. Rep. 50, a construction of questions of fact by the court disposed of each case. The same is true of *Disher v. Railroad Co.*, 2 N. Y. St. Rep. 277, affirmed 21 N. E. Rep. 415, where the facts were more analogous to those in the case at bar.

It does not appear that the damages were so excessive as to require a modification on that ground. The judgment and order should be affirmed.

MCGUIRE v. JOSLYN.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

LANDLORD AND TENANT—DANGEROUS PREMISES.

In an action against a landlord for personal injuries by a tenant who was tripped and thrown by a ragged matting on a stairway which belonged to the landlord, it was used by the tenant as the only means of reaching her apartments, the production by defendant of the matting in evidence, even though it has been constantly used for more than two years since the accident, is a circumstance which may be considered by the jury. *MACOMBER, J.*, dissenting.

Appeal from circuit court, Monroe county.

Action by Lucy S. McGuire against Thomas M. Joslyn for damages sustained by falling down defendant's stairway. Judgment for plaintiff. Defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Albert H. Harris, for appellant. Abraham Benedict, for respondent.

CORLETT, J. In September, 1886, the defendant was lessee of a building on the corner of State and Center streets, in the city of Rochester, and had control and possession of the same and its stairways, under a lease. The plaintiff occupied a portion of the upper part of this building as a tenant of the defendant, under an oral lease. The way of egress from that portion of the building to the street was a stairway used in common by the tenants and occupants of the building. It was for the use of the tenants, and those occupying the building in that capacity had a right to use the stairway. It was alleged on the part of the plaintiff that the defendant negligently permitted the covering of the staircase to remain in such a condition as to be unsafe; that certain matting used upon the staircase was worn, ragged, and dangerous; that the stairway was not properly lighted; and that, by reason of defects in the matting, the plaintiff, without negligence on her part, fell and was injured. The plaintiff's allegations were denied. A trial was had at the Monroe circuit before a justice and a jury, and the plaintiff recovered a judgment for a thousand dollars. A motion for a new trial was made and denied. Judgment was entered on the verdict, and the defendant appealed to this court.

The evidence on the part of the plaintiff tended to show that the only way of reaching the street from the upper floors was by passing down the stairway; that there was no railing on the stairs; that the steps were covered with a matting which had been used, and had become so much worn as to be stringy and dangerous; that the hallway was left in total darkness; that on the 18th day of September, 1886, in the early evening, the plaintiff left her room to go down to get some matches; that she proceeded carefully, and guided herself by placing her hands upon the wall; that she reached the landing at the top of the stairs, and in attempting to descend caught her foot in the loose ropes of the matting, and was thrown violently upon the stairs, and received the injuries complained of. Evidence was given on the part of the defendant tending to controvert the plaintiff's as to the place of her fall, and the degree of care exercised by her, the condition of the hallway and matting, and also as to light and safety. The jury found the controverted questions in favor of the plaintiff.

The contention of the appellant is that the court erred in charging the jury in the following particulars: The plaintiff's counsel asked the court to charge the jury, in respect to the matting, (which was not produced,) that, if the jury were satisfied that it was within the power of the defendant to produce it in substantially the condition it was at the time, and omitted to do so, a similar rule applies as in the case of an omission to produce a witness a party has power to produce. The court declined so to charge, but said: "I charge that that is simply a circumstance in the case which the jury may give such weight to as it is entitled to receive." The plaintiff also requested the court to charge that if it is in the power of one of the parties to produce evidence in this case, and the party fails to produce it, it is a matter the jury may give such weight as they may see fit. The court declined to vary the charge upon that subject. The defendant's counsel did not except to the above rulings. The defendant's counsel asked the court to charge that, if the matting remained in constant use for about two years after the accident, and was then taken up and nalled down on the defendant's veranda, and used since, his omission to produce it could not be taken into consideration in this case. The court in reply stated that: "They take that in connection with the suggestion in regard to its not being produced. The jury will consider all the circumstances. They may say how far the circumstance that it remained on the stairs some time after the accident operated as a reason why it should not be brought into court as an exhibit in the case." The defendant's counsel excepted to the refusal of the court to charge as requested.

The charge of the court, in response to the plaintiff's request, shows the man-

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ner in which the question arose. The charge was that the jury might, circumstance, attach such weight to the omission to produce the matting was entitled to receive. The defendant was content with this, as no exception was taken. The defendant's request, above quoted, assumes as matter of fact, that, if the mat remained in constant use for about two years after the accident, and was then taken up and nailed down and used since, the omission to produce it could not be taken into consideration. It is easy to see that the length of time and manner the matting was used after the accident might change its condition as to render an inspection worthless for the purpose of showing the state it was in when the accident occurred. On the other hand, notwithstanding the defects to which the accident is charged, they might be discovered with more or less distinctness on inspection, after long use. The court could not say as matter of law what changes such time and use would produce. In the very nature of things, the changes which time and use would bring about involve questions of fact. The court, therefore, very properly said that such use and time might be taken into consideration by the jury, but the learned justice was right in refusing to rule, as matter of law, that those circumstances were so controlling that the non-production of the matting could not be considered. The matting was in possession of the defendant, and it was admissible as evidence before the jury. *People v. Gonzales*, 85 N. Y. 49; *King v. Railroad Co.*, 72 N. Y. 607.

The evidence on the trial shows that there was a conflict as to the condition of the matting, in reference to which the jury were authorized to draw different inferences. An omission on the part of the person having possession and control of the matting to produce it would be a circumstance which the jury would have a right to take into consideration against him. *Clark v. Railroad Co.*, 40 Hun, 607; *Bleecker v. Johnston*, 69 N. Y. 309; *The Fred M. Henshaw*, 15 Fed. Rep. 635; *People v. Hovey*, 92 N. Y. 554.

The trial justice was not in error in charging as he did in response to the plaintiff's request. As above stated, the correctness of his charge on this subject was acquiesced in by the learned counsel for the defendant, whose sole contention is narrowed down to the question as to whether, as matter of law, it was the duty of the trial justice to direct the jury that time and use had destroyed all the value of the matting as an exhibit. No error was committed by the court in this respect. No other question being urged by the learned counsel for the appellant, or being presented by the case, the judgment must be affirmed.

MACOMBER, J., dissenting.

FRENCH v. STEVENSON *et al.*

(Supreme Court, General Term, Fifth Department. June 30, 1890.)

ASSIGNMENT—RIGHTS OF ASSIGNEE—ESTOPPEL.

The administrators agreed with a mortgage creditor of decedent not to sue against him at the foreclosure sale of decedent's land, provided the mortgage would discharge certain judgments which he held against the estate. This agreement was executed by the administrators, and the mortgagee bought in the land for less than his debt, though it was easily worth that and the judgments. To this agreement the mortgagee had assigned without consideration the judgment to his wife. Held, that she could not enforce them against the estate, as she occupied no better position than her assignor.

Appeal from special term, Cayuga county.

Action by Mary F. French against the administrators of the estate of William Ross to collect two judgments against decedent. The claims were allowed, and plaintiff appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

W. H. Kenyon, for appellant. W. E. & F. E. Hughitt, for respondents.

CORLETT, J. On the 1st day of April, 1870, William Ross purchased a tract of 214 acres in the town of Montezuma, Cayuga county, for the sum of

230. He died in the month of September, 1887. Letters of administration were granted to the defendants, who duly qualified. At the time of the decease of Ross, the farm was incumbered by mortgages and judgments to the amount of about \$10,000. One of the judgments was recovered by Nelson Beardsley in the supreme court on the 29th day of January, 1887, for \$296.62 damages, and \$22.32 costs. Another was recovered by Nathan Kingsley in the same court on the 23d day of June, 1887, for \$1,395.90 damages, and \$21.36 costs. Another was recovered by D. M. Osborne & Co. before a justice of the peace on the 22d of August, 1887, for \$135.22 damages and costs, a transcript of which was filed in the Cayuga county clerk's office. On the 6th day of January, 1888, George G. French became the owner of the judgments recovered by Nelson Beardsley and D. M. Osborne & Co., which are the claims involved on this appeal. On the 30th day of March, 1887, Ross executed a mortgage on the farm to Nelson Beardsley to secure the payment of \$2,000, which was assigned to Alice B. Ross. This was a junior mortgage, to enforce which she commenced a statutory foreclosure in October, 1887. While the foreclosure was pending, and on the 6th day of January, 1888, the assignee assigned the mortgage to George G. French, for whose benefit the foreclosure was continued in the name of said Alice B. Ross. The time of sale was January 16, 1888. On that day the owner of the mortgage, George G. French, sent his son, Fred. E. French, to represent him on the sale, with full authority to act for him, and do all things respecting the sale, and other proceedings incidental thereto. It had been ascertained before the day of the sale that the personal property of the deceased would be insufficient to pay his debts, including the judgments above mentioned. The defendants decided to bid on the foreclosure sale a sum sufficient to pay all the liens upon the premises, including the judgments. On the day of sale, and prior thereto, one of the defendants, James M. Stevenson, informed Fred. E. French of his intention to bid on the sale the amount of the liens. Thereupon it was agreed between said Fred. E. French, representing his father, and the said Stevenson, representing the defendants, that, if the said Stevenson would not bid upon the sale, the judgments against the deceased, William Ross, should be discharged, and should not be presented as claims against the estate. This agreement was carried out, and the premises were purchased by Fred. E. French for a sum less than the mortgage debt, and afterwards George G. French took the title under this foreclosure, and still owns the premises, which were worth the amount of all the incumbrances, including the judgments. On the 7th day of January, 1888, the said George G. French assigned the judgments in controversy to his wife, Mary E. French, the plaintiff. The said Stevenson, when he made the agreement with Fred., knew that George G. French was the owner of the judgments, but had no notice or knowledge of assignments to his wife, which were never recorded in the clerk's office, and no entry was made indicating any transfer. Stevenson believed at the time of making the agreement that said George still continued the owner of said judgments, and made it on that assumption. Under such circumstances, the plaintiff would be equitably estopped from enforcing her judgments against the defendants. *Blair v. Watt*, 69 N. Y. 113.

The agreement on the part of the defendants was fairly and honestly made for the purpose of procuring a satisfaction of the judgments out of the real estate, and to release the personal property of the deceased for the payment of his debts outside the judgments. Notwithstanding these facts, Mary E. French presented the judgments in controversy as claims against the estate of the deceased. They were disputed and rejected by the defendants. The surrogate appointed James Lyon referee to hear and determine the controversy. The referee found the above facts on sufficient evidence, and, as conclusions of law, determined that the claim was not a just one, and that the plaintiff was not entitled to recover. At a special term, in September,

1889, the report was confirmed, and judgment directed against the plaintiff. This appeal was taken from the judgment entered upon that direction. No case was prepared or motion made for a new trial. The evidence fails to show that any consideration was paid for the judgments by the plaintiff. She occupied no better position, as against the defendant, than her assignor would. *Hull v. Hoole*, 116 N. Y. 299, 22 N. E. Rep. 547. No questions are presented for review on this appeal, except those before the special term, based upon the referee's report, findings, and the plaintiff's exceptions thereto. The evidence and proceedings were never passed upon at special term, and are not before this court. *Railroad Co. v. Ebling*, 100 N. Y. 98, 2 N. E. Rep. 878; *Matthews v. Meyberg*, 68 N. Y. 656.

The sole question here is whether, upon the referee's findings, his legal conclusions were correct. There does not appear to be any room for controversy on this question. The real estate was worth more than the amount of the liens, including the judgments. The defendants represented the creditors and the estate. The duty devolved upon them of preventing its sacrifice, and protecting it for the benefit of creditors and those entitled to the surplus. They could do it only by bidding at this foreclosure sale the value of the property. The agreement, therefore, was a proper and legitimate one, as it enabled them to secure the results which a discharge of their obligations required. The son and agent of French had full authority to act; his principal obtained the benefit of the proceeds. *Mayer v. Deane*, 115 N. Y. 556, 22 N. E. Rep. 261; *Bennett v. Judson*, 21 N. Y. 238. His wife occupied no better position than himself. The law is not chargeable with the gross injustice which a reversal of this judgment would involve. It is a familiar rule that neither the statute of frauds nor any other statute or principle of law can be invoked to aid in the perpetration of a fraud. *Ryan v. Dox*, 34 N. Y. 307; *Dodge v. Wellman*, 1 Abb. Dec. 512. The appellant is in no position to urge that the defendants could not enforce the contract. Equity will not allow her to assume such a position. The only ground upon which she has a colorable standing in court is the violation of an agreement by those under whom she claims, the honest performance of which would have extinguished her judgments. But, as already shown, the defendants were not guilty of any violation of statute or principle of law in making the agreement. The proceedings before the referee disclosed by the case, including the evidence, have been carefully examined, and, if properly before this court for review, show no errors which would warrant a reversal. The conclusions of the referee and the decision of the special term were correct, and the judgment should be affirmed. All concur.

IN re ALBRECHT'S ESTATE.

(Supreme Court, General Term, First Department. May 23, 1890.)

DESCENT AND DISTRIBUTION—HUSBAND AND WIFE—ENTIRETIES.

IN New York a bond and mortgage executed to a husband and wife jointly become the property of the wife on the death of the husband, by right of survivorship. The common-law rule is in force in respect to personal property as well as realty. Affirming 4 N. Y. Supp. 463.

Appeal from surrogate's court, New York county.

Accounting by Christian J. Uhl and Charles H. Hamel as executors of the will of Balthazar Albrecht, deceased. The exceptions to the referee's report were overruled, and contestant appeals. For opinion of surrogate, see 4 N. Y. Supp. 462.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

Henry F. Lippold, for appellant. Samuel Untermeyer and L. A. Glagierich for respondents.

VAN BRUNT, P. J. The principles laid down in the case of *Sanford v. Sanford*, 45 N. Y. 728, 58 N. Y. 72, and reiterated in the case of *Bertles v. Nunan*, 92 N. Y. 156, and which have obtained since the existence of the common law, show that the decree of the surrogate was correct, and should be affirmed, with costs. All concur.

HIGGINS *et al.* v. UNION TRUST CO. *et al.*

(*Supreme Court, General Term, First Department. May 23, 1890.*)

WILLS—ACTION TO CONSTRU—JURISDICTION.

An action to construe a will for the purpose of having it declared invalid cannot be maintained in the supreme court, where complete relief can be obtained in the surrogate's court.

Appeal from special term, New York county.

Action by Fannie Higgins and others against the Union Trust Company and others, to construe the will of Elizabeth J. Bryant, deceased. The complaint was dismissed, and plaintiffs appeal.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

David S. Remsen, for appellants. Alfred H. Byrd, for respondent Union Trust Co. William C. Beecher, for infant respondents.

VAN BRUNT, P. J. This action is brought by the plaintiffs as heirs at law and next of kin of Elizabeth J. Bryant, the testatrix herein, to construe her will for the sole purpose of having the same declared invalid. It seems to us clear that the action ought not to be entertained. *Anderson v. Anderson*, 112 N. Y. 104, 19 N. E. Rep. 427; *Horton v. Cantwell*, 108 N. Y. 255, 15 N. E. Rep. 546; *Weed v. Weed*, 94 N. Y. 243; *Wager v. Wager*, 89 N. Y. 161; *Chipman v. Montgomery*, 68 N. Y. 221. If it should be claimed that the case of *Wager v. Wager*, 89 N. Y. 161, is an authority to the contrary, an examination of that case shows that the court expressly recognized the right of the supreme court to refuse to entertain jurisdiction where complete relief can be obtained in the surrogate's court. In the case at bar, complete relief can be had in the surrogate's court, and there seems to be no good reason why this court should be called upon to do that which can be just as well disposed of in the surrogate's court. Objection is raised as to the allowances made in the decree, because there is no basis shown for these allowances. As the case does not purport to contain all the evidence, we cannot tell whether it contained proof justifying the allowances or not. The judgment should be modified by striking therefrom the words "on the merits," and, as thus modified, affirmed, with costs to the respondents. All concur.

PETERS v. FOSTER.

(*Supreme Court, General Term, First Department. May 23, 1890.*)

1. BANKS AND BANKING—NATIONAL BANKS—POWER OF RECEIVER TO SUE.

Under Code Civil Proc. N. Y. § 449, excepting from the provision that an action must be prosecuted in the name of the real party in interest a person expressly authorized by statute to sue, the receiver of a national bank may sue for assessments levied on the stockholders, being so authorized by the act of congress relating to national banks.

2. RECEIVERS—FOREIGN RECEIVERS—NATIONAL BANKS.

The receiver, appointed by the comptroller of the currency, for a national bank located in another state, is not a foreign receiver, and may sue in the courts of New York for an assessment levied on shareholders of the bank, without regard to the doctrine of comity.

3. SAME—RIGHT TO SUE—COMITY.

A foreign receiver will be permitted by comity to sue in the courts of New York, where there is no question of local rights or interests.

Appeal from special term, New York county.

Action by William H. Peters, as receiver of the Exchange National of Norfolk, Va., against Sarah Gibeon Foster, to recover an assessment levied on defendant's stock in the bank. A demurrer to the complaint overruled, and defendant appeals.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.
Benjamin B. Foster, for appellant. *Charles F. MacLean*, for respon-

BARRETT, J. The Exchange National Bank of Norfolk, Va., was organized under the laws of the United States, and was located in the state of Virginia. It was therefore a foreign corporation, as defined by the Code of Procedure, (section 3343, subd. 18.) The question is whether the plaintiff as receiver of this foreign corporation, appointed by the comptroller of currency, can maintain an action in the courts of this state to recover a assessment duly levied upon the shareholders of the bank. Two points are presented by the appellant: *First*, that the plaintiff is to be treated as a foreign receiver, and as such denied a standing in our courts; *second*, that he is not the real party in interest. As a subdivision of the first point, the plaintiff contends that exclusive jurisdiction in this class of actions is vested in the federal courts. The rule, however, is the other way. It was settled with regard to assignees in bankruptcy by the supreme court of the United States after full consideration. *Claffin v. Houseman*, 93 U.S. 130. The conclusion of the court in that case was that the assignee might sue in the state courts to recover the assets of the bankrupt, so long as congress had conferred no exclusive jurisdiction upon the federal courts. The head-note gives the reason in compendious form, as follows: "The statutes of the United States are as much the law of the land in any state as are those of the state itself, although exclusive jurisdiction for their enforcement may be given to the federal courts, yet where it is not given, either expressly or by necessary implication, the state courts, having competent jurisdiction in other respects, may be resorted to."

The precise point with regard to receivers of national banks was decided in favor of the jurisdiction of the state courts in *Platt v. Crawford*, 8 Ab. (N. S.) 308, and the right of such receivers to sue in the state courts was even questioned in *Platt v. Beebe*, 57 N. Y. 339. See, also, *Bank of v. Pahquioque Bank*, 14 Wall. 383, and *Brinckerhoff v. Bostwick*, 88 61. Upon the main question we are of opinion—*First*, that, even if the plaintiff be treated as a foreign receiver, he should be permitted to prosecute his action in our courts, there being no question here of local rights or interests; but, *second*, he is not to be treated as a foreign receiver in the ordinary acceptance of that term. The discussions on this head with which the books abound are predicated mainly of the demands of local creditors, to subject to their claims the assets of the debtor within the jurisdiction, to the exclusion of foreign assignees in bankruptcy. The contention in favor of such local creditor rights (also in favor of *bona fide* purchasers) was that the foreign statutes have no extraterritorial force, and could only bind or pass the title to property within the territorial limits of such foreign country; and also, as underlying the aid of the question of right, that the foreign assignees had no standing in our courts except by comity, which would not be extended to them to the detriment of local creditors. It does not seem, however, to have been generally doubted that such comity would be extended whenever it did not conflict with or prejudice the rights of our own citizens. Such, at all events, is the settled law of this state. *In re Waite*, 99 N. Y. 433, 2 N. E. Rep. 44; specially pages 446-448, 2 N. E. Rep. 447-449; *Barclay v. Mining* Co., 25 Laus. 25.

But, further, the plaintiff is not to be treated, as already observed, as a foreign receiver, in its strict sense. Technically, it is true, he is the receiver

a foreign corporation. It will be observed, however, that he is not a receiver appointed by the courts of a foreign country, or even of a sister state, but by an officer of the United States, under authority derived from national legislation. Such cases, therefore, as *Booth v. Clark*, 17 How. 322, are inapplicable. A receiver appointed under the laws of the United States has surely no need to appeal, anywhere within the nation, to the doctrine of comity. As was said by Mr. Justice BRADLEY in *Claflin v. Houseman*, *supra*: "The United States is not a foreign sovereignty, as regards the several states, but is a concurrent, and, within its jurisdiction, paramount, sovereignty. * * * The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state and federal governments." It is also well settled that the determination of the comptroller of the currency to appoint a receiver, and his action in levying the assessment, are conclusive upon debtors and shareholders. *Platt v. Crawford*, *supra*; *Cadle v. Baker*, 20 Wall. 650; *Casey v. Galt*, 94 U. S. 678; *Kennedy v. Gibson*, 8 Wall. 498.

The remaining question is whether the plaintiff is the proper person to sue. This question has also been settled adversely to the appellant. *Stanton v. Wilkeson*, 8 Ben. 359; *Bank v. Kennedy*, 17 Wall. 21; *Kennedy v. Gibson*, *supra*; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383; *Platt v. Crawford*, *supra*. Under section 449 of the Code, a person expressly authorized by statute to sue is excepted from the provision that the action must be prosecuted in the name of the real party in interest. Here the receiver is so expressly authorized. See cases above. See, too, Rev. St. U. S. §§ 5151, 5234; also Act Cong. Feb. 14, 1880, § 1. And this is entirely reasonable; for the bank is not the real party in interest, but its creditors, and whatever the receiver collects he must pay over to the treasurer of the United States for the benefit of these creditors. The interlocutory judgment appealed from should therefore be affirmed, with costs. All concur.

**PEOPLE *ex rel.* NIAGARA FALLS HYDRAULIC POWER & MANUF'G CO. v.
RUSSELL *et al.***

(*Supreme Court, General Term, Fifth Department. June 30, 1890.*)

TAXATION—EXCESSIVE ASSESSMENT—REMEDIES—COSTS.

In a proceeding under Laws N. Y. 1880, c. 269, to reduce an excessive and unequal assessment, the relator, on appeal by *certiorari*, cannot, under section 6 of that act, recover costs against the assessors unless it is shown that they acted with gross negligence, or in bad faith.

Appeal from special term, Niagara county.

A proceeding under Laws N. Y. 1880, c. 269, to reduce an excessive and unequal assessment. Appeal by defendants, the assessors, from that portion of the order awarding costs to the relator.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

W. Caryl Ely, for appellant. *Charles H. Piper, Sr.*, for respondent.

MACOMBER, J. The defendants are the assessors of the village of Niagara Falls. In making up the assessment roll in the year 1887, they placed certain lands owned by the relator upon the roll at the valuation of \$23,200. The relator claimed such valuation to be excessive, unequal, and not proportionate to the value of other real estate in that village. Upon the day set for hearing grievances, the relator duly appeared, and was heard; and a slight reduction was made, but not enough to satisfy his demands. A writ of *certio-*

rari under the statute was duly issued; and upon the return thereto upon the evidence subsequently taken, it was decided by the special that the assessment should be reduced to the sum of \$18,560, making a reduction of \$4,640.

The tax upon this excessive valuation, namely, \$14.87, having been paid by the relator, was properly directed by the court to be audited and allowed to the assessors in the next annual tax-levy of the village of Niagara Falls, Section 8, c. 269, of the Laws of 1880, as amended by chapter 842 of the Laws of 1887. Without such direction by the court, it would have been the duty of the assessors so to enter the same, in order to reimburse the plaintiff for the unlawful payment exacted of him. The provision for the allowance or holding of costs in this proceeding is found in section 6, c. 269, of the Laws of 1880, which is as follows: "Costs shall not be allowed against assessors or other officers whose proceedings may be reviewed under this act, unless they shall appear to the court that they acted with gross negligence, in bad faith or with malice. If the writ shall be quashed, or the prayer of the petition denied, costs shall be awarded against the petitioner; but the costs shall in any case exceed the costs and disbursements taxable in an action upon the trial of an issue of fact in the supreme court." The rule governing *certiorari* proceedings generally (section 2143 of the Code of Civil Procedure) has no application to this proceeding. *People v. Coleman*, 18 Abb. N. C. 246. In the absence of a holding by the special term or by this court that the action of the assessors was grossly negligent or in bad faith or with malice, no costs under this statute can be permitted against them. *People v. Johnson*, 31 Hun, 421; *People v. Pond*, 18 Abb. N. C. 1.

The learned justice presiding at special term has, in his opinion, fully and completely exculpated these assessors from any negligence, bad faith, or malice. He has written an opinion to the effect that they acted honestly and intelligently, and committed only an error of judgment such as any honest person is liable to fall into. The costs of the relator have, as it has been shown above, under these circumstances, been admitted to be saved to him, although clearly enough, under the statute, and under the decisions cited, they can not be recovered from these defendants. This has been done by a direction in this proceeding to the assessors to levy the same in the next tax-levy to pay the same over to the relator. We are unable to find any statutory authority for this part of the order appealed from. The costs amount to \$180.14, while the reduction of the tax is only \$14.27. Yet there is no provision of the law by which the relator can be permitted to recover costs except in the cases where it is shown that the assessors have acted with gross negligence or bad faith or maliciously. The persons upon whom the costs are directed to be levied were not parties to this proceeding, nor was the village of Niagara Falls a party thereto. Under the statute the controversy is solely between the aggrieved tax-payer and the assessors. In the absence of a statutory provision by which these costs may be collected in the manner prescribed by this order, the direction to the assessors contained in this order must be deemed to be erroneous. The examination of the evidence leads to the same conclusion reached by the special term, that the assessors acted fairly and honestly; otherwise, upon their appeal, we might probably modify the order, and charge the costs directly upon them, personally. The appeal from should be reversed, but, under the circumstances, without costs. All concur.

CURRY v. CITY OF BUFFALO.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

1. MUNICIPAL CORPORATIONS—ACTIONS FOR TORTS.

Laws N. Y. 1886, c. 573 § 1, providing that actions for personal injuries against municipal corporations having over 50,000 inhabitants shall be brought

within one year after cause of action accrued; and that notice of the intention to bring an action must be served on the proper law-officer of the corporation within six months after right accrued, applies to the city of Buffalo, and is not in conflict with title 3, § 7, of its charter, providing that no action for unliquidated damages for wrong or injury shall be brought till 40 days after it has been presented to the common council for audit.

2. SAME.

A compliance with the provisions of the charter by presenting a petition to the council describing the injury, and praying that the damages be allowed and paid, is not a substantial compliance with the terms of the statute; and the action cannot be maintained without such compliance.

MACOMBER, J., dissenting.

Appeal from circuit court, Erie county.

Action by Mary Curry against the city of Buffalo for personal injuries.

Plaintiff was nonsuited, and appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Adelbert Moot, for appellant. *Frank C. Laughlin*, for respondent.

CORLETT, J. About the 18th day of December, 1887, the plaintiff received an injury by falling upon the defendant's sidewalk. The plaintiff claims that the city was negligent, and that she was free from negligence. The city put in issue the material allegations in the complaint. The action was tried before a justice of this court and a jury on the 24th day of February, 1890. At the close of the evidence, which tended to prove the plaintiff's position, the defendant moved for a nonsuit upon the ground that the plaintiff had failed to comply with chapter 572 of the Laws of 1886. The plaintiff objected to the nonsuit, which was granted by the court. The plaintiff excepted, and the court ordered the exceptions to be heard here.

Section 7, tit. 3, of the charter of the city of Buffalo, provides, among other things, that no unliquidated claim for damages for wrong or injury should be received for audit unless the claim is presented, stating how and where it happened, and that no payments had been made. It further provides that no action to enforce any such claim shall be brought until the expiration of 40 days after it shall have been presented to the common council for audit in the manner provided in that act. On the 9th day of May, 1888, the plaintiff presented to the common council a petition directed to that body which describes the injury received, alleges negligence on the part of the city, claims damages to the amount of \$5,000, and closes as follows: "Wherefore, your petitioner prays that an order be drawn upon the proper fund for the sum of five thousand dollars in favor of your petitioner, to compensate her for her injuries and damages sustained in the premises." This petition was signed by the plaintiff, and verified. On the 4th day of June, 1886, chapter 572 of the Session Laws of that year went into effect. It provides as follows: "Section 1. No action against the mayor, aldermen, and commonalty of any city in this state having fifty thousand inhabitants or over, for damages for personal injuries alleged to have been sustained by reason of the negligence of such mayor, aldermen, and commonalty, or of any department, board, officer, agent, or employe of said corporation, shall be maintained unless the same shall be commenced within one year after the cause of action therefor shall have accrued, nor unless notice of the intention to commence such action, and of the time and place at which the injuries were received, shall have been filed with the counsel to the corporation, or other proper law-officer thereof, within six months after such cause of action shall have accrued. Sec. 2. Nothing in this statute contained shall be construed or held to give or confer any right of action against said corporation for any cause for which said right of action would not have existed had this act not been passed, nor to affect any right of action which may exist against such corporation. Sec. 3. This act shall take effect immediately."

The plaintiff's contention is that this act has no application to the city of Buffalo, mainly because the defendant was always known and designated by that name, and that the act was only intended to apply to a city designated by the terms, "the mayor, aldermen, and commonalty." The title of chapter 572 is, "An act in relation to certain actions against municipal corporations." It is a familiar rule that the title to an act is often resorted to to ascertain its scope and meaning. *Brick v. Gannar*, 36 Hun, 52; *Peop. v. McClave*, 99 N. Y. 83-89, 1 N. E. Rep. 235. There is nothing inconsistent between this act and the provisions of the defendant's charter. The object of the charter was to enable the city, through its common council, to 40 days to examine and determine whether a claim should be audited before an action could be brought. *Reining v. City of Buffalo*, 102 N. Y. 308; 1 N. E. Rep. 792. But the act of 1886 required the notice specified in it to be delivered to the corporation counsel or the law-officer of the city. The provisions of the charter in no way conflict with the act of 1886. It appears from the case that the application to the common council was denied on the recommendation of the corporation counsel. It requires no argument to prove that chapter 572, above quoted, was intended to apply to all municipal corporations in the state having a population of 50,000 or over. *Dawson v. City of Troy*, 2 N. Y. Supp. 187; *Denair v. City of Brooklyn*, 5 N. Y. Supp. 100. In the *Dawson Case* the prevailing and dissenting opinions agree that the act of 1886 applies, although the charter of the city of Troy requires a verbal claim, the same as that of the city of Buffalo. The learned counsel for the appellant contends that the act of 1886 was made general to avoid a constitutional objection; in other words, that it was a successful device to defeat a constitutional provision by indirection. He also claims that many of the cities were originally designated by the terms, "the mayor, aldermen, and commonalty." That fact has no significance. Whatever terms were used in reference was had to the corporation. All redundant words have been eliminated in defining municipal corporations, except in the case of the city of New York.

The only question to be determined here is whether the service of the notice on the common council of the city of Buffalo was a substantial compliance with the provisions of the act of 1886. It is not believed that any difficulty or confusion attending the solution of this question. The notice served on the common council, manifestly, had reference to the charter. Not only does the petition on its face so show, but the argument of the learned counsel for the appellant is to the effect that the charter alone applied to Buffalo, and that the act of 1886 has no application. He does not argue that act has been complied with, or attempted to be, but assumes that, if the act includes Buffalo, a nonsuit was properly directed. The purported scope of the petition embodied a request to the common council to audit and pay his claim. The provision of the charter was to prevent the bringing of an action until the common council had 40 days' time to examine it. The act of 1886 makes it a condition precedent that notice that an action was brought must be served on the corporation counsel within six months after the action must be brought within a year, after the accident. After notice to the common council, that body may neglect or delay action. The requirement of a determination to bring suit may induce promptness. If otherwise the city is in no condition to complain, for its common council has been so notified with the notice required by the charter, and the city attorney with the notice required by the act of 1886. Both of these requisites must be complied with to enable the injured party to maintain the action; but, when both are complied with, the case can be tried on the merits. There is no room for the claim that the act of 1886 has been substantially complied with. As already shown, the learned counsel for the appellant does not so argue. The justice made a proper disposition of the case, and a new trial should be

nied. Motion for a new trial denied, and judgment ordered for the defendant on the nonsuit.

DWIGHT, P. J., concurs.

MAHOMBER, J., (*dissenting*.) This action was brought to recover damages for personal injuries sustained by the plaintiff by reason of falling upon a sidewalk in the city of Buffalo, in consequence of the negligence of the defendant, its agents and servants, in allowing the sidewalk to become defective, and to remain in a dangerous and unsafe condition. The evidence in behalf of the plaintiff tended to establish the allegations of her complaint. At the close of the plaintiff's case the defendant moved for a nonsuit upon the ground that the plaintiff had failed to show that she had complied with chapter 572 of the Laws of 1886, and that consequently she could not maintain this action.

One of the questions before us is whether this act, entitled "An act in relation to certain actions against municipal corporations," is applicable to the city of Buffalo. The first section of that statute is as follows: "No action against the mayor, aldermen, and commonalty of any city in this state having fifty thousand inhabitants or over, for damages for personal injuries alleged to have been sustained by reason of the negligence of such mayor, aldermen, and commonalty, or of any department, board, officer, agent, or employe of said corporation, shall be maintained unless the same shall be commenced within one year after the cause of action therefor shall have accrued, nor unless notice of the intention to commence such action, and of the time and place at which the injuries were received, shall have been filed with the counsel to the corporation, or other proper law-officer thereof, within six months after such cause of action shall have accrued." The injuries to the plaintiff were inflicted on the 18th day of December, 1887. This action was begun in July, 1888. On the 29th day of May, 1888, she caused to be delivered to the city clerk and comptroller, to be acted upon by the common council, a petition to the effect that she had so sustained personal injuries, while lawfully passing over the sidewalk, without negligence on her part. After describing her injuries, and stating the fact that the sidewalk had been out of repair for more than a month before the accident, the plaintiff asked "that an order be drawn upon the proper fund, for the sum of five thousand dollars, in favor of your petitioner to compensate her for her injuries and damages sustained in the premises." No other notice than the above was given to the authorities of the city of Buffalo. This paper, when put in evidence, bore the following indorsement: "Denied on recommendation of corporation counsel. [Signed] WILLIAM ADAMS, Chairman." The case shows that the petition was examined by the corporation counsel, who advised the committee on claims to decline to pay the demand; but it does not appear when the petition was so examined by him, and his advice so given.

Assuming for the moment that chapter 572 of the Laws of 1886 is applicable to the city of Buffalo, and that the provisions therein contained are conditions precedent to the maintenance of this action, it is proper, first, to inquire whether or not there has not been a substantial compliance therewith by the plaintiff. That statute requires that the action be brought within a year after the injuries have been sustained. This action was brought within the time specified. A further provision thereof is that notice of the time and place at which the injuries were received shall be filed with the counsel to the corporation, or other proper law-officer thereof, within six months after such cause of action shall have accrued. The application for the payment of the demand of the plaintiff, containing a statement of the time and place at which the injuries were received, came to the knowledge of the corporation counsel through the clerk and comptroller, and it was officially acted upon by him, and the claim rejected. There is, therefore, no ground

for contending that the plaintiff has not brought herself within the statute except in regard to the following provisions: "Nor unless notice of the intention to commence such action * * * shall have been filed with counsel to the corporation," etc. The petition of the plaintiff to the common council did not, in form, give notice of her intention to begin the action in case her demand was not paid; yet, on the whole, we are inclined to think that an expression of such intention may be necessarily implied in the language of the petition. This statute, being restrictive of the rights of a citizen, should not be extended beyond the purview of the legislature; a literal reading thereof ought to give way when its substance, and the general intent of the legislature as expressed in the act, have been observed. It is most a statute regulating the mode of procedure only; and like all rules of practice, it should be construed in furtherance of justice. The mandatory part thereof has been complied with. The part relating to an intention to begin an action is directory only; and it ought not to be permitted to be interpreted to defeat a just demand, particularly as the law-officers of the defendant treated the notice served as a literal compliance with the statute. It was this act intended to apply to all cities of the state of New York having above 50,000 inhabitants, where such city already had special provisions in its charter regulating and restricting the right of actions in such cases as are provided in Section 7, tit. 3, c. 519, of the Laws of 1870, being a part of the charter of the city of Buffalo, declares that "no action or proceeding to recover or enforce any such claim against the city shall be brought until the expiration of thirty days after the claim shall have been presented to the common council." Whatever may have been in the mind of the draughtsman of chapter 519 of the Laws of 1886, that act, both in its title and in its provisions, is clearly applicable to all cities of the state having 50,000 inhabitants or upwards, though New York is the only city in the state, the legal name of which is "The Mayor, Aldermen, and Commonalty." We do not assume that the statute was made in form a general law, instead of a local act applicable to the city of New York only, in order to avoid the obstacle in section 18, art. 3, of the constitution. If it had been the purpose of the legislature to make the statute applicable only to the city of New York, a direct and legal course would have been to amend the consolidated act relating to that city; for there is nothing in the constitution prohibiting the amendment to the city charter without making the same applicable to all the cities of the state. In the case of *Johnson v. City of Troy*, 2 N. Y. Supp. 137, it was held that this law applied to the city of Troy. The report of the case, however, does not show that the city of Troy had any local provision upon this subject, though the same fact existed. In the case of *Denair v. City of Brooklyn*, 5 N. Y. Supp. 114, it was held that the act was applicable to the city of Brooklyn. At the time of the decision above mentioned, (*Denair v. City of Brooklyn*), the charter of that city contained no provision requiring the presentation of a claim before the bringing of an action, as is contained in the defendant's charter, though the city of Troy had such a provision, as well as the city of New York. It is to be observed that there is no repealing provision in the act in question. It does not purport to amend or repeal any local act; and it cannot be held to repeal such local acts, inferentially or constructively, unless such intent is manifestly intended by the act itself. *Weller v. Nembach*, 114 N. Y. 39, 20 N. E. Rep. 623; *In re Eeergreen*, 47 N. Y. 216. A strong circumstance fortifying this position is the passage by the legislature, in the year 1889, of an act amending the charter of the city of Buffalo in this particular by incorporating the provisions of the charter and of certain ordinances into a homogeneous statute, wherein it is assumed by the legislature, necessarily, that the act of 1886 had no application. Chapter 318 of the Laws of 1889. See Potter's Dwar. St. 143-147. The motion for a new trial should be granted, with costs to abide the event.

CLARK v. SULLIVAN.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

COSTS—ON APPEAL—MODIFICATION OF ORDER.

Where on appeal the general term allows a certain amount for costs, the remedy of the prevailing party, who claims a greater amount, is by application to that court for a modification of its order, and not by appeal from the taxation of the clerk, in accordance with the order.

Appeal from special term, Monroe county.

Action by Charles W. Clark against Sarah E. Sullivan. From an order denying a motion for retaxation of costs defendant appeals. For former report, see 8 N. Y. Supp. 565.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Henry Z. Sullivan, for appellant. Zachary P. Taylor, for respondent.

CORLETT, J. The Monroe county judge made an order directing a commission to issue to take the testimony of a witness out of the state. As amended, it was entered September 7, 1889. The general term on appeal reversed the order, with \$10 costs and disbursements. 8 N. Y. Supp. 565. The county clerk so taxed. The defendant appealed from the taxation of the clerk to the special term of this court, claiming that she was entitled to \$20 before argument, and \$40 for argument at the general term, instead of \$10 costs and disbursements, as specified in the general term order. The special term denied the motion for retaxation. This appeal is from that order.

If the general term fell into an error in directing the amount of costs, it is obvious that the remedy of the defeated party would be an application to that court for a modification or revocation of the order. *Gould v. Root*, 4 Hill, 554. It would lead to great mischief and confusion to attack the decisions of this court collaterally on appeal from another order. The well-established practice is the other way. Aside from this, the order was right on the merits. *Ranney v. Persser*, 3 Law Bull. 10; *Phipps v. Carman*, 26 Hun, 518. It was simply an appeal from an order, and section 3251, subd. 4, has no application. The motion was non-enumerated. Sections 767 and 779. The order should be affirmed. All concur.

BOLT v. HAUSER.

(Erie County Court. March 27, 1890.)

1. LIMITATION OF ACTIONS—JUDGMENT—SUPPLEMENTARY PROCEEDINGS.

Supplementary proceedings on a judgment rendered by a justice of the peace are not an action within the meaning of Code Civil Proc. N. Y. § 383, subd. 7, which provides that an action on a judgment rendered in a court not of record must be commenced within six years after its rendition.

2. EXECUTION—SUPPLEMENTARY PROCEEDINGS.

As Code Civil Proc. N. Y. § 2485, which provides for supplementary proceedings "at any time within 10 years after the return * * * of an execution" unsatisfied, does not require these proceedings to be founded on a court of record judgment, supplementary proceedings on a judgment of a justice of the peace may be maintained at any time within 10 years.

3. SAME—ESTOPPEL.

A judgment debtor, who, with his attorney, was present when a receiver was appointed in supplementary proceedings, and who made no objections thereto, cannot, two years afterwards, when his wife has become involved in litigation with the receiver, be heard to say that at the time of their institution the proceedings were barred by the statute of limitations.

Action by Frank C. Bolt against John Hauser. Plaintiff had judgment, and on proceedings supplementary to execution Hanly C. Green was appointed receiver. Defendant now moves for the vacation of the order appointing said receiver.

Fitch & Braunlein, for plaintiff and receiver. *H. B. Van Peyma*, (Geo. T. Qutab, of counsel,) for defendant.

SEAUER, J. On March 31, 1880, the above-named plaintiff recovered judgment in a justice court of the city of Buffalo against defendant. A transcript was on the same day filed in Erie county clerk's office, and execution on same day issued to sheriff of Erie county. Said execution has been returned unsatisfied on April 6, 1887, proceedings supplementary instituted, and such proceedings were thereupon had that on September 17, 1887, Hanly C. Green was duly appointed receiver of the property of the defendant. September 30, 1887, an action was commenced in superior court of Buffalo against Anna Hauser, the wife of the defendant, by said receiver for the conversion of certain property of the defendant; which action was tried three times, the last one resulting in favor of the defendant, and an appeal now pending at general term of the superior court of Buffalo. At the time of the appointment of said Green as receiver the defendant and his attorney were present, and made no objections; and said defendant was present at all of the trials in the superior court. A motion is now made by defendant for an order setting aside the order of September 17, 1887, appointing said receiver, upon the ground that, six years having elapsed from the recording of said judgment before the commencement of said supplementary proceedings, the order was illegal. I cannot agree to this proposition. The statute of limitations (section 382, Code Civil Proc.) does not apply to proceedings commenced to enforce a justice's judgment by execution or supplementary proceedings, and only limits the commencement of an action upon judgments to within the period of six years. An effort made for the setting aside of a justice's judgment by the issuing of an execution, or the commencement of supplementary proceedings, cannot be termed an action upon judgment.

It was provided by the Revised Statutes that a judgment rendered by a justice of the peace for \$25, exclusive of costs, upon the filing and docketing of a transcript thereof in the Erie county clerk's office became a lien on the estate of the "defendant within the county, in the same manner and with like effect as if such judgment had been rendered in the court of common pleas," (2 Rev. St. pp. 247, 248, §§ 127, 128;) and, further, "that an action on a judgment rendered in any court not being a court of record should be commenced within six years," (Id. p. 295.) In *Waltermire v. Westcott*, 16 N. Y. 16, it was held that the six-years limitation by said section did not destroy the statutory lien of a justice's judgment, and that the sale of real property on an execution issued more than seven years was valid and effectual to pass title to the purchaser. The court said: "It would be contrary, therefore, to all just rules of construction to extend its operation beyond the ordinary and reasonable interpretation of its language. The reasoning which has been fully established that statutes of this sort act upon the remedy only, and not upon the debt, equally proves that the operation of the statute in question here is confined to the particular remedy by action." By section 63 of the Code of Procedure it was provided that from the time of filing a transcript of such a judgment "the judgment shall be a judgment of the county of Erie * * * but no such judgment for a less sum than \$25.00, exclusive of costs hereafter docketed, shall be a lien upon, or enforced against, real property, and, by section 90 thereof, that an action could be commenced "upon a judgment or decree of any court of the United States, or of any state or territory within the United States, * * * within twenty years," and that the statute was a lien on real property for ten years. Section 282 of said Code. The years limitation of the Revised Statutes was thereby abrogated, and judgment of a justice of the peace were placed, so far as the remedy by way of execution and enforcement was concerned, upon the same footing as a judgment of a court of record. *Dieffenbach v. Roch*, 112 N. Y. 621, 20 N. E. Rep. 560. By the enactment of the present Code of Civil Procedure the law upon this subject was materially changed, but the provision of the statute above cited sub-

tially restored. Section 3017 of said Code provides that on the filing of a transcript of a justice's court judgment, "the judgment is deemed a judgment of the county court of that county, and must be enforced accordingly. * * * The judgment is not a lien upon, and cannot be enforced against, real property, unless it is for \$25.00 or more, exclusive of costs;" and by section 382, subd. 7, that an action upon a judgment rendered in a court not of record must be commenced within six years.

Supplementary proceedings cannot be termed an action upon a judgment. By section 3833 of the present Code an action is defined to be "an ordinary prosecution, in a court of justice, by a party against another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense;" and, by section 3834 thereof, that "every other prosecution by a party for either of the purposes specified in the last section is a special proceeding." By section 414 of the present Code it is provided that the word "action" is to be construed, when it is necessary to do so, as including a special proceeding; and by subdivision 1 of said section that it does not apply "where a different limitation is prescribed by law." By section 3017, upon filing and docketing of the transcript of a justice's judgment, it "is deemed a judgment of the county court, and must be enforced accordingly." By section 2435 it is provided that, "at any time within ten years after the return * * * of an execution, * * * the judgment creditor * * * is entitled to an order," etc.; and by section 2453 it is provided that, "in order to entitle a judgment creditor to maintain either of the special proceedings, * * * the judgment must have been rendered upon the judgment debtor's appearance * * * for a sum not less than twenty-five dollars," etc. It is nowhere provided that the judgment upon which these proceedings are founded must be a court of record judgment.

Under these provisions of the Code it seems to me that it was clearly intended that supplementary proceedings on a justice's judgment can be maintained at any time within ten years. In *Rose v. Henry*, 37 Hun, 397, the plaintiff obtained judgment in a justice's court against defendant in October, 1877, and filed transcript thereof March, 1885, and moved the county court for leave to issue an execution. The court said: "The statute [of limitations] operates only on the remedy by action. The judgment was neither extinguished nor dead. Even a civil action could have been maintained upon it if the statute of limitations had not been interposed as a defense. * * * The six-years statute of limitations can have no application," and cannot be invoked to defeat the statutory remedy by execution. Numerous cases have arisen where the judgment creditor, after the lapse of six years, applied for leave to issue execution on a justice's judgment, wherein it was held that the limitation of six years within which action must be brought did not affect the remedy by execution. *Herder v. Collyer*, 6 N. Y. Supp. 513; *Kincaid v. Richardson*, 25 Hun, 237, 9 Abb. N. C. 315; *Rose v. Henry*, 37 Hun, 397; *Olsen v. Roebbing*, 4 Month. Law Bul. 63. The defendant refers to the case of *Dieffenbach v. Roch*, 112 N. Y. 621, 20 N. E. Rep. 560. It has no bearing upon the question here involved. In that case the plaintiff endeavored to offset a justice's judgment six years after its rendition against defendant's claim, and the court held it had not become a judgment of the county court by filing transcript, but remained a justice's judgment, and was barred under the six-years statute of limitations. In *Davidson v. Horn*, 47 Hun, 51, cited by defendant, the transcript had been filed and judgment docketed more than six years after the rendition of a justice court judgment, and the question arose upon a motion for the appointment of a receiver in supplementary proceedings. The court held that the statute of limitations was a vested right, and, as the same had run before the filing of the transcript, the defendant could not be divested of such a right, and that it could be asserted when the first opportunity presented, and that proceedings to enforce the judgment could not

be maintained. In this case the court did not consider the effect of sections 414 and 2435 of the Code of Civil Procedure, prescribing a different limitation, and it does not seem its attention was called to the same. Although this case is in conflict with *Rose v. Henry*, it is no more than of equal authority; but the latter, in my opinion, is more in bearing with the provisions of the Code upon the subject described, and should be followed. In *Herrman v. Stalp*, 6 N. Y. Supp. 514, the question involved was whether an execution could be issued on a judgment rendered in a district court of New York city after the lapse of six years. BOOKSTAVEN, J., in delivering the opinion, in June, 1889, held that, the judgment being practically dead, no live execution could issue thereon. In this case, as in *Davidson v. Horn*, the learned justice did not consider the limitations provided by the sections above cited relative to these proceedings. In April, 1889, just two months prior to the time of delivering said opinion, practically the same question was presented to him in *Herder v. Collyer*, 6 N. Y. Supp. 513, in which he held the reverse, upon the strength of *Waltermire v. Westover*, *supra*, notwithstanding the fact that the case of *Dieffenbach v. Roch* was practically called to his attention as an authority contrary to his then expressed opinion.

This proceeding is clearly not "an action upon a judgment," within the contemplation of section 382, and the motion to vacate the order must be denied. If the foregoing views are not correct, there is still another objection to the granting of the motion. The defendant made no objection prior to or at the time of the appointment of the receiver, and it seems to me it was too late to avail himself of said objection. *Williams v. Willis*, 15 Abb. Pr. (N. S.) 11; *Dezengremel v. Dezengremel*, 24 Hun, 457. The rule as laid down in regard to the statute of limitations is that it acts only as the remedy, that it does not impair the obligations of a contract or pay a debt, but that it is merely a statutory bar to a recovery. *Butler v. City of Oswego*, 8 N. Y. Supp. 114; *Brazill v. Isham*, 12 N. Y. 9; *Waltermire v. Westover*, 14 N. Y. 16; *Rose v. Henry*, 87 Hun, 397; *Driggs v. Williams*, 15 Abb. Pr. 477. Section 413 of the Code of Civil Procedure provides that "the objection that the action was not commenced within the time limited can be taken only by answer," and that in a special proceeding the said objection must be taken in said proceeding. Section 74, Code Proc. The courts have uniformly held in accordance with said sections. *Dezengremel v. Dezengremel*, 24 Hun, 457; *Butler v. Mason*, 16 How. Pr. 546; *Sands v. St. John*, 36 Barb. 628.

The plaintiff urged still another objection to the granting of said motion, which I think is also well taken. The defendant and his attorney were present at the time of the appointment of the receiver; and, not having objected, he is now precluded from raising the statutory provision in his behalf, and is presumed to have waived it. A party may waive by silence a statutory, or even a constitutional, provision in his behalf, and, having once waived the same, cannot afterwards insist upon it to the injury or detriment of another, relying upon such silence and waiver, where the said waiver does not involve considerations of public policy. *People v. City of Rochester*, 45 Hun, 102; *Embury v. Conner*, 3 N. Y. 511; *Baker v. Braman*, 6 Hill, 47; *Williams v. Potter*, 2 Barb. 316; *In re Cooper*, 93 N. Y. 507; *Cropsey v. Perry*, 23 Wkly. Dig. 162; *Webb v. Osborne*, 7 N. Y. Supp. 762. A waiver may be implied. *In re New York, W. S. & B. Ry. Co.*, 35 Hun, 575; *Howard v. Sexton*, 1 Denio, 440; *People v. Taylor*, 34 Barb. 481; *Cole v. Van Keuren*, 51 How. Pr. 451.

Upon the facts presented upon this motion, I think the doctrine above expressed is fittingly applicable. The defendant had ample time in which to raise said objections, but did not consider it advisable to do so until his wife became involved in litigation with the receiver appointed over two years ago.

The motion to vacate said order must be denied, with \$10 costs.

PECK v. DORAN WRIGHT CO., Limited.

(Supreme Court, General Term, Third Department. July 7, 1890.)

1. GAMING—ACTION FOR MONEY LOST—PAROL EVIDENCE.

In an action under 8 Rev. St. N. Y. (7th Ed.) p. 1962, § 9, providing that a person who shall pay any money on the event on any wager may recover the same of the winner, it appeared that plaintiff gave defendant written orders to buy wheat for him, and paid the money sued for as margins to defendant, who agreed to carry the wheat until ordered to sell by plaintiff. *Held*, that parol evidence was admissible to show that the real understanding between the parties when the orders were given was that wheat should not be delivered, but that only the difference in the market price should be paid or received.

2. SAME—SUFFICIENCY OF EVIDENCE.

Plaintiff testified that at the commencement of his dealings he asked defendant's agent as to their course of business, and the latter replied that they had no wheat to deliver, and did not expect their customers to want any; that it was merely to adjust the difference between the price at the time of ordering wheat bought and ordering it sold. The agent denied that any such conversation took place. There was no proof that any wheat was bought or sold. *Held* sufficient evidence to support a verdict for plaintiff, even against the evidence furnished by the form of the contract.

3. CORPORATIONS—ULTRA VIRES.

Defendant cannot repudiate the acts of its agent upon the ground that it is a corporation formed to do a lawful business, and therefore the unlawful dealings of its agent were *ultra vires*.

Appeal from circuit court, Albany county.

Action by Henry C. Peck against the Doran Wright Company, Limited, to recover, under 8 Rev. St. N. Y. (7th Ed.) p. 1962, § 9, the money lost by him upon wager contracts with the defendant upon the market price of wheat. Section 9 provides as follows: "Any person who shall pay, deliver, or deposit any money, property, or thing in action upon the event of any wager or bet herein prohibited, may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager, bet, or stake, or any part thereof, whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not." The defendant was a corporation organized to do a general brokerage and commission business in grain and other commodities. It had an office in Albany, in charge of one Fuller. Plaintiff, at such office, gave to the defendant a large number of orders to buy wheat, and paid various sums as margins. The transactions in form were contracts whereby the defendant bought for the plaintiff, as a broker, upon commission, the wheat ordered at the market price on the day of the order. The plaintiff paid the defendant various sums as margins. The defendant ostensibly carried the wheat upon the margins until the plaintiff ordered it sold, when they accounted with each other upon the basis that the selling price was obtained. Judgment was entered on a verdict for plaintiff, and an order was entered denying a motion for a new trial on the minutes, and defendant appeals.

Argued before LEARNED, P. J., and LANDON, J.

Wm. H. Shepard, for appellant. Eugene Burlingame, for respondent.

LANDON, J. The dealings between the parties were in form genuine contracts, evidenced in writing made at the time, for the purchase and sale by the defendant, as a broker, upon margins, and for a commission, of wheat at the market prices ruling at the time. The losses sustained by the plaintiff were apparently caused because he bought wheat at a higher price than he subsequently sold it. The burden was upon the plaintiff to prove that the apparent contract was not the real contract, and that the real understanding between the parties was, when the contracts were made, that the wheat should not be delivered, and that only the difference in the market price should

be paid or received; in other words, that the parties did not deal in wheat, but agreed to gain from or lose to each other as the price varied between the day the purchase was ordered and the day the sale was ordered. *Kingsbury v. Kirwan*, 77 N. Y. 612; *Story v. Salomon*, 71 N. Y. 420; *Bigelow v. Benedict*, 70 N. Y. 207. The jury have found, upon the evidence, that the plaintiff made good the burden resting upon him. We think the verdict supported by the evidence. True, the written contracts were against him; but the statute against wager contracts would be of small value if the truth could not be shown by extrinsic evidence, and it was competent to give such evidence.

The plaintiff testified that at the commencement of his dealings with Fuller, who represented the defendant, and through whom the same were made, he asked him how the defendants executed their orders, and Fuller replied "that they assumed their orders, and booked them themselves; that they had no wheat to deliver; that they did not expect their customers to want any wheat; that it was merely to adjust the difference as between the market price and the prices marked on the slip, [contract.]" Fuller testified that nothing of the kind was said, and thus it was for the jury to settle the fact. The plaintiff also testified that he did not intend to buy any wheat, but only to deal with respect to its fluctuations in price. The absence of any testimony that wheat was purchased upon any of the orders, and the accounts given of the various transactions, tended to indicate that they dealt with reference to the price of wheat, and not in wheat.

The defendant objects that it is a corporation, authorized to do a legitimate business, and that, as it could not lawfully authorize Fuller to do an illegitimate business, it cannot be bound by his acts in the prosecution of it; that the attempt to confer such authority would be *ultra vires*, and the attempted ratification of the agent's acts equally so. The position is untenable. A person, equally with a corporation, has no lawful power to do wrong; but both have the capacity to act, and the capacity to act amiss inheres in the capacity to act at all. Given the power and capacity to do right, the actor may nevertheless do wrong. Unless the actor is wholly irresponsible, he must answer for his wrong action, partly in justice to those injured thereby, and partly as a deterrent to its like repetition by himself and others. If the agents of a railroad corporation take my timber or iron against my consent, and convert it into a bridge, to the use of the corporation, the corporation must either restore my property, or pay me for it. Here the defendant corporation has obtained the plaintiff's money. It was obtained by means of wager contracts. Confessing that it has the money, the defendant practically argues that, because it could not thus obtain it within its lawful powers, it does not really have it. Pretending to disclaim the transactions by which it obtained the money, it practically argues that its pretended disclaimer gives it title to keep the money. But, in truth, it cannot perfect its disclaimer of the transaction without surrendering its fruits; it cannot retain the money without adopting its agent's method of obtaining it; it cannot insist upon a defense so long as it refuses to qualify itself to interpose it. The doctrine of *ultra vires* is in no wise applicable to the case. We have examined the various other exceptions to the admission of evidence, and to the rulings of the court, and find none which require a reversal. Judgment affirmed, with costs.

DINTRUFF v. ROCHESTER CITY & B. R. Co.

(Supreme Court, General Term, Fifth Department. June 22, 1880.)

HORSE AND STREET RAILROADS—NEGLIGENCE.

Evidence that the driver of defendant's horse-car would have been able to control the horses, and thus to prevent an accident, but for the fact that the rear brake had been mischievously interfered with by boys; that the usual mode of preventing

such interference, the liability to which was matter of common knowledge to all familiar with the operation of the cars, was by tying the brake down; and that defendant's superintendent knew that the brake of that particular car had been tied down at one time to prevent such interference,—is sufficient to show negligence on defendant's part.

Appeal from circuit court, Monroe county.

Action by George Dintruff against the Rochester City & Brighton Railroad Company. Judgment on verdict for plaintiff, defendant's motion for new trial denied, and it appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.
Raines Bros., for appellant. *Walter S. Hubbell*, for respondent.

MACOMBER, J. The injuries to the plaintiff, for which this action is brought, were sustained at 8:30 o'clock in the evening of August 31, 1888, on State street, in the city of Rochester. A presidential campaign club of the Ninth ward was marching, at this time, southward on State street, towards the center of the town, carrying colored lamps, preceded by a band of music. Following immediately behind the torch-bearers was a company of mounted men; and these, in turn, were followed by the residue of the club on foot. Near the corner of Jay street the procession was welcomed by the firing of Roman candles by people ahead, which caused the horses attached to the defendant's car to plunge violently, and to run. The plaintiff, a lad of nine years of age at that time, who was with the crowd of people on the west side of the street, attempted to go across the street-car tracks to the east side of the street, away from the crowd, so as to get a better view of the parade, crossing the track ahead of the band. In the mean time the persons in the procession, apprehending injury from the horses or the car, moved away from the tracks so as to escape any collision. The horses drawing the car plunged forward, striking the boy, and throwing him down, and the car-wheel so lacerated his foot as to maim him for life; for which injuries the jury rendered a verdict for the sum of \$2,000.

Very little need be said of the case, so far as the same relates to the charge that the negligence of the boy contributed to the production of the injuries which he received. There was, apparently, credible evidence, not to say uncontroverted testimony, that the boy not only did not see the runaway team and car, but that he could not, with the exercise of reasonable care, have discovered their approach, before the instant of the collision. There is a suggestion of testimony that, in passing the tracks, he did not go across at right angles, but ran for a distance along them for a space of 150 feet or thereabout. But this evidence, as it appears in the case, even if it is not a mistake in proof-reading, is wholly inconsistent with the facts which the jury was warranted in believing to exist, namely, that the boy did not imperil his own safety by walking any considerable distance upon the railway of the defendant.

The omission of duty on the part of the defendant towards the plaintiff and others is not made in the least doubtful by the evidence. The car in question was a double-end car, designed to be drawn by two horses, with both a driver and a conductor. The steps at one end thereof were removed, and the car converted into what is commonly spoken of as a "bob-tail," namely, a car without a conductor, and one where the collection of fares is made by the deposit of the fare by each passenger, in his own behalf, into the box, or into a metallic conveyor running the whole length of the car to the box. As originally constructed, there was a brake-handle at each end of the car, connecting the same with the brake, so that when one brake-handle is turned the slack in the chain is taken up, which prevents the brake from being applied at the other end of the car. A short time before the collision, some mischievous boys, who were catching rides on the rear platform, either intentionally or thoughtlessly turned the rear handle of the brake so that the brake

would not work; and, when the driver attempted to stop the running by applying the brake at his end of the car, he found that the same would not work, and consequently he was utterly powerless to control the car. For this, the evidence would have warranted the jury in saying that, ever frightened the horses may have been by the band, and by the pyromaniacs, they could have been controlled, and that no injury to pedestrians would have happened. But the brakes were not in good order. The neutralization of the power of the front brakes was a matter well known not only to the drivers, but to the officers of the company. It was common knowledge to all familiar with the operation of these cars that some boys might actually turn the rear brake, and thus render futile the effort of the driver to control the car in an emergency. One of the remedies for a prevention of accidents of this description was the tying down of the rear brake so that intruders could not interfere with it. The evidence charges the defendant's superintendent with knowledge that the particular car had had the rear brake tied down at one time so as to prevent mischievous interference therewith. Notice, therefore, of the dangerous condition of the apparatus for stopping the progress of the car in an emergency was brought directly home to the corporation. The public has the right to assume that the ordinary precaution, well known to the corporation, would be taken to prevent any accident which was liable to happen by reason of the accidental or intentional derangement of the brakes.

The exception taken by the defendant's counsel to the evidence relating to the employment of metallic conveyors of the fares to the money-box in the car is not well taken, for the reason, among others, that it was upon cross-examination of the defendant's witness Brower, the superintendent of the defendant, who had given evidence designed to excuse or extenuate the failure to have a conductor upon this car.

We have examined the several exceptions taken to the charge of the learned judge at the trial, and do not find in them anything that would justify us in interfering with the verdict. The judgment and order appealed from must be affirmed. All concur.

MUTUAL LIFE INS. CO. v. CRANWELL *et al.*

(*Supreme Court, General Term, Fourth Department. April, 1890.*)

- MORTGAGES—FORECLOSURE—DEFENDANTS' RIGHTS AS BETWEEN THEMSELVES.**
Code Civil Proc. N. Y. § 521, which permits a judgment to determine the rights of defendants as between themselves, applies only to those cases where relief sought by defendants is based on facts involved in the litigation of plaintiff's claim; and in foreclosure proceedings the mortgagor, who has conveyed title to her co-defendants by a deed absolute on its face, will not be permitted to set up with them the question whether the deed was intended merely as security for debt, and thereby delay plaintiff in obtaining satisfaction of his mortgage.

- COSTS—EXTRA ALLOWANCE—DISCRETION OF COURT.**

An extra allowance of costs under Code Civil Proc. N. Y. § 3253, which authorizes such an allowance in foreclosure proceedings in a sum not exceeding 2½ per cent of the amount due on the mortgage, nor the aggregate sum of \$300, "in the discretion" of the court, will not be reviewed on appeal unless there has been an abuse of discretion.

Appeal from special term, Oneida county.

Foreclosure by the Mutual Life Insurance Company of New York against Margaret Cranwell, George W. Cranwell, Charles C. Kellogg, Patrick Bulger, Benjamin R. Robson, Erastus Z. Wright, George S. Dana, Elizabeth and Eliza K. Ross. From a judgment of foreclosure for \$15,847.58 rendered against defendant Margaret Cranwell appeals.

In the notice of appeal, it is stated: "The appellant intends to bring this case for review upon such appeal, and also hereby appeals from, the order

supreme court allowing said judgment, and denying said motion to vacate the order of reference, etc., and granting \$200 extra allowance, as in a difficult and extraordinary case." Appellant and her husband executed and delivered to the plaintiff, on the 10th of January, 1885, a bond in the penal sum of \$20,000, and an ordinary real-estate mortgage, collateral thereto, covering premises situated in the city of Utica, particularly described in the complaint. On the 26th day of May, 1885, appellant and her husband executed another bond, in the penal sum of \$10,000, conditioned to pay \$5,000 and interest, and, as collateral security thereto, they executed another mortgage covering the real estate mentioned in the complaint, and delivered the same to the plaintiff; and, in connection with the usual allegations in the complaint for the foreclosure of mortgages, it is alleged, viz.: "And the plaintiff further alleges, on information and belief, that Charles C. Kellogg, Patrick F. Bulger, Benjamin R. Robson, Erastus Z. Wright, George S. Dana, Eliza Ross, and Eliza K. Ross have, or claim to have, some interest in or lien upon the said mortgaged premises, or some part thereof, which interest in, or lien, if any, has accrued subsequently to the lien of said mortgage." The only prayer of the complaint for a personal judgment is in the following words: "That the defendants Margaret Cranwell and George W. Cranwell may be adjudged to pay any deficiency which may remain after applying all said moneys so applicable thereto," etc. The complaint contains a prayer for the appointment of a receiver, and it was stated in the argument that a receiver had been appointed. On the 21st of May, 1889, the appellant served an answer containing some denials, and "for a second and separate answer and defense, and as a counter-claim alleged and directed against the said defendants Patrick F. Bulger and Benjamin R. Robson, and in answer to both counts and cause of action in said complaint set forth, the said defendant Margaret Cranwell, impleaded with said other defendants, alleges that heretofore, and on or about the 19th day of July, 1888, an agreement was made and entered into between said defendant Margaret Cranwell and said defendant Benjamin R. Robson, and also said defendant Patrick F. Bulger, acting as attorney for said Robson, and in his own behalf, and to secure notes held by him, that said Cranwell should convey to said Robson the property described in said complaint, and also other property belonging to said Cranwell. * * * That, in consideration thereof and therefor, said Robson should loan to said defendant Cranwell sufficient money to pay certain then pressing debts and obligations due from her to said defendant Kellogg and said Wright and Dana, and said note to said Patrick F. Bulger, and for interest, insurance, and taxes. * * * And the said parties, Cranwell, Robson, and Bulger, further covenanted and agreed that said Robson should reconvey the said property to said Margaret Cranwell two years from said date, by a good and sufficient deed, upon the payment to said Robson or said Bulger of the amount of money advanced or loaned by said Robson, or either of them, to said Cranwell, or paid out for her or on her account, to pay said specified debts to said Kellogg, Wright, and Dana and Bulger, or to plaintiff, with interest, insurance, and taxes, and also the sum of \$500 to said defendant Bulger for his services, and for the said loan or accommodation, and as a bonus thereon. That said Cranwell agreed to retake or repurchase said property, and pay therefor the said amounts so paid out by said Bulger and Robson, and the said \$500, not to exceed the sum of \$4,610, over and above said plaintiff mortgages, * * * and pay the same at the expiration of two years from said date. That said deed to said Robson was, and was intended to be, only a mortgage upon said terms." The answer contains numerous other allegations relating to the agreement between Mrs. Cranwell and defendants Robson and Bulger, alleging divers breaches of the agreement between her and said defendants Robson and Bulger; and her answer contains a prayer for relief between her and Robson and Bulger, and that "said agreement alleged between said defend-

ants Cranwell, Bulger, and Robson be declared adjudged, and, if necessary, reformed, and thereupon specifically performed, and that said defendants required to specifically perform, and in all respects to carry out, the provisions of said contract, and satisfy said subsequent incumbrances, and that pursuant thereto said defendants Robson and Bulger be directed and required to take care for the property described in said complaint, and to keep the same free from the mortgages in said complaint described." Before the trial, a copy of her answer was served upon the defendants Robson and Bulger. At the close of the evidence the referee held and decided, viz.: "There is no defense made out here, and I think the plaintiff is entitled to the ordinary decree of foreclosure and sale in this case." A report was made and delivered by the referee, and in a special finding made by the referee in regard to the action of foreclosure commenced in 1886, the referee found "that such action was duly settled and discontinued, and an order to that effect duly entered in said clerk's office, prior to the commencement of this action." There were 16 requests to find conclusions of law made to the referee, and 14 refused. To such refusals, exceptions were taken; and there were 14 exceptions filed to the referee's report.

William C. Wilcox, a witness for plaintiff, whose testimony is contained in folios 436, 439, 443, 446, 454, 457, of the printed case, referred to in the opinion, testified that he remembered about the prior action of foreclosure commenced in 1886; that he went to New York, and called on plaintiff's office at the request of the Cranwells; that he arranged with the plaintiff for a withdrawal of that action; and that, on paying interest and costs, the action was discontinued. The plaintiff also introduced in evidence the following stipulation, also referred to in the opinion, signed by its attorney:

"The defendant Margaret Cranwell, having paid the plaintiff the costs and disbursements in the above entitled action, and the interest due September 1, 1886, on the mortgages for the foreclosure of which this action was brought, it is hereby stipulated that said action be, and the same hereby is, discontinued, without further costs to either party as against the other; and it is further stipulated that, upon filing this stipulation with the county clerk of Oneida county, an order discontinuing said action, and directing the cancellation of the notice of the pendency of said action filed with said clerk on November 13, 1886, may be entered, without further notice. WARD HUNT, Plaintiff."

Plaintiff then introduced the following order, also referred to in the opinion, entered in the office of the Oneida county clerk:

"On reading and filing the foregoing stipulation in the above entitled action, on motion of Ward Hunt, the plaintiff's attorney, it is ordered that said action be, and the same hereby is, discontinued, without further costs to either party as against the other; and it is further ordered, on like motion, that the notice of the pendency of said action, filed and recorded with the county clerk of Oneida county on November 13, 1886, be canceled of record upon the production of this order. M. J. BRAYTON, Clerk."

Code Civil Proc. N. Y. § 521, permits the judgment to determine the respective rights of two or more defendants as between themselves.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

E. D. Matthews, for appellant. *H. J. Cookinham*, for respondent. *Sam Kernan*, for defendants Bulger and Robson.

HARDIN, P. J. 1. We are of the opinion that there was abundant evidence before the referee to warrant his finding, as a matter of fact, that the action which was commenced by the plaintiff, in 1886, to foreclose the mortgage now in suit, was settled and discontinued prior to the commencement of the present action. See folios 436, 439, 443, 446, 454, 457, and the stipulation signed by Ward Hunt, then plaintiff's attorney, dated December 3, 1886, found on page 92½ of the appeal-book, and the order entered thereon in the O

county clerk's office in pursuance of the stipulation canceling the notice of the pendency of the action, filed November 13, 1886. *Wormer v. Canovan*, 7 Lans. 36.

2. Undoubtedly, as between the appellant and Robson, he was a mortgagee in possession of the premises at the time of the commencement of this action. After a careful examination of the defendant's answer, and the conveyance made by her to Robson, and the contract which was entered into by Robson with her to reconvey the premises to her at the expiration of two years, and after a careful scrutiny of all the evidence that was offered, as well as that which was received by the referee, we are of the opinion that the appellant had no defense to the bonds and the mortgages set out in the complaint as against the plaintiff. She was, therefore, not entitled to delay the foreclosure of the mortgages held by the plaintiff. Appellant has called our attention to section 521 of the Code of Civil Procedure. Substantially the same provision was found in section 274 of the Code of Procedure. The latter section was construed in *Institution v. Roberts*, 1 Abb. Pr. 381, where it was held, viz.: "The affirmative relief which the court is authorized by section 274 of the Code to grant to a defendant is affirmative relief against the plaintiff only, not against a co-defendant." Construction was also given to that section of the Code of Procedure in *Kay v. Whittaker*, 44 N. Y. 565; and it was there held, viz.: "Under the provision of the Code, § 274, for determining the ultimate rights of the parties on each side as between themselves, the relief which defendants may have as against each other must be based upon the facts involved in the litigation of the plaintiff's claim, and as a part of the adjustment of that claim, and not upon claims with which the plaintiff has nothing to do, and which are properly the subject of an independent litigation between such defendants." In *Lansing v. Hadsall*, 26 Hun, 621, which was decided in this department in 1882, we followed *Kay v. Whittaker*, *supra*; and in the opinion, delivered by SMITH, J., it was further said: "The provisions of the Code referred to are simply declaratory of the pre-existing practice in chancery. *Jones v. Grant*, 10 Paige, 348." And in referring to the rule in *Elliott v. Pell*, 1 Paige, 268, and in stating the exceptional cases in which a decree should be made, the chancellor said it "must be founded upon, and connected with, the subject-matter in litigation between the complainant and one or more of the defendants." The rule has recently been reaffirmed in *Smith v. Hilton*, 2 N. Y. Supp. 820; *Institution v. Burdick*, 87 N. Y. 40. In the case of *Jones v. Grant*, 10 Paige, 348, parties who were somewhat similarly situated to property affected by foreclosure proceedings sought by petition "for summary relief," and the chancellor again asserted the rule, and stated: "No such decree can be made, between co-defendants, founded upon matters not stated in the bill, nor in litigation between the complainant and the defendants, or either of them." In that case the petition was dismissed, "but without prejudice to the rights of the petitioners to proceed either by a suit at law or by a bill in equity founded upon the decree in this cause, and the matters stated in their petition, to recover compensation in damages." We think it proper that the judgment in this case should be modified so as to contain a protective clause somewhat similar to the one we have just quoted, and as so modified the judgment of foreclosure should be affirmed.

3. After the order made at the special term held at Rome on the 4th of June, the parties appeared before a justice of this court who designated a suitable person to act as referee, and thereafter an order as of the term commencing the 4th of June was prepared and entered; and apparently, from the note at the foot of the order, it was entered with the clerk of Onida on the 27th of June, 1889. The reference was brought on for hearing before the referee named in the order. No motion was made to set the order aside until after the hearing of the referee. While that order stood the referee was fully commissioned by the court to act as such referee. He therefore properly over-

ruled the objections that were made before him in respect to his power to terminate the issue between the plaintiff and the appellant. After his report was made upon the issue which he was authorized to hear and determine, after his report was made in pursuance of an order authorizing him to compute the amount due as to the non-answering defendants, which order was made at the Jefferson special term, a motion was made at the Onondaga special term to confirm the referee's report, and for a judgment. When that motion came on to be heard, the appellant sought to have the order of reference vacated. We think the special term properly denied the motion to vacate the order of reference.

4. As to the order granting an extra allowance, we think a case was made calling for the exercise of the discretion of the court, under section 8253 of the Code of Civil Procedure. The language of that section authorizes the court "in its discretion," to award "in an action of foreclosure a sum not exceeding two and one-half per centum upon the sum due, or claimed to be due, upon the mortgage, nor the aggregate sum of \$200." It was held in *Morse v. M. Brouck*, 13 Wkly. Dig. 393, (third department,) that such discretion will be reviewed where there has not been an abuse of it. See, also, *Hamt v. Railway Co.*, 8 N. Y. Supp. 546. We think the order granting the extra allowance should stand.

Judgment modified by inserting a clause therein to the effect that the plaintiff shall be "without prejudice to the right of the Cranwells to proceed, either by a suit at law or a bill in equity, to enforce the agreement set up in the answer against Robson and Bulger, or to recover compensation in damages, and, as so modified, judgment affirmed, with costs. See *Jones v. Grant*, Paige, 351. Orders appealed from affirmed, with costs. All concur.

FENNO *et al.* v. HANNAN *et al.*

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

FRAUD—PLEADING AND PROOF.

In an action based on false representations by defendants, a verdict for plaintiffs was set aside on the ground that it was not sustained by the evidence, and the order was affirmed on appeal. On the second trial a verdict was directed for defendants. The evidence was as consistent with the innocence of defendants as their guilt. Held, that the direction of a verdict would not be disturbed by the general term.

Exceptions from circuit court, Monroe county.

Action of replevin by Isaac Fenno and others against John W. Hannan as sheriff, and others, to recover goods alleged to have been purchased by false representations by the execution debtor. Judgment for defendants. Plaintiffs appeal.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Fanning & Williams, for plaintiffs. *Perkins & Hays*, for defendants.

CORLETT, J. This is an action of replevin commenced in December, 1889. The plaintiffs were wholesale clothiers in Boston, Mass. They sold clothing in question, of the value of about \$2,000, to Michael H. Carroll of Rochester, who afterwards made an assignment to the defendant Thomas Groves, with preferences. The complaint alleges that the goods were obtained by the fraud of Carroll. The assignee did not answer, and the sheriff justified his levy by virtue of an execution upon a judgment against Carroll in favor of the firm of Wile, Brickner & Wile. The action has been tried; the first, before Justice MACOMBER and a jury. A verdict was directed for the plaintiffs. The trial justice set aside the verdict, and granted a new trial, as against the weight of evidence, on payment of costs, which was affirmed on appeal to this court. 2 N. Y. Supp. 474. The defend

paid the costs, and the action was again tried, before Justice RUMSEY and a jury. At the close of the evidence the trial justice directed a verdict for the defendants, and ordered the exceptions to be heard here. When the case was before the court after the first trial, Justice BARKER, who delivered the opinion, reached the conclusion that the evidence required a submission of the case to the jury, but states that a new trial should be granted because of an error in one of the rulings to which exception was taken. A majority of the court, however, agreed with the trial justice; and his decision was affirmed, which involved a payment by the plaintiffs of the costs of trial. This was entirely inconsistent with the granting of a new trial because of error in setting aside the verdict as against evidence, or on exceptions. Carroll carried on business in Main street, in Rochester, from 1880 until he assigned, in 1886. His trade was retail, and he had always been a debtor of the firm of Wile, Brickner & Wile, and purchased goods from them from time to time. His inventory in the early part of 1886 seems to have amounted to over \$11,000. He also owed a sister upwards of \$900. He seems to have been in fair credit—able to purchase all the goods he wanted in his business—until about the time of his failure.

Much evidence was given on the part of the plaintiffs tending to show, as they claim, that he made false and fraudulent representations as to his assets and liabilities, on the strength of which they allege they sold him goods on credit. The defendant denies this, and presents his version of his dealings. All the witnesses were seen by the two trial justices. Each listened to the evidence, saw the witnesses, and had a good opportunity of forming correct conclusions. Each, after all the evidence had been given, reached the conclusion that fraud had not been established. The justice who heard the case the first time allowed it to go to the jury, but set aside the verdict on the ground that the evidence did not warrant the verdict. On the second trial the trial justice refused to submit the case to the jury. A detailed review of the evidence would not be profitable or instructive. An examination of it, however, does not produce the conviction that either of the learned justices fell into an error. A majority of the court did not concur with Justice BARKER. It is a familiar rule that, where fraud is alleged, it must be proved. *Jaeger v. Kelley*, 52 N. Y. 274; *Parker v. Conner*, 93 N. Y. 118; *Stearns v. Gage*, 79 N. Y. 102; *Macullar v. McKinley*, 99 N. Y. 353, 2 N. E. Rep. 9; *Arthur v. Griswold*, 55 N. Y. 400. Where the evidence is equally consistent with innocence and guilt, the former interpretation must be given. *Morris v. Talcott*, 96 N. Y. 100. The evidence in the case at bar is certainly quite as consistent with innocence as guilt. The motion for a new trial must be denied.

All concur.

HOLLISTER *et al.* v. MOTT *et al.*

(*Supreme Court, General Term, Fifth Department. June, 1890.*)

MECHANIC'S LIEN—PERFORMANCE OF CONTRACT.

A contractor agreed with defendant to build three houses, and a sewer to connect each house with a sewer already built, for a stated sum per house. Various payments were made, the houses were completed substantially as agreed, and defendant took possession, but the sewers were not built because it was found that a connection could not be made with the existing sewer, which was not deep enough for the purpose. Afterwards this sewer was deepened, the contractor allowing \$120 therefor. He failed, however, to build the connecting sewers, and defendant completed them at a cost of \$180. *Held*, this failure was not such a breach of the contract as would defeat the contractor's right to the balance due, less the sums of \$120 and \$180, and therefore a mechanic's lien for lumber furnished and used in the houses was enforceable for the amount due after such deductions.

Appeal from judgment on report of referee.

Action by Granger A. Hollister and another against Philander Mott and others to foreclose a mechanic's lien. Judgment for plaintiff, from which defendant Mott appeals.

Argued before DWIGHT, P. J., and MACOMBEE and CORLETT, JJ.

M. M. Waters, for appellants. *F. L. & J. E. Durand*, for appellees.

CORLETT, J. On the 22d day of April, 1887, Philander Mott and John Huls entered into a written agreement, whereby Huls agreed to build for Mott three dwelling-houses on the same number of lots of land on the north side of Clifford street, in the city of Rochester. The price of the dwelling-houses, finished, was to be \$990 each. The size, time, and mode of finishing, and all the particulars, were set out in the agreement. It was also provided that Huls should put in a sewer for all the houses, connecting with the sewer Mott had built on the south side of Crawford street the season before. The laterals for all the sewers were to be laid under ground and run from the back end of each cellar, and all the conductors should be so arranged as to convey the water from the roof to the laterals at the back end of each cellar. It was afterwards ascertained that the sewer referred to as the one into which the sewer agreed to be built in the contract was too small and was not deep enough for that purpose. Huls, upon the request of Mott, delayed the construction of the sewer and the putting in of the water-work. In September, 1887, Mott agreed with one Tripp and others for deepening the sewer, and for its expansion over the courses specified in the contract with Huls, so as to drain the three houses, which job Tripp was to complete within 90 days. Huls consented to this agreement, and allowed for its completion \$120, that being the sum paid by Mott to Tripp. After the completion of the houses in other respects, Huls neglected to put in the laterals for the sewers, which Mott completed at an expense of \$180. Huls also neglected to properly plaster the houses, and the expense of remedying this was \$35. One of the chimneys was also improperly built. This defect cost \$35 to remedy. There were no other defects. Mott paid Huls upon the contract \$1,900, and \$120 to Tripp, making in all \$2,020. The defendants turned over to Huls, after making the contract, lumber of the value of over \$800, to be used in the construction of the houses, which was so used. That sum of lumber remains unpaid. Huls performed extra work at Mott's request, the value of the value of \$35. Mott took possession of the houses in October, 1887, and on the 10th of October of that year the plaintiffs, who were lumber dealers, filed notice of lien upon the premises for \$800. Mott was indebted to Huls upon the building contract, and for extras, including interest, to September 21, 1889, the date of the report, the amount of \$875. The action is brought to foreclose the lien. Issue was joined; the case was referred; the referee found the above facts upon sufficient evidence; after deducting the above amounts for defective construction and non-performance, judgment was entered upon his report, and the defendant appealed to this court. The evidence shows that the plaintiffs furnished lumber to various contractors, and that payments were made to them by different persons without a full account being kept. The defendants claim that the amount found was not shown to be due on account of lumber furnished Huls. The examination of the evidence shows with reasonable certainty that the amount found for which the lien was filed was correct. The appellant further contends that on account of the various defects and omissions, it was not entitled to deductions, but one of substantial non-performance, and that a lien should not be enforced. The plaintiffs contend that there was a substantial performance; also that under chapter 342 of the Laws of 1885 it was not necessary to prove full performance of the contract to enable them as lienors to maintain

the action, and refers in support of his contention to the following cases: *Wright v. Roberts*, 43 Hun, 418; *Larkin v. McMullen*, 14 Daly, 311; *Graf v. Cunningham*, 109 N. Y. 369, 16 N. E. Rep. 551; *Van Clief v. Van Vechten*, 1 N. Y. Supp. 99; *Müller v. Mead*, 3 N. Y. Supp. 784, affirmed, 6 N. Y. Supp. 278. The defects in the chimney and plastering were of trifling importance. Full compensation was made, and a recovery ought not to be defeated on those grounds. The \$180 expense to complete the water connections was more important, but to some extent the difficulty over that question grew out of the shallow sewer. Full allowance was made by the referee for this expense, and, within the above cases, the plaintiffs as lienors should not be defeated on account of this omission. There were no errors on the trial in matters of substance which could prejudice the defendant. The judgment must be affirmed. All concur.

THOMPSON v. McLEAN *et al.*

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

1. SALE—RIGHTS OF VENDOR.

Where a sale of goods is for cash, and after getting possession the vendee refuses to pay for a portion of the goods, the vendor may maintain replevin for such portion.

2. LIABILITY OF AGENT FOR TORT.

One who wrongfully takes property as the agent of another is liable therefor.

Appeal from circuit court, Wyoming county.

Action by Charles D. Thompson against Alexander E. McLean and others. Judgment was given for plaintiff, and defendants appeal.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Fanning & Williams, for appellants. *M. E. & E. M. Bartlett*, for respondent.

CORLETT, J. In February, 1889, William W. Durfee and the defendant Alexander E. McLean were engaged in buying apples for the defendant, Henry B. Slade, a fruit-dealer in the city of Rochester. On the 27th day of that month, Durfee made a contract, in behalf of the defendant Slade, for the purchase of a quantity of apples. The plaintiff's contention was that he sold all his apples for \$1.25 per barrel. The defendants claim that they bought first quality of apples, only, for that price, and that no price was agreed upon for second-class fruit, which amounted to from 40 to 50 barrels. In March the apples were delivered at the Erie depot at Dale, in Wyoming county. The defendant paid \$312.50 for 250 barrels at the alleged contract price for first-class apples. This left between 40 and 50 barrels claimed to be second class. The defendants refused to take these, and pay the price claimed by the plaintiff. He insisted upon the full price for all apples, and refused to allow any of them to be shipped until full payment. The defendants refused, and the plaintiff brought replevin. Issue was joined, and the action was tried in September, 1889, at a circuit in Warsaw, before the court and a jury. The trial resulted in a verdict for the plaintiff. The defendants made a motion for a new trial, which was denied. Judgment was entered, and the defendants appealed to this court. The plaintiff's evidence tended to show the purchase on the terms alleged by him, while the defendants' evidence tended to establish the reverse. The jury found for the plaintiff, the amount of the recovery being limited to the apples not paid for.

It is a familiar rule that, where the sale is for cash, the vendor has a right to the possession until payment. *Osborn v. Ganta*, 60 N. Y. 541; *Russell v. Nicoll*, 3 Wend. 112. A person wrongfully taking property is liable, although he acts as agent for another. *Latimer v. Wheeler*, 3 Abb. Dec. 42; *Judson v. Cook*, 11 Barb. 645. No exceptions were taken on the trial requiring comment. The evidence was sufficient to submit the case to the jury. No errors were committed requiring a new trial. Judgment and order must be affirmed.

All concur.

DUNN v. HUNT.

*(Supreme Court, General Term, Fifth Department. June 20, 1890.)***APPEAL—REVIEW.**

In an action by a vendor against the vendee for refusal to take goods in accordance with the contract of sale, a finding by the referee that, by reason of the failure of defendant to take certain goods, plaintiff was damaged in a certain sum, not being objected to on appeal on the ground that it fails to state the facts, where no case is made, and the evidence is not brought up.

Appeal from judgment on report of referee.

Action by Thomas B. Dunn against John K. Hunt. Judgment was given for plaintiff, and defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.
George E. Warner, for appellant. R. E. White, for respondent.

CORLETT, J. On the 1st day of February, 1884, an agreement in writing was entered into between the plaintiff and E. H. Dickenson & Co., composed of one Dickenson and John K. Hunt. The material parts of the agreement are to the effect that Dunn should manufacture and deliver Globe Brand Dyes at \$4.75 per package, provided the cost did not exceed that amount; also, that if he could manufacture and deliver at less cost than \$4.75, receiving his own services at \$20 per week, he would do so, and that his statement of the cost should be conclusive upon the other party. The agreement was made for the last five years, and the appellants were to take from Dunn during the two years 100 gross packages per month on the average; after that, during the term, 166 packages per month; and, in addition to the gross sum aforesaid, pay 25 cents on every gross package. The \$4.75 should be paid at the end of every month, and the other 25 cents additional at the end of every three months. The action was commenced in February, 1886. The complaint contained three counts. The first was to recover for packages delivered under the agreement; the second was to the effect that the defendant refused to receive the 100 packages per month, and that the number not received during the two years was 978 packages and a fraction, for which the plaintiff sought to recover damages to the amount of \$1,500; the third was to recover damages for refusing to employ the plaintiff to prepare samples. In his answer put in issue the material allegations of the complaint, and the case was referred. In May, 1889, the referee reported in favor of the plaintiff for \$760.40, upon which judgment was entered, and the defendant appealed to this court. The referee found that the defendant had overpaid on account of dyes delivered the sum of \$332.23. He also found "that, by reason of the failure and neglect of the defendants to order and take said 978 76-144 gross packages of said dyes, the plaintiff was damaged in the sum of \$1,092.69;" and, as a conclusion of law, "that the plaintiff is entitled to recover from the defendant, to be collected out of the joint property of both defendants and the separate property of the defendant Hunt, the sum of \$760.40." Hunt was the only defendant personally served. The amount for which judgment was ordered was the sum found for damages, less the amount overpaid. The defendant excepted to the third finding of fact above quoted, and stated as a reason for the exception, "that the same is not a finding of fact, as no case is stated therein, and that the same is an opinion or conclusion." The defendant also excepted to the third conclusion of law, which is as follows: "That the defendant, Hunt, is not entitled to recover any sum whatever against the plaintiff upon the cause of action set up in his answer as a counterclaim." The defendant also excepted to the fourth conclusion of law above quoted, and, after the exception, states various reasons for it.

No case was made, so it comes before this court on the referee's findings and the exceptions thereto. It will be noticed that the only questions before this court are upon the findings of fact above quoted, and the conclusions

law awarding to the plaintiff the amount for which judgment was entered. No errors appear upon the record. The referee distinctly finds the amount of damages sustained by the plaintiff by reason of the defendant's default. The appellant insists that the finding is defective because it fails to state the facts. The evidence upon which the finding is based occurred on the trial, and, if the appellant believed the proof was not sufficient to warrant this finding, he should have prepared a case. Then the merits of his contention could be considered. As it is, it must be assumed that there was evidence to sustain the referee's findings. The conclusion based upon it was the legal result. The learned counsel for the appellant cites numerous authorities to show the true rule of damages. The difficulty with his position is that the record shows no errors. The appellant's argument is seemingly based upon the opinion of the referee; but it is not a part of the record, and is not before the court. *Van Tassel v. Wood*, 76 N. Y. 614; *Verplanck v. Member*, 74 N. Y. 620. But an examination of the opinion of the learned referee fails to disclose any errors. The judgment must be affirmed. All concur.

BECKER v. NEW YORK, L. E. & W. R. CO.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

1. PLEADING—AMENDMENT.

A complaint alleged that plaintiff's cattle strayed upon defendant's railroad track without plaintiff's fault, and that, through the negligence of defendant's servants in managing a train, the cattle were killed or injured. Held, that an amendment to the effect that the cattle strayed upon the track through the failure of defendant to maintain a proper fence, as required by statute, did not change the cause of action, the action being still based on negligence, as before.

2. SAME—ALLOWANCE WITHOUT TERMS.

Where an application to amend is made before the trial, and defendant is not surprised or misled, it is proper to grant the amendment without imposing terms.

Appeal from a judgment on report of referee.

Action by James Becker against the New York, Lake Erie & Western Railroad Company. There was a judgment for plaintiff, and defendant appeals. Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.
George F. Brownell, for appellant. *Obed Edson*, for respondent.

CORLETT, J. This action was brought in July, 1884, for killing and injuring the plaintiff's cattle. Issue was joined, and the action was referred. In February, 1886, the referee reported in favor of the plaintiff. Judgment was entered, and the defendant appealed to this court. The original complaint alleged, in substance, that the defendant was a railroad corporation, and the plaintiff the owner of four cows, of the value of \$200; that they casually strayed in and upon the track of defendant; and that the defendant, by its servants and agents, so carelessly run and managed its cars and locomotive that they ran against the cows, and killed two of them, and injured two others. The answer admitted the corporation, and denied the other material allegations in the complaint. At the commencement of the trial before the referee the plaintiff asked to amend his complaint by alleging that the cattle strayed upon the premises through a fence which the defendant was bound to maintain, and that four cattle were killed instead of two, and three injured. The referee reserved his decision on the question of the amendment. No objection was made or exception taken by the defendant's counsel to the reservation. At the close of the evidence, plaintiff's counsel renewed his application to amend, which was granted. The referee found, in substance, that in April, 1882, four cows and three heifers, the property of the plaintiff, strayed upon the defendant's track for want of a fence, and that while there four of them were killed and three injured by a passenger train on the defendant's road; that the value of the cows killed was \$190, and the damage

to those injured \$55. The referee further found that there was no negligence on the part of the agents and servants of the defendant in running the locomotive or the management of the train which killed and injured the cattle, that the defendant's only negligence was in failing to maintain fences on the sides of its track by reason of which the plaintiff's cattle strayed upon the track and were killed and injured. Judgment was entered for the plaintiff.

The substantial contention on the part of the defendant on the trial was that the amendment allowed by the referee changed the plaintiff's cause of action, and that the referee had no power to grant it on the trial; the defendant claiming that, as the referee found no negligence on the part of the company or its servants in running the train which killed and injured the cattle, a recovery based upon its omission to keep up the fences was not negligence on the part of the company, but a violation of a duty imposed by statute, and that there could be no recovery for a breach of the statutory command under a complaint which alleged specific acts of negligence against the plaintiff by the referee. Proper exceptions were taken by the defendant to present the questions raised. The evidence supported the referee's findings of the killing and injuring of the cattle being caused by the defendant's omission to maintain proper fences. It is provided by the general railroad act that "every corporation formed under this act shall erect and maintain fences on the sides of their road, of the height and strength of a division fence required by law, with openings or gates or bars therein, at farm crossings of the road for the use of the proprietors of lands adjoining such railroads." Laws 1850, c. 140, § 44. In *Corwin v. Railroad Co.*, 34 N. Y. 42, it was held that where a railroad corporation neglects to maintain fences as required by law, and cattle get upon the track and are injured by its engines or cars, the corporation is liable to the owner in damages, although he is not an adjoining proprietor, and it does not appear whence the cattle came upon the road. Judge DENIO, in delivering one of the opinions, stated that the statute imposes a public duty upon railroad corporations, for a violation of which they are subject to indictment, whether individual interests are affected or not. Under this statute, as between the company and adjoining proprietors, there was an implied contract on the part of the company to maintain the fences, gates, bars, and crossings required by statute, but a broader duty was imposed for other reasons to do the things required, and neglect or omission to perform would involve breach of duty and negligence. The doctrine of this case was reaffirmed in *Bradley v. Railroad Co.*, 34 N. Y. 427, and *Rhodes v. Railroad Co.*, 5 Hun, 344. It has been held in this department that a plaintiff can recover for injuries to cattle on a railroad track for want of fences, although there was no negligence in the manner of running or operating the train. All the cases are to the same effect. See *Graham v. President, etc.*, 46 Hun, 386, where it was also held that a person who is injured by a corporation that violates an express statute is guilty of negligence. In *Hungerford v. Railroad Co.*, Id. 339, it was stated and assumed by the court that an action to recover damages from a railroad company by reason of its omission to maintain fences is based upon negligence. The courts have uniformly proceeded upon that assumption. The obligation to ring bells and blow whistles was created and imposed by statute, and the courts have uniformly held that an omission to perform these duties was admissible as evidence of negligence. There can be no substantial distinction between negligence based upon an omission to perform a statutory duty and negligence from other causes. In *Van Raden v. Railroad Co.*, 8 N. Y. Supp. 914, it was held that a statute might be proved upon the question of negligence, though not pleaded. See *Archer v. Railroad Co.*, 106 N. Y. 589, 13 N. E. Rep. 318.

The original complaint charges, among other things, that the plaintiff's cattle strayed upon the defendant's track without his fault. The amendment was only an amplification in alleging that it was the defendant's fault.

omitting to construct proper fences. The amendment in no way involved a new or distinct cause of action. Before the amendment the complaint was for negligence. It was no less so afterwards. The act was the same, not a distinct or different one. The amendment only enlarged the original allegation on the same subject. The application to amend was made before the trial commenced. The defendant, therefore, had full notice of the plaintiff's intention, and it could not have been misled. The learned referee finds, in substance, that there was no evidence of any surprise or misleading, and he was right in not imposing terms. Sections 539, 540, Code Civil Proc. When cattle are upon the track by the fault of the company, a killing or injuring by the train imposes a liability without regard to the care or prudence with which it is operated. The findings of the referee, therefore, on this branch of the case simply negative negligence in operating the train. But he does not find that any degree of skill or care in operating would relieve the company from negligence in omitting to maintain proper fences. If in this respect the statute had been complied with, the defendant would not be liable unless the train was improperly managed or operated. But the company had no right to run trains at all upon the track which would injure or destroy property rightfully there in favor of the owner, but wrongfully and negligently there as against the company. It need not be said that the defendant was not misled by the amendment increasing the number of cattle killed or injured. *Smith v. Railroad Co.*, 85 N. H. 356, is in its essential features similar to the one at bar, is in harmony with the cases above cited, and decisive of this case. The judgment must be affirmed. All concur.

LOESER v. ROSMAN.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

ATTACHMENT—VACATING.

An affidavit for attachment, after averring the indebtedness of defendant to plaintiff, stated that affiant had learned from a neighbor of defendant that the latter had taken a considerable portion of the goods from his store, and packed them for shipment, and that they were not shipped in defendant's name; that on the same day several judgments were entered against defendant, some of them being in favor of relatives; that the sheriff had informed affiant that defendant requested him to sell his property under such judgments without delay; and that defendant had refused to give affiant any information as to his affairs. The affidavit further alleged, upon information and belief, that the said judgments were not based upon any indebtedness, but were procured to be rendered for the purpose of defrauding creditors. *Held*, that an attachment granted on such affidavit would not be vacated, in the absence of counter-affidavits of defendant.

Appeal from special term, Monroe county.

Action by Fred M. Loeser against Harris Rosman. Defendant appeals from an order denying a motion to vacate an attachment.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Lewis Marshall, for appellants. *Wile & Goff*, for respondents.

CORLETT, J. In September, 1889, the plaintiff was a merchant in Rochester engaged mainly in selling clothing. The defendant was a retail dealer in clothing at Lowville, in Lewis county. About the 4th day of that month the plaintiff sold a bill of goods to the defendant of the amount of \$428.88, which remains unpaid. About the 4th day of January, 1890, the plaintiff commenced this action, and upon his affidavit, and that of Morris Wolff, obtained an attachment at chambers from a justice of this court. On the 24th day of February a motion to vacate the attachment based on the original papers was made at special term, and denied. From the order entered the defendant appealed. The plaintiff's affidavit stated, in substance, the amount of the bill of goods sold, referring to the items which appear in detail in the case, and that \$428.88 and interest was then due the plaintiff over and above all coun-

ter-claims and set-offs known to him. The affidavit of Morris Wolff shows that he lived in Rochester, and was employed as a salesman for the plaintiff; that he took the order for the bill of goods, and that they were delivered and received by the defendant at his store in Lowville; that about the 31 day of December, 1889, a considerable part of the goods of the defendant were taken from the store, packed by him in cases ready for shipment, but were not shipped in his name. These facts the affiant learned from one C. Burdick, who lived at Lowville, and had a place of business near that of the defendant; that after the removal of the goods, and on the same day, three judgments were entered against the defendant,—one in favor of Sumdle Roman for \$1,806.28; and another in favor of Moses Rosman, both brothers of the defendant; one in favor of Sarah Schimburg for \$209, alleged to be for goods purchased by the defendant from her; and another in favor of the First National Bank of Lowville for \$442.88, which was entered on the 2d day of January, 1890; that executions were immediately issued on these judgments upon which the defendant's goods were levied, except those previously boxed; that the sheriff informed the deponent that the defendant requested him to sell the goods so levied upon without delay, which he declined to do; that on the 1st day of June the affiant had a conversation with the defendant at Lowville, and requested him to inform him about his indebtedness; that the defendant refused to do so, or impart any information on that subject, or about his books or accounts; that he refused to confess a judgment in favor of the plaintiff, and informed him that a proposition for settlement would be made by his brother Sumdle within about four weeks, when business would be commenced in that brother's name. He further stated that the reason why judgments were entered was that certain creditors were pressing for payment, and he thought it best that his brothers and cousin should have their claims paid first. He also stated that the sheriff was in fault for not selling the goods on the 6th day of January, as he had promised. The affidavit further shows that the affiant had used every effort to adjust and arrange the plaintiff's claim without success, and that the goods levied upon were not of greater value than the executions. The affiant also stated various matters upon information and belief, to the effect that the matters above stated were engaged in for the purpose of defrauding creditors; that the judgments were not based upon the defendant's indebtedness; that prior to the above arrangement the defendant seemed to be doing a prosperous business; that the affiant so believed, and that all the surroundings, including the observation of those acquainted, tended so to show in short, that the whole scheme was gotten up to cheat and defraud creditors. He states the sources of his information to be the defendant, the sheriff of Lewis county, L. C. Burdick, and other neighbors of the defendant, whose names were unknown to the deponent. The defendant made no affidavit to sustain his motion to vacate the attachment, but based his application on the papers upon which it was granted. All the matters in reference to which the affidavits speak were peculiarly within the knowledge of the defendant. His conversation with Wolff; the active interest he took in preferring his relatives, assuming he owed them; his refusal to secure the plaintiff or give him any satisfactory assurances or information; his packing goods in boxes and concealment in reference to them,—in connection with various other circumstances above referred to,—strongly tend to show that the whole scheme was for the purpose of defrauding creditors. In *White v. Reichert*, 10 Wkly. Dig. 285, it was held that an affidavit made by one partner of a firm stating the amount due, and by the other that the defendant's stock had increased at a more rapid rate than could be accounted for by his legitimate business, were sufficient to uphold an attachment, in the absence of opposing affidavits on the part of the defendant. The facts stated in the affidavits in the case at bar are much stronger than those appearing in that case. In *Frankel v. Hays*, 20 Wkly. Dig. 419, it was held that, where there was

no denial or explanation on the part of the defendant, all legitimate deductions and inferences should be indulged in to uphold the attachment. It cannot be urged with force, or even plausibility, that the various matters stated in the affidavits do not require the defendant to explain. In connection with other matters, statements resting upon information and belief must be taken into consideration. *Buell v. Van Camp*, 8 N. Y. Supp. 207. No reason is perceived why uncontradicted affidavits upon which an attachment is granted should not be construed with reasonable liberality. The order must be affirmed. All concur.

COLE v. FALL BROOK COAL CO.

(Supreme Court, General Term, Fifth Department. June 30, 1890.)

1. NEW TRIAL—SURPRISE.

In an action by a brakeman for personal injuries sustained by his being crushed between two cars, from one of which plaintiff alleged that the bumper was gone, —which was denied by defendant,—a new trial will not be granted defendant on the ground of surprise because plaintiff adduces evidence to show that he was compressed within a space of six inches, and that his injuries are permanent and incurable; as such evidence is within the issues of the case, and cannot be regarded as a surprise.

2. SAME—NEWLY-DISCOVERED EVIDENCE.

Affidavits by physicians that plaintiff could not possibly have lived had he been squeezed within a space of six inches, and affidavits that plaintiff had developed into an able-bodied man since the trial, are merely cumulative evidence, and are not sufficient basis for the granting of a new trial.

Appeal from circuit court, Corning county.

Action for personal injuries by a brakeman against the Fall Brook Coal Company. Verdict and judgment for plaintiff. Defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.
Gabriel L. Smith, for appellant. *Jacob Schwartz*, for respondent.

CORLETT, J. The plaintiff was employed as a brakeman on the defendant's road, a corporation organized under the laws of the state of Pennsylvania. On the night of the 9th of November, 1887, while engaged in coupling cars, he received severe injuries, which he claimed crushed his hip bones and pelvis, injured his spine, and inflicted other bruises. The plaintiff's contention was that the defendant's negligence consisted in the want of a bumper on the car he was directed to couple to the engine after dark. The material allegations as to negligence, and the extent of the injuries, were put in issue by the answer. The trial was had in Corning in April, 1889, before the court and a jury. It resulted in a verdict of \$8,000 for the plaintiff. A motion for a new trial was made before the trial justice upon the ground of surprise and newly-discovered evidence, which was denied. Application for a new trial was also made on a case and exceptions, which was denied. Judgment was entered on the verdict, and the defendant appealed to this court. The material controversy as to the plaintiff's right to recover was narrowed down to the question as to whether the bumper was on the car which the plaintiff coupled to the engine. The plaintiff's evidence tended to show that it was broken off, was an old break of sufficiently long duration to charge the defendant with knowledge of its existence, and that at the time he was directed to make the coupling he was ignorant of the defect, and proceeded in the discharge of his duties upon the assumption that the bumper was all right, and the car in good condition; and that by the negligence of the defendant in the particulars above stated, although he exercised proper care and diligence on his part, he received the injuries for which the verdict was rendered. The defendant's evidence tended to show that the car was in good condition, the bumper on, and that the injuries were not caused by the negligence of the defendant, but by want of care and prudence on the part of the plaintiff. The

defendant also controverted the extent of the plaintiff's injuries, but with no witnesses on that branch of the case. The charge of the trial justice in all respects as favorable to the defendant as it had a right to claim, and the jury found in favor of the plaintiff's contention, assessing the damages at the sum above stated.

There is no serious controversy upon this appeal as to the sufficiency of the evidence to warrant the verdict, or the correctness of the charge; nor to complain that any exceptions were taken involving error. The real controversy is whether a new trial should be granted because of surprise and newly discovered evidence. On the trial the plaintiff's evidence tended to show that the parts injured were crushed within a space of 6 inches, while the defendant's evidence tended to show that there was a space or opening of 12 inches. The plaintiff's evidence also tended to show that his injuries were of a permanent and incurable nature, and that his future life would be one of suffering and comparative uselessness. The defendant's evidence on the question as to the extent of the injuries was confined to the light thrown on the subject by the cross-examination of the plaintiff's witnesses. The bumper question was upon a gondola car at the rear end of the engine-tank, where the plaintiff was crushed. The plaintiff was a large man, his dimensions from hip to hip being about 16 or 17 inches, and his weight 200 pounds. The defendant claims that squeezing a man of his measurement and size within a space of 12 inches would produce the injuries complained of. The question as to whether the bumper was gone, or as to whether the plaintiff was squeezed into the narrow place claimed by him, was sharply litigated upon the trial. It is a familiar rule that evidence within the issues framed cannot be urged as a surprise. *People v. Marks*, 10 How. Pr. 261. Where unexpected evidence is given on the trial, and the party is surprised, if plaintiff may withdraw a juror, and if defendant move for a postponement. *Mesinger v. Bank*, 48 How. Pr. 542. The cause of the injury, including the existence of the bumper, was in issue, and sharply litigated, as was the extent of compression or squeezing of the plaintiff's injured parts, the seriousness of his injuries, and his own freedom from negligence. The defendant did not, within the rules above referred to, successfully urge any evidence within the issues as a surprise upon it. If, in fact, evidence was given it did not anticipate, and which threw it off its guard, it was proper to apply to the court for a postponement; but after a verdict, when no such application was made it is too late to urge such considerations as sufficient reasons for the granting of a new trial.

The rules applicable to new trials for newly-discovered evidence are well known and familiar. The evidence must be discovered since the trial; it must appear that it could not have been obtained on the trial by the exercise of reasonable diligence; it must be material to the issues; it is not sufficient if it merely tends to impeach witnesses; it must not be cumulative; it must also be reasonably certain that a new trial will change the result. *Baylies*, New Tr. 525; *Raphelsky v. Lynch*, 43 How. Pr. 157; *Darbee v. Elwood*, 67 Barb. 525; *Bank v. Heaton*, 6 Thomp. & C. 37, 3 Hun, 414; *Sistare v. Olcott*, 5 N. Y. Supp. 114. "It is only in case of indispensable necessity that a party will be relieved by the granting of a new trial." *Gautier v. Manufacturing Co.*, 52 How. Pr. 325. There is no substantial conflict in the cases. Different expressions and results have sometimes been produced by an application of the facts to each case. Where, for example, a conspiracy based upon fraud and perjury became known after the trial, it might control the application. *How. Pr.*, above cited. The application of the defendant for a new trial on the ground of newly-discovered evidence is based upon the affidavits of 13 different persons, some of whom are physicians and surgeons of alleged prominence and ability. Their affidavits are to the effect that, if the injured portions of the plaintiff's body were compressed within the compass claimed

him, death was inevitable, and a recovery, partial or complete, impossible. It will be observed that this evidence is in its very nature cumulative. That question was within the issues, and litigated upon the trial. It required the absence of the bumper to render possible the compression claimed on the part of the plaintiff. It is not urged that the crushing of it into so narrow a space could have occurred if the bumper was on the car; so that the evidence disclosed in the affidavits would tend to strengthen the defendant's contention that there was a bumper, and thus overthrow the plaintiff's claim that it was not there. The rest of the affidavits relied on by the defendant bear upon the extent of the plaintiff's injuries, by alleging, with more or less amplification and detail, that after the trial the plaintiff developed into an able-bodied man, performing vigorous and continued labor in various directions. The same remarks apply to this evidence. The extent of the injuries, including their temporary or permanent character, was squarely within the issues, and was necessarily litigated upon the trial. The defendant knew, and it was so appraised by the nature of the injuries, that the plaintiff would make efforts to show all the injuries he had received, for the purpose of increasing damages. It follows that the evidence bearing upon the extent of the injuries would be simply cumulative. In this connection it is not out of place to say that some of those making affidavits were employed by the defendant as detectives to watch the plaintiff, and to make discoveries on the subject stated in their affidavits; but none of them go far enough to show that the plaintiff had committed perjury on the trial, or practiced fraud upon the court, or that he engaged in any conspiracy. It must be assumed, for in the nature of things it always is so, that every person will do the best he can to strengthen his case in all its branches. No intelligent litigant or lawyer can be blind to these universal attributes of human nature.

Sixteen affidavits are produced on the part of the plaintiff to sustain the truth of his contention on the trial. Several surgeons and physicians of alleged standing and experience differ from those making affidavits on the part of the defense, and are to the effect that the plaintiff could be compressed within the limits claimed, and not only survive, but suffer no greater injuries than shown upon the trial. The affidavits of the other witnesses tend to show that he performed some labor before and after the trial, but that his efforts were the result of poverty and necessity, attended with much suffering and inconvenience. The affidavits of the plaintiff and his wife are to the same effect, and tend to show that he in no way exaggerated his case upon the trial, and that all his labors were attended with suffering, and that what he had sworn to upon the trial in reference to the nature and extent of his injuries was in all respects true. Applying to these affidavits the rules above stated, the application for a new trial must be denied. All concur.

BRENNAN v. CROUCH *et al.*

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

CONDITIONAL SALE—PLEDGE—CHattel MORTGAGE.

Plaintiff, who held a paid-up life policy, the surrender value of which was \$1,600, applied to one of the defendants for a loan of \$1,500, which was refused. Two days afterwards he entered into an agreement with both defendants which recited that plaintiff "has this day sold and assigned" his policy to defendants, "and they have agreed to sell the same to him on or before" a certain day on payment of \$1,600, and that, if "said \$1,600 be not paid as aforesaid, and in the event of their not selling said policy to [plaintiff,] they will, on demand, at any time after said date, pay to" plaintiff \$100 in full of all demands. *Held*, that the transaction was not a mortgage, but a sale of the policy with the right to repurchase on or before the day named.

Appeal from special term, Monroe county.

Action by Francis X. Brennan, as executor of Andrew Brennan, against George W. Crouch and Henry H. Craig, to have a reassignment of an insurance

policy on the life of decedent decreed. The complaint was dismissed on merits, and plaintiff appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Albert H. Harris, for appellant. *William N. Cogswell*, for respondent.

CORLETT, J. On the 18th day of November, 1862, the Mutual Life Insurance Company of New York issued to Andrew Brennan a policy on his life for \$4,000. The money was payable to him, his heirs, executors, and assigns. In March, 1879, the insured had paid up the policy, and its value as a deferred annuity claim was about \$6,400, and its surrender value as fixed by the company about \$1,600. On the 19th of March of that year the insured applied to defendant Henry H. Craig for a loan of \$1,500, which he declined to make. On the 21st an instrument in writing was executed, of which the following was a copy:

"THIS AGREEMENT,

"Made this 21st day of March, 1879, by and between Henry H. Craig and George W. Crouch, Jr., of the first part, and Andrew Brennan, of the second part, *witnesseth*: Whereas, the party of the second part has this day sold and assigned to parties of the first part policy 27,578, issued by the Mutual Life Insurance Company of New York, and they have agreed to sell the same to him on or before the 21st day of September, 1879, on payment of sixteen hundred dollars: Now, therefore, in consideration of one dollar to them in hand paid, and other valuable considerations, the receipt whereof is hereby acknowledged, parties of the first part agree that if by or on September 21, 1879, the sixteen hundred dollars be not paid as aforesaid, and in event of their selling said policy to said party of the second part, they will, on demand any time after said date, pay to Andrew Brennan one hundred dollars, the receipt whereof shall be in full liquidation of all claims and demands against them in his favor, of every name and nature.

"HENRY H. CRAIG.

"GEORGE W. CROUCH, JR.

"ANDREW BRENNAN.

[L.
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Brennan did not, on or before the 21st day of September, pay or offer to pay to Craig and Crouch the said sum of \$1,600, but in February, 1880, he offered to pay to said Craig and Crouch the amount which was due upon the contract to enable him to procure the assignment; but they refused to accept the money or reassign the policy to him. In March, 1889, an action was commenced by the insured for the purpose of having a reassignment decreed to him. The complaint alleged, in substance, that the transaction was a loan of money and that Craig and Crouch were not the absolute owners of the policy. The defendant George W. Crouch, Jr., by separate answer, denied a loan; alleged a sale and ownership. The issues were tried at an equity term in Rochester in December, 1889. The plaintiff's contention on the trial was that the transaction was a loan, and defendants' that it was a sale, with the right conferred upon the plaintiff to repurchase within the time and on the terms mentioned in the agreement, and that he failed to do so. The trial justice found the facts against the plaintiff, and in favor of the defendants, and dismissed the complaint on the merits. Judgment was entered, from which the plaintiff appealed. Andrew Brennan died on the 17th day of September, 1889, leaving a will in which Francis X. Brennan was named executor. Letters testamentary were issued to him. He qualified, and was substituted as plaintiff in place of the deceased. It is the rule that an assignment absolute on its face may be shown by parol to have been given simply as security, and in doubtful cases a contract will be construed as a mortgage instead of a conditional sale. *Matthews v. Sheehan*, 69 N. Y. 585. The facts in that case were not fully stated, but the court say on page 593: "There was nothing about a repurchase or a resale or a reassignment, but the right to redeem

expressly stipulated. The language used shows that the parties intended that the policy should be held as security for the premiums paid. Such a construction is at least as admissible as any other, and hence the court did not err in directing a verdict for the plaintiff." The agreement in this case was clearly an absolute assignment, with an agreement to resell on certain conditions. It shows that if the plaintiff paid \$1,600 within a given time the policy should be reassigned, but, if not, the plaintiff would have a right to demand \$100 more, which would be in full of all claims. There is nothing in the testimony showing a different agreement or understanding. The findings of the trial court were justified by the evidence. The legal conclusion necessarily followed. While the amount was less than the actual value, still no more could be got from the company, and it does not appear that the insured could obtain any more on a sale. The right to purchase, given by the agreement, secured to the insured a benefit which he could not obtain from the company. *Jones, Mortg.* (2d Ed.) § 258; *Baker v. Thrasher*, 4 Denio, 498; *Saxton v. Hitchcock*, 47 Barb. 220; *Whitney v. Townsend*, 2 Lans. 249; *Randall v. Sanders*, 23 Hun, 611; *Macauley v. Porter*, 71 N. Y. 173; *Brown v. Dewey*, 2 Barb. 28; *Conway's Ex'rs v. Alexander*, 7 Cranch, 218-237; *Glover v. Payn*, 19 Wend. 518; *Wallace v. Johnstone*, 129 U. S. 58, 9 Sup. Ct. Rep. 243.—illustrate, upon a variety of facts, the distinction between a mortgage and conditional sale. Applying the doctrine of these cases and others which might be cited to the facts in the case at bar, it is very clear that the transaction was a sale, and not a mortgage. The judgment must be affirmed. All concur.

WARD v. DEANE.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

1. LIBEL AND SLANDER—EVIDENCE—MALICE.

In an action for libel all of the separate publications prior to the commencement of the action that make the same charge, and relate to the same subject-matter, are admissible in evidence on the question of malice, though they are not all set out in the complaint.

2. SAME—CHARACTER—EVIDENCE.

Testimony as to plaintiff's character is inadmissible, unless it was pleaded in mitigation of damages.

3. SAME—MEASURE OF DAMAGES.

Mental anxiety, grief, and loss of society, resulting from the libelous publication, may be considered in estimating plaintiff's damage.

4. PARTIES—DEFECT OF—DEMURRER.

Code Civil Proc. N. Y. § 488, provides that where the defect appears on the face of the complaint defendant may demur. Section 498 provides that where the defect does not so appear the objection may be taken by answer. Section 499 provides that an objection not taken by answer or demurrer is waived. Held that, where the complaint in an action for slander shows that plaintiff is a married woman, the objection that her husband should have been joined can be taken only by demurrer.

Appeal from circuit court, Chautauqua county.

Action for libel by Emily J. Ward against Benjamin S. Deane, editor of the Morning News of Jamestown, N. Y. Judgment for plaintiff. Defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

E. R. Booty, for appellant. F. W. Stevens, for respondent.

CORLETT, J. In March, 1888, the defendant was the editor and publisher of the Morning News, a newspaper in the city of Jamestown, having a large circulation. The plaintiff is the wife of James H. Ward, to whom she was married in February, 1881. She resided with her husband in Schenectady until they moved to the city of Jamestown, in April, 1886, where they kept an art wall-paper and artists' supply store at No. 13 West Second street, in the new Allen block. Their residence was at No. 11 of the same block. The

family consisted of the plaintiff, her husband, and Ethel Claire Ward, step-daughter, who at the time she went to Jamestown was 13 years of age. The plaintiff gave instructions in painting and drawing, for which she received compensation. On the 8th of March, 1888, an article was published in the defendant's newspaper, which was a morning issue, headed, "An Outrage." It was to the effect that the plaintiff had improperly treated her step-daughter in depriving her of society, proper schooling, and clothing, and beating her, subjecting her to drudgery and unreasonable labor, and also improperly treating her in other respects. It purported to be based upon information derived from reliable sources. Another article to the same effect was published in the same paper, in another column, on the same day. On the 9th of March another article was published headed, "A Bluff, Pure and Simple," which was to the effect that the defendant had been threatened with a lawsuit, and that it would not withdraw the first publications, the substance and accuracy of which were based upon reliable data. On the 12th of March another article was published, headed, "A Weakening Bluff," which contained a communication signed by the plaintiff and her husband, written by D. Barlow, the plaintiff's attorney, claiming great injury by the previous publications, and asking a withdrawal of the charges. After inserting this request, it stated, in substance, that the previous publications were well founded, that there would be no withdrawal or retraction; and that, if vindication was desired, resort must be had to the courts. On the morning of the 12th another article was published, entitled, "We are Seven," in which appeared a communication from seven ladies, stating, in substance, that the articles previously published were not well founded, and were unjust to the plaintiff, her husband and daughter. This communication was commented upon at some length, to the effect that the ladies labored under a misapprehension, and that the previous articles were well founded, and inflicted no injustice. The plaintiff brought an action to recover damages for libel. The complaint contains the first two articles in full, and a portion of those published on the 9th and 12th; but the one containing the letter from the ladies was not inserted in the complaint. The answer admitted the publications alleged in the complaint, denied malice, and justified.

The cause was tried in May, 1889, before the court and a jury, in Mayville, Chautauqua county. On the trial the first two articles were read in evidence. That of the 9th of March, headed, "An Outrage," was offered in evidence by the plaintiff. Its reception was objected to by the defendant because only a portion was set out in the complaint, and that it was not material to the issues. The objection was overruled, and the defendant excepted. The plaintiff also put in evidence the article entitled, "A Weakening Bluff," published on the 12th. The plaintiff offered in evidence the article headed, "We are Seven," which was objected to on the ground that it was not pertinent to the issues, was hearsay, and was not set out in the complaint. The objections were overruled, the articles admitted, and the defendant's counsel excepted. The plaintiff was sworn as a witness on her own behalf, and she was asked, "What was your condition of health immediately prior to the publication of these articles?" This was objected to by the defendant on the ground that it was not proper evidence, that no damage could be given for such a cause, and that the plaintiff was not the proper party to recover such damages. The objections were overruled, and the defendant's counsel excepted. The plaintiff answered, "I was able to work from day to day, which I did." The plaintiff's counsel then asked, "What was your condition of health after the publication of these articles?" to which the defendant objected on the same ground. She answered, "I was prostrated by the shame and disgrace brought upon me." The defendant asked to have the answers stricken out, which the court refused, and the defendant excepted. The plaintiff then rested, and the defendant moved for a dismissal of the complaint on the ground that

cause of action was in favor of the husband, and that it should have been brought by him, and that he should be joined with the plaintiff; second, that the wife could not maintain the action as sole plaintiff; that the articles were not libelous *per se*. The court denied the motion, to which the defendant's counsel excepted. Various witnesses were sworn on the part of the defendant, their evidence tending to show improper treatment of the girl by the plaintiff. This was rebutted by witnesses on the part of the plaintiff, which included the girl. At the close of the evidence the defendant renewed his motion for the direction of a verdict on the same grounds. The court denied the motion. The defendant excepted. The defendant also asked the court to charge that the plaintiff could not recover damages on account of ill feeling, or grief in mind, or loss of society. The court refused, and the defendant excepted. The jury found a verdict of \$475 for the plaintiff. No motion for a new trial was made, and the case comes before this court on exceptions.

The defendant contends that the court erred in admitting in evidence the articles not set out in full in the complaint; also the one, no part of which was inserted. All the articles were published before the commencement of this action, related to the same subject, and were substantially a repetition of the same charge. They were therefore admissible on the question of malice. *Fry v. Bennett*, 28 N. Y. 327; *Bush v. Prosser*, 11 N. Y. 360; *Distin v. Rose*, 69 N. Y. 124; *Bassil v. Elmore*, 65 Barb. 627; *Gott v. Pulwifer*, 122 Mass. 235.

The objection that the action could not be maintained without the joinder of the plaintiff's husband cannot be sustained. Section 488 of the Code of Civil Procedure provides that the defendant may demur where the defect appears upon the face of the complaint; and section 498 provides that, when such is not the case, the objection may be taken by answer. Section 499 provides that any objection not taken by answer or demurrer is waived. *DePuy v. Strong*, 87 N. Y. 372; *Straus v. Bank*, 36 Hun, 451; *Spooner v. Railroad Co.*, 115 N. Y. 22-30, 21 N. E. Rep. 696. The fact that the plaintiff was the wife of James H. Ward appeared on the face of the complaint, and, no objection having been taken by demurrer, it was not available on the trial.

The defendant's offer to prove the character of the plaintiff in the building in which she lived was properly excluded. It was only available by way of mitigating damages, and should have been pleaded; besides, it is not claimed that the matters sought to be proved were known or believed by the defendant before publication. *Hatfield v. Lasher*, 81 N. Y. 246; *Morey v. Association*, 1 N. Y. Supp. 475.

The defendant's counsel asked the court to charge that the plaintiff could not recover for mental anxiety, etc. This was refused, and the defendant's counsel excepted. The ruling of the trial court is sustained by the authorities. *Hamilton v. Eno*, 16 Hun, 599, affirmed 81 N. Y. 116.

The other exceptions have been examined, but require no special comment. No errors to the prejudice of the defendant were committed by the trial court, and the judgment must be affirmed. All concur.

In re GIBBONS.

In re LEXINGTON AVE.

(Supreme Court, General Term, First Department. May 28, 1890.)

MUNICIPAL CORPORATIONS—ASSESSMENTS—DIRECTORY STATUTE.

Laws N. Y. 1880, c. 550, § 1, providing that "all officers charged with any duty connected with the imposition or confirmation of assessments for local improvements in the city of New York are hereby directed so to perform such duty that assessments for all local improvements heretofore completed shall be finally passed

upon by the board for revision and correction of assessments, * * * within six months after the passage of this act," is merely directory, and an assessment may be levied within a reasonable time after the six months have expired.

Appeal from special term, New York county.

Petition by Margaret Gibbons to vacate an assessment for Lexington avenue, regulating, grading, curbing, etc., from One Hundred and Second street to Harlem river, confirmed June 29, 1887. The petition was denied, and the petitioner appeals.

Laws N. Y. 1880, c. 550, § 1, provides that "all officers charged with duty connected with the imposition or confirmation of assessments for local improvements in the city of New York are hereby directed so to perform said duty that assessments for all local improvements heretofore completed shall be finally passed upon by the board for the revision and correction of assessments, pursuant to the provisions of law relating to assessments in said city, within six months after the passage of this act."

The following opinion was delivered at special term: "ANDREWS, J. It seems to me that all the questions raised in this proceeding have been posed of adversely to the petitioner by the decisions in *Matter of Deering*. The provisions of section 1 of chapter 550 of the Laws of 1880, requiring assessments for local improvements theretofore completed to be finally passed upon within six months from the passage of that act were fully and carefully considered in that matter. The general term of the court of common pleas held that such provision was not mandatory, but merely directory; that an assessment for such improvements might be laid within a reasonable time after the expiration of such six months; and the application to vacate an assessment laid in 1885, for an improvement completed in 1872 was denied because it was considered that, in view of certain litigations which were pending, and of other complications, the assessment had not been unreasonably delayed. 14 Daly, 89. The order of the general term of the court of appeals was affirmed by the court of appeals, but no opinion was delivered in the latter court. 105 N. Y. 667, 13 N. E. Rep. 928. It is contended by counsel of the petitioner that the decision in *Re Deering* does not apply to the case at bar, because in that proceeding the petitioner could have gone before the assessment commissioners, while in this case no such opportunity has been afforded. There is no evidence before me that if the petitioner in this case had had an opportunity to go before the assessment commissioners, she would have obtained any relief. It is stated in the brief of petitioner's counsel that he would have had grounds for equitable relief before such commissioners, because the area of assessment was limited to land north of One Hundred and Second street, and that other equally substantial grounds for equitable relief existed. No decision can be based upon this statement, because it is not supported by any legal proof before me. Moreover, the decision in *Deering* was not placed upon the ground that the petitioner in that case might have gone before the assessment commissioners, but upon the broad ground that the provisions of said section 1, c. 550, Laws 1880, were not mandatory. It is also claimed by the petitioner's counsel that the delay in the case at bar in laying the assessment was unreasonable. I do not think this claim is well founded. The reasons for delaying the assessment in this case are as many and sufficient as those which existed in *Matter of Deering*, where a delay of thirteen years was held to be reasonable. It is also claimed by petitioner's counsel that, if the entire assessment is not vacated, it should be reduced to an amount equal to the interest which was included. The interest included in the assessment was calculated only to August 20, 1880, and the petitioner has not been prejudiced, so far as the interest is concerned, by the delay which has occurred since that day. Moreover, the statute, by its express terms, applies to all assessments hereafter imposed for local improvements, and as was held in *Re Deering, supra*, that the interest was properly included in

assessment, although the improvement in that case had been completed some years prior to 1880. The application must be denied, with costs."

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

James A. Deering, for appellant. *William H. Clark*, Corp. Counsel, for respondent.

BARRETT, J. The order appealed from should be affirmed upon the authority of *In re Deering*, 14 Daly, 89; 105 N. Y. 667, 13 N. E. Rep. 928. There seems to be no substantial distinction between that well-considered case and the present, and we concur in the views entertained at special term upon that head. Mr. Justice ANDREWS' opinion is quite satisfactory, and needs no amplification. Order affirmed, with costs. All concur.

FARMER v. EMIGRANT INDUSTRIAL SAV. BANK *et al.*

(*Supreme Court, General Term, First Department. May 23, 1890.*)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where the only testimony for defendant is that of her husband, who is uncontra-dicted, a judgment for plaintiff will not be disturbed on appeal, as it was for the referee to judge of the credibility of the witness.

Appeal from judgment on report of referee.

Action by Ann Farmer, as administratrix of Henry Fitzsimmons, deceased, against the Emigrant Industrial Savings Bank and Annie E. Devlin. There was a judgment for plaintiff, and defendant Devlin appeals.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

Win. H. Arnoux and *Francis C. Devlin*, for appellant. *Abram Kling*, for respondent.

VAN BRUNT, P. J. This action was brought by the plaintiff, as administratrix of one Henry Fitzsimmons, deceased, of Pennsylvania, to recover from the defendant the Emigrant Industrial Savings Bank a balance standing to the credit of the deceased upon the books of the bank. The bank having petitioned the court, the defendant Annie E. Devlin was brought in as a party defendant, and set up a claim for said moneys under a gift *causa mortis* from said deceased. The issues in the action were referred to a referee, who reported that the defendant Devlin had not established a gift *causa mortis*, and gave judgment in favor of the plaintiff, and from the judgment thereupon entered the defendant Devlin has appealed.

The mere ground of the appeal is based upon alleged errors in the referee's findings of fact. This point might be disposed of upon the ground that, as the case does not state, so far as we have been able to discover, that it contains all the evidence, questions of fact cannot be considered; but, as no such point is raised by the respondent, and questions of fact are discussed upon the briefs of both parties, we will consider these alleged errors upon their merits.

The only evidence tending to establish the alleged gift is that of the husband of the appellant, possibly somewhat supported by the witness Mary Duffy. The story told by the appellant's husband was disbelieved by the referee; and, as he had the witness before him, and heard him testify, and could therefore best judge of his credibility from his demeanor upon the stand, his conclusion should not be interfered with unless we should have good reason to think that he erred. It is claimed by the appellant that, no witness having contradicted the appellant's husband, the referee should have found the gift as established. The story of the witness was that in 1874, when the alleged donor was sick with his last illness, he had a conversation with him in his (the witness') wife's presence; that he told him he was going to die, and told the appellant to bring him a parcel, and gave her the key to the trunk;

that she brought down the parcel, and handed it to the deceased, who took the parcel, and opened it, and took out the bank-books in question, and gave them to the appellant. She asked: "What am I to do with them?" He said: "You keep them. They are for you." "He said he thought he was going to die, and he wanted everything that was there to belong to her; and, in case he recovered, he knew that she would give them back to him." The witness further testified that the appellant and her husband (the witness) came back to New York, bringing the books with her, and that they have since been in the possession of herself or her attorney. On cross-examination the witness stated that he had had charge, to a certain extent, of his wife's financial affairs; that he had never talked over that matter with his wife, never talked over this case with her, never had spoken a dozen words to her about it; that he had never made a memorandum of the amounts shown in the books; and that he never spoke to anybody about these books until after Father Carew's (who was the administrator of the deceased in Pennsylvania) death, which took place in 1886. The appellant states that she brought the books in with her; that she had no conversation about them with her husband on the train; did not figure how much there was in the books on the train, or ever at any other time; from 1874 up to the year 1888 or 1889 had no conversation with her husband with regard to the books; that she never made any inquiries as to the amounts in the books; and that, in her business matters, her husband generally acted for her. Thus the appellant kept concealed her possession of these books for nearly 14 years, speaking to nobody about them, except her attorney,—not even to her husband,—from the time she received them. It is not at all remarkable that the referee refused to credit this remarkable story. In many of its features it is so palpably incredible that it would be indeed surprising if any intelligent mind could possibly give credence to it. There are many other features of the testimony of these witnesses which tend to discredit them, but which we cannot refer to here. Suffice it to say that a reading of the testimony shows that, unless the referee was bound to believe the statement of an interested party, which he clearly is not, there is no reason for disturbing his finding that a gift *causa mortis* was not established. The corroborating evidence, it may be so called, of Mary Duffy is of little value, as her statements upon her direct and cross examination show a material variance. Upon her direct, she says that when she gave the deceased a drink, on one occasion, he said: "I gave Annie the books; and, if I want them back, she will give them." Upon cross-examination the witness states the conversation as follows: "Annie has got the books; and she will do what is right with them, and she will give them back to me." Not the slightest suggestion of a gift, but merely a deposit for safe-keeping, can be inferred from this language, even if it be held to refer to the bank-books in question at all.

The whole case being so full of suspicious circumstances, we see no reason for disturbing the findings of the referee. Many exceptions to the exclusion of evidence are called to our attention, but most of them relate to the exclusion of declarations of persons deceased, or proof of transactions by the appellant with the deceased; and the rulings were proper. We have not by any means stated all the considerations which lead us to the conclusion to which we have arrived, but enough has been stated to justify such result. The judgment appealed from should be affirmed, with costs.

BARRETT, J. I concur. The referee, upon all the facts, was justified in declining to give that full credit to the claimant's husband which was essential to a finding of fact in favor of the gift. It seems to me most extraordinary that the party claiming these bank-books should, if she had faith in her case, have imperiled her rights by the long delay. She knew, as did her husband, that her success depended upon the latter's testimony, and that his

death would leave her substantially without hope. It is a grave thing to refuse credit to an uncontradicted witness, but the circumstances here are so peculiar and unusual that it was not without justification.

BARTLETT, J., concurs.

ROTHSCHILD v. WHITMAN *et al.*

(Supreme Court, General Term, First Department. June 6, 1890.)

SET-OFF AND COUNTER-CLAIM—CLAIM ARISING FROM INDEPENDENT TRANSACTION.

In an action for malicious prosecution by unlawfully causing plaintiff's arrest, a claim for damages for inducing defendants to sell goods on credit by false representation, which was one of the causes of action for which the original prosecution of plaintiff was commenced, cannot be maintained as a counter-claim, as it does not arise out of the same transaction, and is not connected with the subject-matter of the action, as required by Code Civil Proc. N. Y. § 501.

Appeal from special term, New York county.

Action by Abraham Rothschild against Clarence Whitman and others. Plaintiff appeals from an interlocutory judgment overruling his demurrer to defendants' counter-claim.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Horwitz & Hershfeld, for appellant. *Davenport & Leeds*, (*John Davenport*, of counsel,) for respondents.

BRADY, J. This action was brought by the plaintiff against 16 defendants to recover damages for unlawfully, wrongfully, and maliciously commencing an action against him, and for causing to be issued against him an order of arrest, and thereafter causing him to be taken into custody by the sheriff of the city and county of New York. The complaint alleges that the order of arrest was duly vacated by this court upon the ground that the same was illegal, unauthorized, and without jurisdiction to grant the same, and that the defendant was consequently discharged, and the proceedings finally determined in favor of the plaintiff against the defendants by order of the court. The defendants Whitman and Creighton appeared, and served a separate answer, setting up a counter-claim in their favor, as against the plaintiff for a sum named. The counter-claim set up a cause of action for deceit against the plaintiff in inducing the defendants to sell goods on credit by false representations, and which, the answer alleged, constituted one of the causes of action for which the prosecution of the plaintiff, which is the subject of this action, was instituted, and that the vacating of the order of arrest was not on the merits, but because of a misjoinder of causes of action and of parties. To this counter-claim the plaintiff demurred, for the reason that it did not arise out of the same transaction, and is not connected with the subject-matter of the action, and is not, therefore, of such a character as required by section 501 of the Code.

The learned justice in the court below held that the plaintiff, having alleged malice and want of probable cause, and, by the demurrer, having admitted that the arrest was for a cause of action which entitled the defendants to an order of arrest, was estopped from asserting, as matter of law, that there was no connection between the causes of action set out; and, further, that the question of connection should be left for decision at the trial, where it would present itself either in the form of a question of law or a question of fact. This latter view is based upon the proposition that, if the action were conducted as one for false imprisonment only, the counter-claim might not be admissible; while on the other hand, if it should be conducted as one for malicious prosecution, the counter-claim might be received. The allegations in the complaint of malice and want of probable cause are sufficient to present a claim for malicious prosecution. It is well settled that, if a complaint is sus-

ceptible of two meanings, the one most unfavorable to the pleader must be accepted by him upon his demurrer. *Clark v. Dillon*, 97 N. Y. 370. The defendant has a right, therefore, to proceed upon the proposition that this action is one for malicious prosecution.

Is the counter-claim, therefore, one connected with the subject-matter of the action? It is admitted by the demurrer that the order of arrest was based upon the charge of deceit and fraudulent representation; and this would seem to establish the legal result that it is a cause of action arising out of the transactions set forth in the complaint as the foundation of the plaintiff's claim, and connected with the subject of that action. In the case of *Carpenter v. Insurance Co.*, 93 N. Y. 552, a kindred question was disposed of. It was an action for an alleged wrongful conversion of a quantity of wood. The defendant set up as a counter-claim, in substance, that it held a bond and mortgage as collateral upon certain lands which were insufficient security, and the obligor was insolvent; and that plaintiff, being a second mortgagee in possession of the lands, with knowledge of the facts, and with intent to reduce, and deprive defendant of, its security, and to defraud it, wrongfully cut the wood in question from the land, thereby wasting the land, etc., to defendants' damage; and that on the foreclosure of defendants' mortgage, and sale thereunder, a large deficiency was left. The court (EARL, J.) said: "The transaction set forth in the complaint was the conversion of the wood, and hence it cannot be said that the counter-claim arose out of that transaction. But was it not connected with the subject of the action? The word 'connected' may have a broad signification. The connection may be slight or intimate, remote or near; and where the line shall be drawn it may be difficult sometimes to determine. The counter-claim must have such a relation to and connection with the subject of the action that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and in the counter-claim should be settled in one action by one litigation; and that the claim of the one should be offset against, or applied upon, the claim of the other. Here it is sufficiently accurate to say that the subject of the action was the wood wrongfully taken by the defendant, and the counter-claim was for damages sustained by the defendant in the wrongful impairment of its security by the severance of the same wood from the land, and thus diminishing the value of the land by the value of the wood. In such case it is certainly just that the defendant should counter-claim its damage for the severance of the wood against the plaintiff's claim for the conversion thereof. In the forum of conscience, the plaintiff was under obligation to restore the wood to the defendant as a portion of its security for its claim against the mortgagor." In the forum of conscience, it might perhaps be said here, the plaintiff is under the obligation of recognizing the claim of the defendants arising from his fraudulent conduct. This view is strengthened by the case of *Manufacturing Co. v. Hall*, 61 N. Y. 226, in which it was declared that the policy of the Code required a liberal construction of section 501, to the end that controversies between the same parties should be settled in one action. But, nevertheless, whether this can be done or not depends upon the statute; and the counter-claim set up, if not within the provisions of section 501 of the Code, cannot be maintained. It is not. The arrests from which the plaintiff suffered were upon process which was unauthorized, and each one of them was a separate and distinct wrong, connected with no other subject than the unlawful arrest. The reasons why such a defense might have been allowed sufficiently appear, if the legislature had permitted it; but they have not, and without that sanction it has no place in a controversy like this. It does not grow out of any transaction, because a transaction, *eo nomine*, involves the operation of two minds, at least, or out of a contract which requires the concurrence of two minds, at least; and it is not connected with the subject-matter of the action, which is not a transaction or contract, but a wrong done by

the attempted enforcement of a contract in an illegal mode. The cause of action here is for a tort or personal injury. The defendants' claim arises upon a contract legal and enforceable, if the proper methods be adopted. They are therefore wholly separate and distinct, and not connected. The only and remote connection between them, it may be said, is that one caused the other; that is, the attempted, but illegal, enforcement of one gave rise to the other, and they exist independently, therefore. If the plaintiff had judgment herein, and the defendants had judgment on their claim, and an application were made to set them off, there would be a different condition presented for consideration, which might be attended by a different result.

For these reasons the interlocutory judgment appealed from must be reversed, and judgment ordered for plaintiff, sustaining demurrer, with leave to defendants to amend within the usual time on payment of the costs of the demurrer and of the appeal.

VAN BUREN, P. J., concurs in result.

DANIELS, J. I agree that the counter-claim set up in the answer, to which the demurrer has been directed, is not connected with the subject of the action in any legal sense, and has not arisen out of the same transaction, and that the interlocutory judgment should be reversed, and that the plaintiff should have judgment sustaining the demurrer, with leave to the defendant to amend in the usual time on payment of costs of the demurrer and of the appeal.

BEARNS v. MELA.

(*Supreme Court, General Term, First Department. June 8, 1890.*)

VENDOR AND VENDEE—RIGHTS OF VENDEE—DOUBTFUL TITLE.

Testator devised all his property to his executor in trust to receive the income, pay it to testator's mother during her life, and, on her death before two certain children should become 21 years of age, to apply it to their support, etc., until that time, and, if the mother had died before that time, the property was then to be equally divided between the children, and, in case of the death of either leaving lawful issue, such issue was to take the share of the decedent. There was no devise of the estate given to the executor until both the children became 21 years of age. *Held*, that the validity of the trust and of a power of sale given to the executor to aid in its execution was so uncertain on the ground that the will unlawfully suspended the power of alienation, that one who had agreed to purchase the property from the executor would not be compelled to take the title.

Case submitted on agreed statement.

Action by Joseph H. Bearns, executor of Alexander Wing Fisher, against Ferdinand H. Mela, to enforce a contract of sale of certain realty, and to compel payment of the purchase money.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Rabe & Keller, for plaintiff. *Charles Putzel*, for defendant.

VAN BRUNT, P. J. There being no evidence furnished to the court that the papers, as required by the provisions of the Code, have been filed with the clerk of the court, we might very well on that ground decline to entertain the submission. In order that the court may acquire jurisdiction it is necessary that proof should be furnished of the jurisdictional facts, one of which is that papers should be filed in the office of the county clerk. The plaintiff in this action entered into a contract whereby he agreed to sell to the defendant certain premises. At the time fixed for the delivery of the deed the defendant refused to take title, upon the ground that the trust attempted to be created by the will of one Fisher, of whom the plaintiff was acting as executor, was invalid, in that it unlawfully suspended the power of alienation; and that the power of sale in the will is inseparably connected with the trust, and falls with it; and also that, if the trust is adjudged to be valid, the plaintiff has no

power to sell until after the death of the life-tenant. It is very clear that judgment in favor of the plaintiff, compelling the defendant to take this title, cannot be rendered if there is any reasonable doubt as to the character of the title which the defendant will acquire by the conveyance tendered to him by the plaintiff. The court is obliged to construe the provisions of a will without having the parties before it to make such construction conclusive. And therefore, if there is any reasonable question as to the construction which is to be placed upon the will, the defendant should not be compelled to take title to this property, because he does not get a marketable title, viz., one free from reasonable doubt. We think, upon an examination of the will in question, there may be doubt in reference to the validity of the trust and the power of sale, and therefore the defendant should not be required to take the title. The said Fisher of whom the plaintiff is executor died seised of the premises in question, leaving him surviving his mother and a brother and sister of the half blood, and also a last will and testament in which he devised to his executor, the plaintiff, all his property, in trust—*First*, to receive the rents, issues, and profits thereof; *second*, to pay the same unto his mother during her natural life; and, *third*, upon the death of his mother before his half brother and sister shall have arrived at the age of 21 years, he directs his executor to apply the rent, income, and profits of said real estate for the support, education, and maintenance of said half brother and sister until they respectively arrive at the age of 21, and then, upon the death of the testator's mother, and upon the said half brother and sister arriving at the age of 21, he gave and devised unto his said half brother and sister all his estate of every kind, to be equally divided between them, and, in case of the death of either leaving lawful issue, such issue was to take the share his, her, or their parent would have taken if living, to be equally divided between them share and share alike, to them, their heirs and assigns, forever. It is claimed upon the part of the plaintiff that this devise is similar to that contained in the will which was considered in the case of *Monarque v. Monarque*, 80 N. Y. 321. But upon an examination of that case it will be seen that there is a distinction which makes the construction of the devise under consideration too uncertain to compel a purchaser to take title dependent upon the validity thereof. In the case cited by the first clause of his will, the testator gave to his widow the use of all his personal and real estate during her life; by the second, he gave all income arising from his estate to his four daughters, "to be divided equally between them share and share alike, during their and each of their respective natural lives, remainder to their respective children, and to their respective heirs and assigns, forever." This latter clause in reference to the remainder is conspicuously absent from the will now under consideration. The presence of this clause showed that it was the intention of the testator that from the time of his death the children of his daughters should take a vested remainder in his estate; and that, upon the death of a daughter leaving children, he intended that such children should be entitled to an estate in possession. Under these circumstances, the court held that there was no suspension of the power of alienation beyond the period limited by the statute. In the case at bar there is no such provision in regard to the remainder; upon the contrary, there is no devise of such remainder except upon the half brother and sister arriving at the age of 21 years. The language of the testator is that upon the death of his mother, and upon said half brother and sister arriving at the age of 21, he gave and bequeathed unto them all his estate, etc. There is nothing which devises the estate which has previously been given to his executor until those two children arrive at 21 years of age. If they were both living, and one arrived at the age of 21, no title would vest in the one so arriving until the other had attained that age; and if either died prior to arriving at 21 there would be no devise until the other arrived at 21, thus contravening the statute. But it may be argued that the testator provided that,

in case of the death of either leaving lawful issue, such issue was to take the share his, her, or their parent would have taken if living. But it is difficult to establish that such issue can take anything until the parent would have arrived at 21 years, because there appears to be no devise to such parent until he or she arrives at 21; and if the children are to take what the parent would have taken, and the parent would have taken nothing until arriving at 21, there is nothing for the children to take until that time elapses. It is possible that a different construction may be placed upon this clause, but it is by no means certain that it can be brought within the rule laid down in *Monarque v. Monarque, supra*. It appears from a reading of the will that the power of sale is distinctly connected with the trust, is part and parcel of it, and was given to aid in the execution of the trust, and for no other purpose whatsoever. Under these circumstances, we do not think that the defendant should be compelled to take the title which has been offered, and judgment is given for defendant accordingly, with costs. All concur.

KELLOGG v. AMERICAN MANUF'G & SUPPLY CO., Limited.

(Supreme Court, General Term, First Department. June 6, 1890.)

APPEAL—REVIEW—INSTRUCTIONS.

In an action for wrongfully discharging plaintiff from defendant's service, error in submitting to the jury the question whether a certain individual transaction between plaintiff and the president of defendant company was a reasonable ground for the discharge, is not cured by a subsequent instruction that such transaction did not arise under the contract of employment, when the jury are not told that they should not consider it in determining whether plaintiff was properly discharged.

Appeal from circuit court, New York county.

Action by Fordyce L. Kellogg against the American Manufacturing & Supply Company, Limited. Judgment was entered on a verdict for defendant, and a motion was denied. Defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Arthur H. Smith, (*L. L. Kellogg*, of counsel,) for appellant. *N. A. McBride*, (*D. McClure*, of counsel,) for respondent.

VAN BRUNT, P. J. This action was brought to recover damages for alleged breach of contract of employment, said breach being the discharge of the plaintiff from the employment without just cause. The answer of the defendant alleged failure to perform the contract, and denial of the discharge, but that, on the contrary, the plaintiff left of his own accord. The evidence showed that the plaintiff had been employed by the defendant to take charge of the sales of black powder, and also to make himself useful in doing the general business of the company, and that, certain differences having arisen between the plaintiff and one Bedford, the president of the company, either the plaintiff was discharged, or left the employment of the defendant; the plaintiff claiming that he was discharged, and the defendant claiming that he left voluntarily. The circumstances leading up to this severance of the relations between the parties were the subject of considerable conflict of testimony, upon which the jury were called upon to pass. Among other evidence that was introduced was evidence of the fact that the plaintiff had received the title of certain property in which Bedford and other persons were interested; that at or about the time of his discharge, or leaving the employment of the defendant, Mr. Bedford, the president of the defendant, demanded of the plaintiff a conveyance to himself of this property. The plaintiff demurred to making this conveyance upon grounds which he stated to Bedford; and this, it is claimed, was the ground of his discharge. And in submitting the question as to whether the plaintiff had been properly discharged, in commenting upon this refusal to convey, the court said: "Under these cir-

circumstances, and under his allegations in his complaint, and the proof that he was discharged because he would not execute that deed, you are to find whether, upon his side of the case alone, that was a wrongful reason for his discharge, and not a reasonable one." The submission of this point to the jury was excepted to by plaintiff's counsel upon the ground that the subject should not be submitted to the jury, but dealt with by the court as matter of law. In other words, apparently claiming that the court had no right to submit any question in relation to the refusal to execute the deed as a ground of discharge, because it was an individual transaction between Bedford and the plaintiff, and had nothing to do with his relations to the company itself. That this is the correct interpretation of the position of the counsel for the plaintiff is evidenced by a clause in the subsequent part of the charge, where the court, apparently upon request, charged that the transaction in regard to the execution and delivery of the deed was not one arising under his contract of employment, and, using its own language: "It was not. That was a matter which, although connected with these parties, arose under the partnership agreement of Smith & Co., where Kellogg, the plaintiff, was a party."

The question presented by this exception is whether that part of the charge was retracted by the subsequent language of the court. We do not find that it was. The court left it to the jury to find whether, if he was discharged because he would not execute that deed, that it was a wrongful reason for his discharge, and not a reasonable one. All that was subsequently said was that the transaction in regard to the deed was not one arising under the contract of employment. The jury were not instructed that therefore it could form no ground for the discharge. If they had been so instructed, then the erroneous view given to the jury would have been done away with, and the charge would have been correct. But, although the court stated the abstract proposition that this transaction was not one arising under the contract of employment, it did not instruct the jury that therefore, in determining the question as to whether the plaintiff was properly discharged or not, they should not take that into consideration. Therefore the jury may have inferred that, although this transaction did not arise under the contract of employment, yet still the previous instruction said that they had a right to find whether or not the circumstances attending that transaction offered a reasonable ground for the discharge of the plaintiff; and this objection seems to us of so great importance as to call for a reversal of the judgment.

There are no other objections or exceptions which it is important now to consider, as they were properly disposed of. The judgment should be reversed, and a new trial ordered, with costs to appellant to abide event. All concur.

ATKINS v. MANHATTAN RY. CO.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

1. DAMAGES—EXPERT TESTIMONY—SPECULATIVE DAMAGES.

In an action for personal injuries, testimony by a medical witness as to what results are likely to flow from the injuries is inadmissible.

2. EVIDENCE—EXPERT TESTIMONY.

In an action for personal injuries, testimony by a physician, who had no knowledge of plaintiff's medical history prior to the accident, that he treated her for certain symptoms due entirely to the injuries, is inadmissible.

Appeal from circuit court, New York county.

Action for personal injuries by Minna Atkins against the Manhattan Railway Company. Judgment for plaintiff. Defendant appeals.

Argued before VAN BRUNT, P. J., and DANIELS and BRADY, JJ.

Davies & Rapallo, (Saml. Blythe Rogers, of counsel,) for appellant. Sullivan & Cromwell, (W. J. Curtis, of counsel,) for respondent.

VAN BRUNT, P. J. This action was brought to recover damages for personal injuries alleged to have been sustained because of the negligence of the defendants. The only questions submitted upon this appeal arise upon exceptions to the admission of questions relating to the permanency of the injuries received.

The following question was asked of one of the medical witnesses by the plaintiff: "Tell the jury what results are likely to flow from the injuries from which Mrs. Atkins was suffering on the 3d of January, 1888?" This question was duly objected to, and the objection overruled. This was clearly error. This form of question has been so often condemned that it seems somewhat remarkable that it should still be persisted in. In the cases of *Johnson v. Railroad Co.*, 4 N. Y. Supp. 848; *Strohm v. Railroad Co.*, 96 N. Y. 306; and *Griswold v. Railroad Co.*, 115 N. Y. 61, 21 N. E. Rep. 726, —such a form of interrogatory is expressly condemned.

There was another class of expert evidence, which was admitted under objection, which was equally obnoxious to the rules of evidence. The physician had testified that he had never seen the plaintiff before she was hurt, to attend her professionally; that he had no personal knowledge of her medical history prior to the accident, except that which he gained from her in questioning her when he first saw her, and subsequently. No evidence was given as to what the plaintiff had told the physician, and this question was asked: "For what have you treated Mrs. Atkins? What symptoms have you treated her for during the time intervening between the 3d of January, 1888, to the present time, due entirely to the injuries she received at the time of the accident?" This question was duly objected to, and objection overruled. This question allowed the witness completely to usurp the functions of the jury. It left the witness to determine what injuries the plaintiff had received from the accident. It left the witness to determine what her previous condition had been, without the jury having any knowledge upon what such determination was based; and the question also made the witness testify, not as to an opinion, but to the absolute facts that the symptoms arose from the injuries which the physician assumed the plaintiff to have received; but what those were which the physician assumed, the jury were entirely ignorant. In fact, throughout the whole of this case the medical experts were allowed to testify without the jury having the slightest information as to upon what such evidence was founded. The judgment and order appealed from must be reversed, with costs to the appellant to abide the event. All concur.

COMMERCIAL TELEGRAM CO. v. SMITH *et al.*

(*Supreme Court, General Term, First Department. June 6, 1890.*)

1. ATTORNEY AND CLIENT—LIEN FOR SERVICES.

An attorney may have the satisfaction vacated and execution issued to collect the amount of a judgment paid to his client after notice to defendants to pay the same to him, as he had a lien thereon for professional services.

2. SAME.

That there is a dispute between the attorney and his client as to the amount of his compensation or his right to remuneration does not defeat his right to enforce his lien on the judgment by a summary proceeding against defendants after notice to them that he claimed it.

3. SAME.

That the attorney has sued his client by attachment for professional services does not defeat his right to enforce his lien on the judgment if the claims giving rise to such lien were not included in that action.

4. SAME.

When the judgment is against several defendants, an appeal taken by one of them operates in his favor alone, and as to the defendants who have not appealed the attorney's lien may be enforced by issuing execution against them.

Appeal from special term, New York county.

v. 10 N. Y. S. no. 5—28

Motion by James E. Chandler to vacate the satisfaction of judgment recovered by the Commercial Telegram Company against James D. Smith, as president of the New York Stock Exchange, and others, and for permission to issue an execution against the Gold & Stock Telegraph Company and the Western Union Telegraph Company to collect the amount of the judgment, and enforce his lien for services as attorney for plaintiff in the litigation. Motion denied. Appeal by James E. Chandler.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

James E. Chandler and Robert P. Harlow, (Wm. M. Safford, of counsel,) for appellant. Wm. W. Cook and Dillon & Swayne, for respondents.

DANIELS, J. The appellant was the attorney for the plaintiff in the action in which the judgment was recovered. The recovery was for the sum of \$2,295.42, and included no more than the costs, together with an allowance amounting to the sum of \$1,000. The appellant claimed to be entitled to a lien upon this judgment for his services in the litigation, and in December, 1889, he gave notice in writing to the attorneys for the defendants in the action that he had a lien upon the amount of the judgment for the services rendered by him as attorney and counsellor at law for the plaintiff in the litigation, which had resulted in the recovery of the judgment, and in January, 1890, he served a further notice upon the attorneys for one of the defendants that he should issue an execution to collect the judgment unless the same was paid to him. At their instance he delayed doing so for the time being, and on or about the 4th of February, 1890, the judgment was settled by the payment of the amount of it to the plaintiff itself. The attorney thereupon applied to the court for an order vacating a discharge of the judgment, and allowing him to issue an execution upon it for the recovery of the amount. But this application was denied, and apparently under the authority of the decision in *Howitt v. Merrill*, 113 N. Y. 630, 20 N. E. Rep. 868. But that decision in no way denies the right of the attorney to enforce the lien existing in his favor in this manner, and, where the judgment may have been satisfied after notice of the lien claimed by him, the power of the court to vacate the satisfaction and permit the execution to be issued upon it for the benefit of the attorney is conceded by this decision. But in that case it was considered that redress might be obtained by the attorney by proceeding against the plaintiff in the action, while here that would be impracticable, for the reason that it has been made to appear that the plaintiff in this action is insolvent to a large amount, and on that account incapable of responding to the appellant for the services performed by him in the action. And where services of this description have been performed, and the recovery of a judgment has been secured by the attorney, it has been repeatedly held by the courts that the lien asserted in this instance exists in his favor, and may be enforced by him for the satisfaction of his demands. *Marshall v. Meech*, 51 N. Y. 140; *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. Rep. 649; *Randall v. Van Wagenen*, 115 N. Y. 527, 22 N. E. Rep. 361; *Wright v. Wright*, 70 N. Y. 98. And the attorney is entitled to proceed in this summary manner to enforce the lien and obtain satisfaction. *In re Wolf*, 4 N. Y. Supp. 239. And the circumstances that a dispute may exist concerning the amount of his compensation or his right to remuneration will not defeat the proceeding; for the court is empowered, through the intervention of a reference, to determine the validity of his claim, as well as of the objections which may be made against it by either of the parties to the judgment or others.

It has been asserted on behalf of the parties to the judgment that the appellant has been paid the sum of \$13,832.40 for his services in this and other litigations in behalf of the plaintiff in the judgment. And a payment nearly to this extent has been conceded by him, but, at the same time, it has been stated,

with apparent probability as to its correctness, that he had disbursed nearly the sum of \$6,000 in the litigation, by way of expenses, and that the plaintiff in the action still remains indebted to him in a large sum of money, excluding the costs and allowances recovered by this judgment. Who may be correct concerning this disputed state of the accounts it is not necessary to attempt to determine; neither could that be satisfactorily done upon the affidavits as they were presented on the hearing of the motion. If the appellant is right in his statements, then he is entitled to enforce his lien upon the amount included in the judgment by issuing an execution for its collection, while, if he is not right in that statement, then by an inquiry which may be regularly made in the proceedings it will be established as a matter of fact that he had been paid for his services, and has no legal right to enforce the collection of this judgment. That is a matter which can only be litigated satisfactorily by taking the testimony of the witnesses, whose evidence may be important on this subject, and then ascertaining the facts established by their evidence.

It has been made to appear by the affidavits that the attorney in December, 1889, commenced a suit in the superior court of the city of New York to recover the sum of \$18,915.39, stated to be owing to him for his services in the plaintiff's litigation as its attorney, and that an attachment had been issued in that suit, and a bond given discharging the attachment, which secured the payment to the attorney of any sum which he might be able to recover in that litigation; and, if that suit had included the claim now made by the plaintiff, that would have furnished a very satisfactory reason for dismissing this application, for the attorney could then very well held to have elected to prosecute his remedy by action instead of by means of a summary proceeding of this description. But the statement made by him is that the claims presented for determination of that suit are exclusive of that forming the basis of this proceeding; that this was reserved by him, and not made a part of the demands for the recovery of which that suit was commenced and is now being prosecuted. This statement, as the affidavits have been presented, appears worthy of credence, and the action in the superior court, therefore, cannot be permitted to defeat the application made in this action. It has also been stated that it was supposed that all the claims made by the attorney for services rendered to the plaintiff had been paid and satisfied in the manner already stated, but no arrangement or agreement whatever is authenticated or disclosed by the affidavits which would warrant the conclusion that the money received by the attorney was so received in satisfaction of his demands against the plaintiff. Neither does it appear satisfactorily there was any understanding, to which the plaintiff had become a party, that all litigation should be indefinitely suspended, or that the attorney should abandon his right to satisfaction for services in this action by enforcing his lien upon the judgment which had been recovered. It is stated in the points on behalf of the respondents that the defendant James Smith, as president of the New York Stock Exchange, had appealed from the judgment, and given security on that appeal staying the issuing of an execution; but, if that is the fact, it will not prevent the attorney, in case his right to enforce his lien in this manner shall be established, from issuing an execution against the defendants who have taken no appeal, and recovering the amount to which he may be entitled for his services in this action against those defendants. The stay of proceedings affected by the appeal and undertaking of the other defendant will operate in its favor alone, and not in favor of the defendants who have been proceeded against. The order should be reversed, with \$10 costs and disbursements, to abide the event of the proceedings, and an order should be entered directing a reference, for the hearing of the matters alleged, to a referee to report to the court the evidence taken by him, with a statement of his opinion as to the facts proven by it. All concur.

*In re CITY OF ROCHESTER.**In re WARRANT.**(Supreme Court, Special Term, Monroe County. May 2, 1890.)***1. MUNICIPAL CORPORATIONS—PUBLIC PARKS—MANDATORY STATUTE.**

Laws N. Y. 1888, c. 198, § 4, providing that, before land can be taken by the city of Rochester for park purposes, the common council "shall," at its next regular meeting after the map of the land to be taken has been filed as required by section 3, "by resolution declare that the city intends to take" the land, is mandatory, and the power to pass such resolution expires with the next regular meeting held after the filing of the map.

2. SAME—COMMISSIONERS—RESIDENTS OF CITY.

Residents of a city seeking to condemn land for park purposes are disqualified by reason of interest to serve as commissioners to appraise the land to be taken.

Application by the city of Rochester to acquire land of John W. Warrant. The said Warrant, respondent, now moves to vacate an order by which commissioners were appointed to make an appraisal of his land.

F. G. Hone, for the City. *J. L. Angle*, for respondent.

RUMSEY, J. This proceeding was taken under the authority of chapter 198 of the Laws of 1888, to acquire *in invitum* the lands of the respondent for park purposes by the park commission of the city of Rochester, created by that act. For the purposes of this motion it will be assumed that the act is constitutional, although, if necessary, a strong argument might be made against it. The act provides that, before any proceedings shall be taken for acquiring title to real estate, the commissioners shall cause to be filed a map of the land which they propose to take. Section 3. It is then prescribed that upon filing the map "the common council shall, at the next regular meeting of the common council thereafter, by resolution, declare that the city intends to take" the land, and shall give notice of such intention by publishing the same for 20 days. Section 4. The next section provides that "at the next regular meeting of the common council, after the expiration of said publication," a notice shall be published for 10 days that the city will apply at the place therein to be named to the supreme court for the appointment of three commissioners to appraise the lands. No personal notice to the owners of the application for appointment of commissioners is required. The report of the commissioners, when made, is to be filed in the office of the clerk of Monroe county, and a notice of the filing and of the time and place of a motion to confirm the report shall be published, and on the day for which the notice is given the court is required to confirm the report upon proof of the publication. As has been said, the statute makes no provision for personal notice on any one. Neither does it provide any protection for the rights of infants or incompetent persons, nor is any power given to the court to appoint any one to protect their interests. In its whole scope the proceeding is exceedingly summary.

It appears by the statute, also, that the compensation is to be fixed by the commissioners, and there is no appeal from their action, and no discretion given by the act to the court to set it aside for mere mistake or error, or because the award is too small. The amount of compensation is therefore almost entirely in the discretion of the commissioners. The purchase price of the lands is to be paid by the sale of bonds of the city, which, with the interest, are to be finally liquidated by taxation. The tax-payers of the city, present and to come, have therefore a direct personal interest in making the compensation to be awarded to land-owners as small as possible. The commissioners appointed are citizens of the city, and it is claimed that the order is irregular for that reason.

But two objections will be considered: The first one is that the court did not acquire jurisdiction to make the order. It appears that the map was filed

on the 10th day of June, 1889, and that the next regular meeting thereafter was held on June 11th, but the resolution that the city intends to take the lands was not passed until October 29, 1889. The point is made that the requirement of the statute that the resolution of intention to take the lands shall be passed at the next regular meeting after the filing of the map is mandatory, and that the power to pass the resolution expired with that meeting. It has come to be a maxim of the jurisprudence of this state that, when lands are taken in pursuance of a statute authority in derogation of the common law, every requirement of the statute having the semblance of benefit to the owner must be strictly complied with. *Sharp v. Speir*, 4 Hill, 76; *Sharp v. Johnson*, Id. 92; *Newell v. Wheeler*, 48 N. Y. 486. For many years, as the occasions for depriving citizens of their property by summary and unusual proceedings have increased, the courts have been inclined to insist upon the rule above stated with much strictness. They do not assume to say that any requirement of the legislature in such proceedings is immaterial, or that the courts can say that any course of proceeding, other than that prescribed by law, will do just as well. *Powell v. Tuttle*, 3 N. Y. 396, 405; *People v. Whitney's Point*, 82 Hun, 511; *In re Emigrant, etc., Bank*, 75 N. Y. 388. All the prescribed prerequisites to the exercise of the power to take the property of the citizen *in invitum* must be strictly complied with. *In re City of Buffalo*, 78 N. Y. 362. It was said by BRONSON, J., in *Striker v. Kelly*, 7 Hill, 9, that when the particular mode in which the corporation was to act was specially declared by its charter, it can only act in the prescribed form.

The contrary doctrine wants the sanction of legal authority, and is fraught with dangerous consequences. This language was used in a dissenting opinion, it is true, but it has received the approval of at least one of the judges of the court of appeals. *People v. Gardner*, 24 N. Y. 583, 587. The language of the statute is imperative: "The common council shall, at the next regular meeting." They "shall give notice" by publishing for 20 days. Both requirements are in the same section. Confessedly, the requirement to publish for 20 days is mandatory. But the words in which that requirement is made are precisely the same as those which direct the passage of the resolution. Generally, and in its primary meaning, the word "shall" signifies a command and not a suggestion. The word is imperative. It leaves no discretion. They were just as much bound to pass the resolution as they were to publish the notice. The requirement to pass it at the next regular meeting after the filing of the map was also, I think, peremptory and mandatory. Those people whose land was included in the map were entitled to know whether it was to be taken. They could only ascertain by learning whether the common council passed the resolution. Either the common council must act at the time prescribed, or they might postpone action as long as they chose, though it were 20 years. It is plain that those people whose lands are liable to be taken should not be required to watch and wait for the pleasure of the common council for their notice, but are entitled to have the matter disposed of at the time fixed by the statute. It is quite true that certain cases are to be found in which it has been held that the time when an act is to be done, although fixed by the statute, may be directory; but in those cases the time was merely formal, and, as was said by Judge MARCY, there was nothing in the nature of the power, or in the manner of giving it, that justifies the inference that the time was a limitation of the power. These cases are cited in *People v. Gardner, supra*. It cannot be denied that here the time was prescribed at which the common council must act, and that it was important to the landowner to know whether the common council did act, without watching each recurring meeting for all time. The time of action was, I think, essential, and not merely incidental. It is not to be denied that in many instances, in the face of a supposed public necessity, there is much looseness in dealing with rights of property. It is quite important that the few safeguards thrown

by law around such proceedings should be strictly insisted upon. The courts are becoming much more particular in this matter as the necessity for such strictness is seen to increase. Within the rules of the later cases I think the specification that the common council should act at the next regular meeting after the map was filed was imperative, and they had no power to act afterwards. *People v. Whitney's Point*, 82 Hun, 511; *Semon v. City of Trenton*, 47 N. J. Law, 489, 4 Atl. Rep. 312.

Another serious objection to the order appointing commissioners is that they appear to be residents of the city of Rochester. It is quite clear, I think, that they were incompetent to serve as commissioners. There was no doubt that they would have been incompetent at common law. Co. Litt. 157, a, b; *Wood v. Stoddard*, 2 Johns. 195. The fact that the legislature struck out the word "disinterested" from the statute did not make inhabitants of the city competent who were not competent before. There is no statute which I can find which removes the incompetency. *Dwyer v. City of Elmira*, 51 N. Y. 506. The fact that the commissioners are not shown to be tax-payers is not material. The cases cited above show that at common law the incompetency existed because of residence within the locality. There may be an interest not created by financial responsibility which the law recognizes as sufficient to disqualify. Such an interest arises when an inhabitant of a city is put to pass, in a court of record, upon a question between the city and a third person. It is removed as to jurors by statute, but that statute does not apply to these cases. For both the above reasons this order must be vacated. It is not necessary to discuss the constitutionality of the act, and I do not pass upon it, although it was argued.

GERNSHEIM *et al.* v. OLCOTT *et al.*

(Supreme Court, General Term, First Department. April 15, 1890.)

CORPORATIONS—REORGANIZATION—INJUNCTION.

By an agreement for the reorganization of a corporation, entered into between the stockholders and creditors, it was provided that new stock should be issued in lieu of the old, which should be divided *pro rata* among the holders of the floating debt of the corporation, on certain conditions, and among the old stockholders who should elect to provide their *pro rata* share of the amount requisite to pay the floating debt and other charges, the amount of such *pro rata* share to be fixed and determined by a certain trust company. Held, that the old stockholders, on a simple allegation that the assessment made by the trust company was "unnecessarily high," could not have an injunction restraining the distribution of stock until the validity of the claims to be paid by the assessment could be investigated. Reversing 7 N. Y. Supp. 873.

Appeal from special term, New York county.

Action by Michael Gernsheim, Eugene A. Loeb, and Albert Loeb against Frederic P. Olcott, the Houston & Texas Central Railway Company, Collins P. Huntington, and others, to reduce an assessment levied on the stockholders, and to enjoin defendants from disposing of any stock of the new or reorganized Houston & Texas Central Railway Company. An agreement for the reorganization of said company was entered into between its creditors and the stockholders, by which a new corporation, under the same name, was to be created, and the Central Trust Company of New York city was to become the purchaser of nearly all the property of the old corporation at foreclosure sale, and new stock was to be issued in lieu of the old, to be divided among creditors and the old stockholders on certain conditions. The latter company was charged with the execution of all the important details of the agreement. Plaintiffs were stockholders in the old corporation. From an order continuing an injunction restraining the distribution of such stock defendants appeal.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

Butler, Stillman & Hubbard, (Almon Goodwin and Adrian H. Joline, of counsel,) for appellants. Dittenhoefer & Gerber, (Frederto R. Coudert and Jefferson Chandler, of counsel,) for respondents.

BARRETT, J. The facts are fully stated in the opinion delivered at special term, (7 N. Y. Supp. 872,) and it will not be necessary to repeat them *in extenso*. The plaintiffs commenced this action for the purpose of obtaining a judgment, adjudging that a decree of the circuit court of the United States for the eastern district of Texas was "fraudulent, collusive, illegal, and void." The prayer for relief is in the alternative, and asks, in the event of the court refusing to decree invalidity, that the plaintiffs have a reasonable time to intervene in the Texas suit, or to apply there by original bill to set aside the decree, and the sale and all subsequent proceedings thereunder. As an incident to both prayers, the plaintiffs ask an injunction restraining the defendants from issuing any shares of stock or bonds under a certain reorganization agreement, referred to in the pleadings. The entire case made by the complaint, in support of this relief, was minutely and ably examined by the learned judge at special term, and every question presented was decided adversely to the plaintiffs, the injunction being dissolved in great part, and retained only as to the issuance of stock in the reorganized company. In his reasoning and conclusions as to these questions we fully concur.

There is, however, a question which underlies the right to the maintenance of the injunction at all, as the case was made, and which evidently was not called to the attention of the learned judge, but has been raised on this appeal, and which causes us to think that the correct result of the views expressed would have led, if presented to him, to the entire dissolution of the injunction. When the plaintiffs failed with regard to the Texas decree and the reorganization agreement, they failed as to the scope of the bill. They could then obtain the relief granted by the order appealed from only upon an amended complaint, setting up fraud, mistake, or negligence on the part of the trust company; in other words, an abuse of the power of determination conferred upon it by the reorganization agreement. And it would also have been necessary to support these averments by at least *prima facie* proof of the injustice or invalidity of the claims which were allowed, or of the failure of the company to make proper investigation before such allowance. It will be observed that the case upon this head is substantially a new one. It proceeds upon an affirmation of the reorganization agreement, and a willingness to accept the *pro rata* share of new stock, provided the assessment is fair and just. The present allegations of the complaint might possibly remain and be treated as leading up to and coloring the oppressive assessment, but, standing alone, they clearly disaffirm the reorganization agreement, and all the proceedings which called it into existence. Now, under this reorganization agreement, the function of determining the amount of the assessment is, as above suggested, conferred upon the trust company. The provision on that head reads as follows: "*Ninth.* The said ten million dollars (\$10,000,000) par value of said new stock is to be issued to, and shall be divided *pro rata* among, such holders of the floating debt of the said railway company as, within a time to be prescribed by said trust company, may provide a *pro rata* share, proportionate to the whole floating debt of the company, of the cash payments to be made hereunder for interest and bonus to the holders of the first mortgage bonds and coupons, and for the necessary charges, expenses, and liabilities incurred, or to be incurred, by the said trust company in carrying out the provisions of this agreement: provided, however, that the holders of the existing capital stock of the Houston and Texas Central Railway Company may, within a time to be prescribed by said trust company therefor, if they shall elect so to do, provide their *pro rata* share proportionate to the whole outstanding capital of the present company of the amount requisite to

discharge the floating debt of the company, and to provide for the cash payments, charges, expenses, and liabilities above referred to, and in that event they shall be entitled to receive a like proportionate amount of stock of said reorganized company. The amount of such *pro rata* share to be paid, whether by the holders of the floating indebtedness of said company or by said stockholders, is to be fixed and determined by the said trust company."

If, therefore, the case is to proceed upon the theory that the trust company has fixed a percentage of assessment in excess of what is necessary to discharge the floating debt, and to provide for the cash payments, charges, expenses, and liabilities referred to, there must, of course, be proper allegations and proofs. The only statement of fact upon that head which is to be found in the present complaint is this: "That said assessment was made unnecessarily high, and, as plaintiff verily believes and charges, in bad faith, by the said Huntington and his associates, to bar out the present stockholders, and to enable, under the said plan of reorganization, the Southern Pacific Company to acquire the entire stock on the payment simply of the amount required to be paid to the first mortgage bondholders for interest and bonus and the expenses of the reorganization." It is plain that such an allegation will not answer. The assessment was not "unnecessarily high" to meet the floating debt and other charges, as fixed and determined by the trust company. And there is neither allegation nor evidence questioning the good faith and vigilance of the trust company, or impugning the correctness of the determination which it made. It is said that the assessment is an extraordinary one. And so it is. But the trust company's answer to that suggestion is that it is not responsible for the amount of the floating debt or other charges, and that it is the latter which happen to be extraordinarily large. The error which we think the learned judge at special term here fell into consists in the assumption that the stockholders have a right to enjoin the completion of the reorganization scheme until they can investigate the claims upon which the assessment was fixed. In other words, that the plaintiffs, having failed in their attack upon the Texas decree and the reorganization agreement, may proceed as for an accounting with regard to the floating debt, and obtain a final judgment modifying the action of the trust company, and judicially fixing the assessment at whatever amount may, upon such accounting, seem requisite to the court. Clearly, there should at least have been a preliminary request for particulars from the trust company. It cannot be presumed that that company allowed any claim without adequate investigation. Nor can it be presumed that information with regard to its action would have been denied. Indeed, the president of the company in his affidavit filed upon the hearing of the motion testifies as follows: "The said Central Trust Company caused an examination to be made to ascertain the amount of the floating debt, and of the cash payments, charges, expenses, and liabilities incurred, or to be incurred, by it in carrying out the provisions of said agreement. Said examination was made in good faith, and the result thereof is contained and set forth in the exhibit annexed to the answer of said trust company, marked 'Exhibit A,' to which I respectfully refer. Thereupon the said trust company ascertained and determined the amount of the *pro rata* share of the stockholders of the old company of the amount required for the purposes specified in the reorganization agreement, and gave notice thereof, prescribing the time within such *pro rata* share should be provided." This was not denied, nor was the good faith of the examination impugned. Unless, therefore, these stockholders have a right to an independent judicial investigation, regardless of the agreement, and upon such investigation to substitute the judgment of the court for that of the trust company, we see no way of sustaining even this limited injunction. It certainly cannot be sustained without some allegations upon the subject more definite than the statement that "the assessment was made unnecessarily high." But, in our judgment, the

proposition that the stockholders may come into a court of equity, investigate there in a general way the justice and validity of each item composing the floating debt, liquidate by decree the sums which should be allowed and those which should be disallowed, and thereupon settle the proper percentage of assessment,—meanwhile tying up the entire reorganization,—cannot for a moment be entertained. The true view of the reorganization agreement is that all this is to be done by the trust company. That company cannot, of course, act arbitrarily or unreasonably, nor is there any evidence that it has done so. But, before the court can interfere, it must be made to appear by proper allegations and proofs that the claims (or some of them) which entered into the trust company's computation were unjust or excessive, or that for some adequate reason they should not have been included in its estimate. As the case now stands, there are no issues on this head to be tried, and, if the cause were to be heard at special term upon the present pleadings, the complaint, under the general views entertained by the learned judge, (in which, as already observed, we fully concur,) would have to be dismissed, unless, indeed, the court should thereupon proceed with a general inquiry into the nature and justice of the floating debt,—a function more analogous to that of an investigating committee than a tribunal organized to adjudicate *secundum allegata et probata*. The order appealed from should therefore be reversed, with \$10 costs, and the usual disbursements, and the injunction dissolved, without prejudice, however, to a further application upon an amended complaint and proper proofs, if the plaintiffs are so advised. All concur.

PEOPLE *ex rel.* HEFFERON v. MCCLAVE *et al.*

(Supreme Court, General Term, First Department. June 6, 1890.)

MUNICIPAL CORPORATIONS—DISMISSAL OF POLICEMAN.

Relator was dismissed from the police force on the charge of being intoxicated at his residence. A physician who attended him at the time in question testified that relator told him that he had been drinking a little too much, and that relator's breath smelt strongly of alcohol. But relator testified that he told the physician that he had taken brandy and oil, and the testimony of several other witnesses was to the effect that he had taken brandy and oil for cramps. There was no evidence that he was in the habit of drinking liquor. *Held*, that the dismissal could not be sustained.

Certiorari to police commissioners.

Proceedings on the relation of John M. Hefferon to review the action of the police commissioners of the city of New York in dismissing the relator from the police force.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Louis J. Grant, for relator. William H. Clark, (John J. Delany, of counsel,) for respondents.

DANIELS, J. By the specification of the charge, it was stated that the officer was unfit for duty at his residence by reason of alcoholism on the evening of September 25, 1889; and Surgeon Dexter testified that he aroused him, and asked him what he reported sick for, and that, after a little hesitation, he answered that he had been drinking a little too much, and knew that where he was was a better place for him than on patrol, and that he could not then do duty; that he smelt his breath, and it seemed to be strong of alcohol. He testified, further, that he was coming out of it, but was still unfit for duty; that he inquired of him if he could go on duty the next morning, and his reply was: "No; I want to to-morrow night." The case in this manner made out was not advanced or strengthened by any other evidence upon the hearing; and the officer testified that the statement made by him was that he took brandy and oil after arriving at his home. But, while the surgeon stated that the relator had not put it in this form in their interview, still this was

probably the truth; for Roundsman Deeves, who saw him in the afternoon, said that his face was then flushed, and he spoke dull, and he thought him under the influence of liquor; added that he called upon him in the evening, and was informed by the woman at the door that she had given him oil and brandy for cramps. And Patrolman Kivlen testified that in the afternoon his nose was bleeding, and he did have cramps, and he covered his post for him while he went to the drug-store. And Bridget Walsh, in her evidence, said that the officer's wife asked her to stay there until she went to the station-house, and that he had cramps, and that she herself went, and brought brandy and five cents' worth of castor oil, and gave him the two together; that this was about half-past 7 o'clock, and she remained there until his wife returned. Patrolman Crosset confirmed the fact that the officer was unwell about 4 o'clock in the afternoon. And there was no evidence that he was addicted to drinking spirituous liquor. The witness Deeves also testified that he brought Dr. Steinert to the officer after he had first seen him at his house, and the doctor pronounced him perfectly sober. The doctor, in his evidence, said that he roused the officer, and he was all right, and sensible in his speech. This was about 40 minutes after 9, and before the officer was seen by Dr. Dexter, which was about 10 minutes after 10. The very decided probability from the evidence is that the officer was unwell, that he took what he drank as a medicinal remedy, and that it had not produced the effects when Dr. Steinert visited him which it had at the later hour referred to by Dr. Dexter. The whole case is therefore clearly reconcilable with the presumption of innocence existing in favor of the accused, and he should not have been removed. On this evidence the verdict of a jury against him would not be allowed to stand. And the decision of the commissioners should be reversed, and the officer restored to his position on the force. All concur.

PAUL v. STEVENS *et al.*

(*Supreme Court, General Term, First Department. June 6, 1890.*)

PARTNERSHIP—FIRM LIABILITIES—EVIDENCE.

Plaintiff loaned money to one who put it into a partnership business with defendant. Afterwards the borrower retired from the firm, and assigned his interest to his wife. Defendant, upon inquiry, assured plaintiff that the interest on the borrower's note to her would be paid the same as before, and subsequently, but before the note was due, executed a new note in exchange therefor, payable on demand, and signed in the firm name. It was understood that the money should remain in the business, and thereafter the interest was paid by checks in the firm name. Held sufficient evidence that defendant considered it a firm liability, and a verdict against him was properly directed.

Appeal from circuit court, New York county.

Suit by Ellen Paul, individually and as executrix of Theodore R. Paul, deceased, against Augustus P. Stevens and Julia A. Van Da Linda. Verdict and judgment against defendant Stevens, from which he appeals.

Argued before BRADY, P. J., and DANIELS, J.

A. Simis, Jr., for appellant. Coleridge A. Hart, for respondent.

DANIELS, J. The verdict was directed for the amount unpaid upon a promissory note made on the 12th of October, 1885, payable to the plaintiff or order, in the sum of \$2,500. It was subscribed by the firm name of "A. P. STEVENS & Co.," and it was alleged in the complaint that these defendants were associated together as partners in business under that firm name, and made and delivered the note in question to the plaintiff. These allegations were not denied by the defendant's answer, but he set up an affirmative defense to exonerate himself from liability upon the note; and he was received as the witness upon the trial by whose evidence alone these defenses were endeavored to be maintained. It appeared by his evidence that he, together with James A.

Van Da Linda, were previously in partnership under the firm name of A. P. Stevens & Co., and that the plaintiff loaned to Van Da Linda the sum of \$2,000, which he put into this firm as his capital, and gave the plaintiff his individual note for the payment of the indebtedness. Before the note in suit was given, James A. Van Da Linda retired from the firm, and resigned his interest in it to the defendant Julia Van Da Linda, his wife; and under this assignment, with the assent of the witness, she became associated with him in the business, and had so continued since the year 1884. After the retirement of James A. Van Da Linda, who had given the preceding note to the plaintiff, she had an interview with the defendant Augustus P. Stevens concerning the interest payable to her upon the indebtedness, in which he stated that the interest would be paid the same as it previously had been. Then she inquired what would happen to her if he should die, and he testified there was something in that; and he sat down, and drew the note in controversy for this of \$2,500, which included \$500 of interest then unpaid on the note held by her, and delivered the note to the plaintiff, and that she then destroyed the other note. After that, interest was paid upon this note by checks drawn by this defendant from time to time, and the principal remained in the business.

It was substantially on this state of the proof that the verdict was directed in favor of the plaintiff against the defendant Augustus P. Stevens; and it disclosed sufficient to indicate the truth to be that he regarded the preceding loan as a debt of the firm, and had paid interest upon it according to that understanding, and that the note in suit had been given in place of the preceding note for the reason that James Van Da Linda had withdrawn from the firm, and that this defendant intended to carry the indebtedness along as that of this firm. The note was payable on demand after date; but, from the interview which this defendant states took place between himself and the plaintiff, it was clearly the understanding that the money should be permitted to remain in the business of the firm, and that no immediate measures should be taken to enforce its collection. That is evident from the fact of the assurance given that the interest should be paid upon the debt the same as it had been while Mr. Van Da Linda was a member of the firm, and the inference was plainly supported that an extension of time was given for the payment of this money, and that formed a consideration between this defendant and the plaintiff, under the circumstances which appeared to have taken place, supporting the making and delivery of this note; for it has been repeatedly held that forbearance or an extension of the time for the payment of a debt is a good consideration for the making and delivery of an obligation of this description. *Insurance Co. v. Smith*, 23 Hun, 535; *Bank v. Penfield*, 7 Hun, 279; affirmed 69 N. Y. 502. A point similar upon its facts to that controlling the disposition of this case, arose in *Spalding v. Cargill*, 53 N. Y. Super. Ct. 453, where it was held that a substitution of a note for a previous obligation was sufficient to maintain it as a legal obligation. The benefit to the firm by leaving the money in its business for an indefinite period of forbearance created such a consideration. From the evidence which was given, it was also to be inferred, although the money had been loaned to Van Da Linda himself, that it had been considered by this defendant as a firm indebtedness, and the interest had been paid upon it by him with that understanding; and the change in the form of the obligation from the preceding note in this manner given was no more than continuing the same liability, and imposing the observance of the same obligations, which had been previously accepted and fulfilled by this defendant. There was sufficient, therefore, in the case, as against this defendant, to maintain his liability for the indebtedness. No question of fact was presented by the evidence, and a verdict for the plaintiff was legally directed. In these essential respects the case differs from that of the other defendant, Mrs. Van Da Linda, and the judgment and order should be affirmed.

ROSS *et al.* v. BUTLER *et al.*

(Supreme Court, General Term, First Department. June 6, 1890.)

ATTACHMENT FOR CONTEMPT—INDEFINITE ORDER.

An assignee for the benefit of creditors cannot be attached for contempt in not complying with an order directing him, in general terms, to distribute the funds remaining in his hands, after deducting fees, costs, and commissions *pro rata* among a large number of creditors, where the amount to be paid to each creditor is not specified by such order. The acts to be done are not sufficiently specific to be made the basis of an attachment.

Appeal from special term, New York county.

Suit by William A. Ross and the Norwich Lock Manufacturing Company against John H. Butler, John O. Constant, and Charles W. Butler, assignee of the property and effects of John H. Butler and John O. Constant. Appeal by Charles W. Butler from an order adjudging him guilty of contempt.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Birdseye, Cloyd & Bayless, (Lucien Birdseye, of counsel,) for appellant. *Richards & Heald*, for respondent the Trenton Lock & Hardware Company.

VAN BRUNT, P. J. Without definitely passing upon the point whether, under any circumstances, an attachment could issue for the enforcement of a decree entered in an action similar to the one at bar, which is a matter of more than grave doubt, (*In re Hess*, 1 N. Y. Supp. 811,) it is clear that, in the position in which this action was at the time the order appealed from was made, and from the nature of the order itself, the court has no power to make the same. This action was brought to compel the appellant, as assignee under a general assignment for the benefit of creditors, to render an account of the estate coming into his hands as such assignee, and to distribute the moneys remaining in his hands among the creditors entitled thereto. Certain proceedings having been had, on the 16th of April, 1889, a decree was entered adjudging that a certain sum of money was in the hands of the said assignee, from which balance the assignee was directed to pay the several plaintiffs or their attorneys their costs and disbursements, including the sum of \$——, the fees of the referee, together with an additional allowance; said costs to be taxed by the clerk of the city and county of New York. The assignee was further directed to pay to the defendant assignee's attorney his costs and disbursements, to be taxed in like manner. He was then directed to retain a sum specified for his compensation, as commissions, and also an additional amount of \$10 costs, and was then directed to divide the residue of the fund remaining in his hands among a list of 133 creditors, *pro rata*, and without preference; the amount of the claims of the creditors against the assigned estate being stated; but the amount which was to be paid to them not being determined.

If there is one thing which is well settled in reference to the power of the court to enforce by attachment its judgment or decree, it is that such judgment or decree shall be definite and certain; that there shall be no opportunity for ambiguity, but that the party proceeded against is to be adjudged to do a certain specific act,—if it is to pay money, then to pay a specific sum of money. In the case at bar, who is to determine as to what amount, in dollars and cents, the moving creditors in this proceeding are to obtain? The referee's fees have not been determined; the costs have not been determined; and the amount which each creditor is to receive has not been determined. This is all matter of calculation, to be gone into after the amount of the referee's fees is settled, and the costs taxed. Who is to determine when these things have been legally and regularly done? In order that a commitment may issue under any circumstances, as already stated, the precise thing to be done by the party proceeded against must be stated in the judgment or order. When we

come to examine the order adjudging the party in contempt, what do we find? It is that the appellant be punished by imprisonment as for a contempt, unless within five days he pay to the moving creditors or their attorneys the amount due under the judgment, together with \$10 costs of these proceedings. Who is to determine the amount due under that decree,—the moving creditors or the assignee? The appellant has not been directed to do any specific thing, and, if a commitment were issued upon such an order, it would be impossible for the sheriff to determine when the appellant had conformed to its requirements. It is absolutely clear that a party cannot be adjudged to be in contempt without definitely stating what he shall do in order to purge himself of the contempt. There is no such statement in this case. The court has not yet determined the precise amount which he is to pay to these various creditors, and until it does the appellant cannot be proceeded against by this class of proceeding. But by anything that has been said we do not intend to intimate that, under any circumstances, the payment of money under a decree of this kind can be enforced by proceedings for contempt. The order should be reversed, with \$10 costs and disbursements. All concur.

MORRISON, Public Administrator, v. MUTUAL LIFE INS. CO.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

EXECUTORS AND ADMINISTRATORS—LIFE INSURANCE POLICY.

In an action on a life insurance policy, it appeared that the assured died a resident of Maine, and an administrator was there appointed, who obtained possession of the policy, and recovered upon it. Plaintiff was appointed administrator of the assured in New York, and sued for the amount of the policy. *Held*, the fact that he never had possession of the policy is fatal to a recovery.

Appeal from special term, New York county.

Suit by Richard J. Morrison, as public administrator of the goods, chattels, and credits of Joseph E. Miller, deceased, against the Mutual Life Insurance Company of the city of New York. Trial by the court without a jury, and judgment for defendant, from which plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
O. P. Hibbard, for appellant. *Julian T. Davies*, for respondent.

VAN BRUNT, P. J. In March, 1873, the defendant, at the city of New York, issued to one Joseph E. Miller a policy of insurance upon his life. In September, 1886, said Miller died in the state of Massachusetts, being at the time of his death a resident of the state of Maine, and was at the time of his death in possession of said policy. In November, 1886, one Chase was duly appointed the administrator of the estate of said Miller in the state of Maine, and duly received said policy, and remained in possession thereof until its surrender, as hereinafter mentioned, and served upon the defendant notice and due proof of the death of said Miller, and demanded payment of the amount of said policy, and in November, 1887, began an action against the defendants for the recovery of the amount due on said policy. That service in said action was made in the state of Maine upon an agent of the defendants appointed pursuant to the laws of said state. In May, 1887, the plaintiff was appointed in New York as administrator of the estate of said Miller, and in June payments of the amount due on said policy was demanded by the plaintiff. In August this action was begun to recover said amount. In October, 1887, a judgment was rendered in the Maine action, and execution issued therein; and on the 19th of that month the Maine judgment was paid and satisfied, and the policy surrendered by said Chase. Upon the trial of this action the complaint was dismissed on the merits, and judgment thereupon entered for the defendants, from which this appeal was taken.

It is claimed by the plaintiff that the case of *Holyoke v. Insurance Co.*, 22

Hun, 75, affirmed without opinion, 84 N. Y. 648, sustains his right of recovery in this action. An examination of that case, however, we think, shows that it is perhaps as direct authority in support of the judgment herein. In the case of *Holyoke v. Insurance Co.*, one Perkins, a resident of Maine, had assigned a policy of insurance upon his life to one Holyoke, a resident of this state. Holyoke having died, letters testamentary were issued to the plaintiff, and subsequently letters of administration with the will annexed, of the estate of Holyoke, were issued in Maine to one Bonney. The plaintiff received the assignment of the policy, but the policy itself was in Maine, and received by Bonney as such administrator. Upon being paid the amount of the policy, Bonney assigned the same to another person residing in Maine, and the action was brought by the plaintiff to recover the amount of the policy in the courts of this state; and the court held that, because the policy was in Maine, it there formed part of the property of the testator, and belonged to the administrator in Maine. The policy, never having been in this state, could not, under the principle of the foregoing case, form any part of the assets of the deceased to which the plaintiff acquired title. But it is urged that, the debtor being here, and the administrator in Maine not being able to sue the debtor, therefore the other principle announced in the case cited—that, if a debtor pays to an administrator of his creditor appointed in the state where he resides, he cannot be sued elsewhere—applies. An examination of the case shows that the ground upon which such a payment is protected is because the debtor cannot be compelled to pay elsewhere, but the case also holds that such a payment will not be protected if there exists a written contract creating the indebtedness which is not held by the party claiming payment, but it is within another jurisdiction. If the plaintiff had possession of the policy in question, then his case would have been identical with that of *Holyoke v. Insurance Co.*, but the want of such possession is fatal to his action. The following cases—*Insurance Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. Rep. 364; *Holmes v. Remsen*, 4 Johns. Ch. 460; *Embree v. Hanna*, 5 Johns. 101—support the view taken. The plaintiff, never having obtained the title to the policy in question, or the right to the possession thereof, cannot maintain this action. The judgment appealed from should be affirmed, with costs.

All concur.

COOKE *et al.* v. UNDERHILL MANUF'G CO.

(Supreme Court, General Term, First Department. June 6, 1890.)

Sale—Warranty—Acceptance.

In an action for the price of an engine sold defendant, which plaintiffs had guaranteed to give satisfaction, it appeared that the engine was started in April, 1887, but it was conceded that defendant had not accepted it up to November 30, 1887, when defendant asked plaintiffs to remove it, but continued to use it. On February 10, 1888, plaintiffs wrote defendant to know "what decision you have come to about the engine." On February 21st defendant replied, "We have no reason to change our views expressed in our letter of November 30, 1887," and said that the engine was at plaintiffs' risk, and requested them to remove it. Plaintiffs replied by writing that they did not wish to remove the engine, and argued to show that they should not be held responsible, and said: "If we admit, which we do not, that we must take the engine out under your instructions, what is to become of the foundation?" Defendant immediately wrote that the engine was not satisfactory, and on February 28th that it was subject to plaintiffs' order. Held, that there was no acceptance of the engine by user, and it was error to submit that question to the jury.

Appeal from circuit court, New York county.

Action by James W. Cooke and Lydia Cooke against the Underhill Manufacturing Company. Judgment on verdict for plaintiffs, defendant's motion for a new trial denied, and it appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
James Dunne, for appellant. Charles D. Baker, for respondents.

VAN BRUNT, P. J. This action was brought to recover for an engine proposed to be furnished, delivered, and set up by the plaintiffs for the defendant. Under the contract, the plaintiffs were to build the foundation; the defendant to do the excavating, filling, or piling that might be necessary to secure a firm subfoundation. The plaintiffs guaranteed this engine to be built in the very best manner, and to be as durable and economical as any automatic engine. In short, to use their own language, "we guaranty to give satisfaction, or to take it out at our expense." The engine was put in and started in April, 1887. Certain complaints having been made as to the engine, tests were made, and on the 28th of November, 1887, the defendant wrote that the engine was not giving satisfaction, and the plaintiffs were asked to remove it. On the 30th of November the plaintiffs were again asked to remove it, and, without considering in detail the evidence produced upon the trial, it is sufficient to say that, up to this time, it was conceded that the engine had not been accepted. Other evidence was introduced showing that subsequent to that time the engine was used by the defendant, and the question submitted to the jury was whether this use was of such a character as constituted an acceptance of the engine. The learned court was asked to charge the jury that, if they found that the defendant never intended to and did not in fact accept the engine, then their verdict should be for the defendant. This the court refused to charge except as it had charged, leaving the question as to whether there was an implied acceptance still for the jury to determine. We think, upon the conceded facts of the case, that there was no such question which could be submitted to the jury. On the 28th of February, 1888, the engine was absolutely rejected by the defendant, and, if it had a right at that time to reject, then there never had been an acceptance. We think that an examination of the correspondence shows that not only had there never been an acceptance up to that time, but that the plaintiffs so understood it. On the 10th of February, 1888, the plaintiffs wrote: "We are quite anxious to know what decision you have come to about the engine." If it had already accepted the engine, what decision could the defendant come to in respect to the engine which would be of any interest to the plaintiff? It is clear that at the time of writing that letter the plaintiffs did not understand that the defendant had accepted this engine. On the 21st of February, 1888, the defendant wrote, "We have no reason to change our views expressed in our letter of Nov. 30, 1887," up to which time it is admitted there had been no acceptance. "As you are aware, the engine is remaining at Franklin at your risk. The sooner you can remove it, the more agreeable it will be to us." What is the answer of the plaintiffs? On the 25th of February, 1888, they write acknowledging the receipt of this letter of the 21st. "Before taking any decided action, we want to make a statement of the case as it appears to us, and will endeavor to be as brief as possible. We have no hesitation in saying, what you no doubt have inferred, that we do not want the engine to come out, and this for various reasons;" stating them. "There are two reasons why the engine does not satisfy you, and for neither of these should we be held responsible." And then follows an argument to show that they should not be held responsible for those reasons. And the plaintiffs claim that it is not fair, in view of all the facts, that they should be held to a technical interpretation of the promise that the engine should be entirely satisfactory to the defendant. And the letter closes, "expressing the hope that a consideration of the case as above stated may lead you to look upon the matter in a light more favorable to us. If, however, you are fixed in your determination, there is one point which should be understood. If we admit, which we do not, that we must take the engine out under your instructions, what is to become of the foundation?"

There is not a single pretense in this correspondence that the plaintiffs understood that the defendant had accepted this engine, or that it had not a

right still to reject it, if it did not comply with the contract. The phrase, "if we admit, which we do not, that we must take the engine out under your instructions, what is to become of the foundation?" was a dissent from nothing except that the engine could be taken out if the defendant desired, whether it complied with the contract or not. There was no pretense that it could not be taken out if it did not comply with the contract. And there was no pretense that the defendants had no right to claim that it could be taken out because they had accepted it. Upon the same day the defendant writes that it does not comply with the contract, and that it was not satisfactory, and on the 28th that the engine was subject to the plaintiffs' order and risk. In view of this correspondence, it is difficult to see how the mere user of the engine during this period could be or was looked upon by either of these parties as an acceptance thereof. In fact, up to the very time when the correspondence ceased and the user of the engine ceased, it was conceded upon the part of the plaintiffs in their letters that there had been no acceptance, and they were negotiating with the defendant for the purpose of getting it to accept it. We think, therefore, that there was no question upon acceptance which could be submitted to the jury. The only question was as to whether the engine complied with the contract or not, and the defendant obliged to accept. This question does not appear to have been submitted to the jury, and we think that, where both parties assume that up to the time of rejection there was a right to reject, and dealt with each other upon that basis, the jury should not be allowed to come to a different conclusion, and say, under the circumstances, there had been a sufficiently long user to constitute an acceptance. There seems to have been error in refusing the request charged, and the judgment must be reversed, and a new trial ordered, with costs to appellant to abide event. All concur.

KINNE v. MEYER.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

JUDGMENT BY DEFAULT—OPENING—SERVICE OF PROCESS.

A judgment by default rendered against defendant, who swears that he was at his residence in New Jersey at the time summons was alleged to have been served on him in New York city, and who is supported by eight witnesses, will be opened so far as to enable him to appear and defend, though four witnesses for plaintiff directly contradict defendant, and swear that service was made as alleged.

Appeal from special term, New York county.

Action by George P. Kinne against Jacob Meyer for alienating the affections of plaintiff's wife. Plaintiff obtained judgment by default. Defendant moved to vacate the judgment because he had never been served with process. From an order denying his motion, defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Stimson & Williams, (*William Pierrepont Williams*, of counsel,) for appellant. *H. T. Marston*, (*Albert I. Sire*, of counsel,) for respondent.

BRADY, J. The question presented for the consideration of the court below was one of fact; namely, was the summons served upon the defendant? The defendant denies it, and sustains his denial by evidence showing him to have been at his place of residence in New Jersey at the time the service is alleged to have been made in this city. These affiants number nine, including the defendant, to which is superadded affidavits of the defendant's character as a good and reputable man by persons who have known him long and well; one being the president of a bank, and another the surrogate of Essex county, N. J. The plaintiff sustains his asseveration that the service was made by four persons, whose depositions relate directly to the subject, and by others, some of which relate to the good character of some of the affiants on

his behalf, who are assailed by contradictions. The number of depositions thus arrayed on both sides amounts to 25 and upwards, and on this mass of conflicting statements the learned judge in the court below was asked to determine the question suggested. He decided it in favor of the plaintiff; but, as no opinion was delivered, we have not the benefit of his views. He did not have the advantage of hearing the proofs and of seeing the witnesses, and neither party had the benefit of a cross-examination. The action is for a wrong done, and the damages were assessed by a sheriff's jury on a default. It is thought, on such a motion, marked by such extraordinary elements, one of two modes should have been adopted; namely, a reference to examine and report upon the truth of the alleged service or the retention of the judgment as security, but opening it so far as to enable the defendant to appear and defend. This protects the plaintiff's rights, if he have any, secured by the asserted service of the summons, and the defendant's rights, whatever they may be, by giving him the opportunity to respond to the charge made against him. For these reasons the order appealed from should be modified by inserting in it the provision suggested, namely, opening the judgment so far as to enable the defendant to appear and defend, but allowing it to remain as security, without costs to either party. Ordered accordingly. All concur.

HIRSH v. VAN DER PERREN.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

ARREST IN CIVIL ACTION.

Affidavits averring that defendant had admitted that he had obtained the delivery to him by plaintiff of a bill of lading by expressly promising to collect as the agent of plaintiff the money due for the goods represented by the bill, and pay it to plaintiff at once, and that he had collected the money, and personally appropriated it, are sufficient to justify an order of arrest.

Appeal from special term, New York county.

Action by Morris M. Hirsh, as sole survivor, etc., against Ferdinand van der Perren. Defendant appeals from an order denying his motion to vacate an order of arrest.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Theo. H. Friend, for appellant. Felix Jellinek, for respondent.

BRADY, J. The complaint alleges that the claim set up is for moneys received by the defendant as agent for the plaintiff in a fiduciary capacity, and the affidavits show that such allegation was properly made. The defendant requested the plaintiff's agent, having possession of the same, to deliver to him a bill of lading, which was done upon the express promise and agreement that he would, as the agent of the plaintiff, collect the money due from the vendees of the merchandise represented by it, and pay over the same to the plaintiff immediately. This appears from a statement of these facts on information and belief, but to which is added a declaration by the affiant that the defendant admitted it to be true. And further it appears by an affidavit of another deponent that the defendant admitted his collection of the money, and his personal appropriation of it. There are no arguments within the whole realm of ingenuity that can overwhelm these elements. They contain all that is necessary to justify an order of arrest, and need only be stated to make that proposition unquestionable. The order appealed from must therefore be affirmed, with \$10 costs, and the disbursements of the appeal. All concur.

HARLAND et al. v. HOWARD.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

1. PLEADING—ANSWER.

A complaint alleged as plaintiffs' cause of action that defendant, as the agent of plaintiffs, sold goods for them, and received therefor certain moneys, which he re-

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fused to pay over on demand. The answer admitted the agency, the sale of the goods, and the receipt of moneys, but denied every other allegation in the complaint. *Held*, that a judgment for plaintiffs on the answer was erroneous.

2. ARREST IN CIVIL ACTION—PLEADING.

A complaint which alleges that defendant, as plaintiffs' agent, sold merchandise and received the proceeds, and refuses to pay over the sum so received as plaintiffs' agent, will not support an order of arrest, under Code Civil Proc. N. Y. § 549, providing that a defendant may be arrested, in an action to recover money or property, "where it is alleged in the complaint that the money was received, or the property was embezzled or fraudulently misapplied, by * * * a factor, agent, broker, or other person in a fiduciary capacity."

3. SAME—SERVICE OF ORDER.

A private detective, without a warrant, forcibly seized defendant for the purpose of detaining him until the order of arrest could be served on him by the proper officer. *Held* that, though the order of arrest was subsequently served, while defendant was detained on a charge of assault committed in breaking away from the detective, there was an abuse of process, for which the order should be set aside.

Appeals from special term, New York county.

Action by Robert Harland and others against Thomas Howard. The complaint alleged that "plaintiffs had consigned to the defendant, as such agent, certain goods, wares, and merchandise, to be sold by him for their account, the gross proceeds to be returned to them without deduction,—the expenses of conducting the business having been provided by plaintiffs; that as such agent the defendant sold and disposed of a large quantity of merchandise, and has received the proceeds of such sales; and that he has neglected and refused, and neglects and refuses, to pay over to the plaintiffs the sum of 4,485 97-100 dollars, so received by him as plaintiffs' agent, although such payment has been duly demanded from him." Code Civil Proc. N. Y. § 549, provides that a defendant may be arrested in an action, where the action is brought to recover for money received, or to recover damages for the conversion or misappropriation of property, "where it is alleged in the complaint that the money was received, or the property was embezzled or fraudulently misapplied, by a public officer, attorney, solicitor, or counsel, or an officer or agent of a corporation or banking association in the course of his employment, or by a factor, agent, broker, or other person in a fiduciary capacity." Defendant moved to vacate an order of arrest issued in the action, on the ground that the arrest as made was an abuse of the process of the court, and based a separate motion for the vacation of such order upon the papers upon which the order was granted. From orders denying these motions, and from a judgment rendered for plaintiffs on the answer, defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

William J. Gaynor, for appellant. *Lord, Day & Lord*, for respondents.

VAN BRUNT, P. J. The ground upon which this motion is based is that one Macdonald, a private detective, forcibly detained the defendant until the sheriff of Kings county could arrest him. It seems to us that this claim is established beyond all question. It is true that it is claimed that the plaintiffs' affidavits, by preponderance of proof, show that no such thing had occurred; and that both Macdonald and Yaxley, the agent of the plaintiff swear that no compulsion whatever was used, and no false pretenses made; but that the defendant went with them voluntarily to the Fulton-Street police station, and apparently was very anxious to have the officer in charge detain him until the sheriff could come to arrest him; and that after the officer in charge refused to detain him, and he was proceeding with them voluntarily to the jail, he broke away, tripped up Macdonald, striking him so that he fell; that he was thereafter caught by two policemen, arrested, and, upon a charge by Macdonald, held at the station-house for assault. A more improbable story has seldom come under the consideration of the court. It bears upon every part of it the stamp of falsity. If Howard was willing to go with these people, why go to the station-house, and ask the sergeant in charge to hold him

until the sheriff could come there to arrest him? If these parties were not detaining him, why was it necessary for the defendant to trip Macdonald up, and knock him down, in order to get out of his custody? The conceded facts upon the part of Macdonald and Yaxley prove beyond all question that they were guilty of a gross abuse of power, such as private detectives are altogether too prone to indulge in, and for which they should be severely punished. This man undoubtedly represented himself to be an officer, took forcible possession of the defendant, compelled him to go with him, and endeavored to get him held at the station-house until the sheriff could arrest him. If that is not an abuse of any power ever conferred upon him, it is difficult to see how any power could be abused.

It is sought to sustain this arrest upon the ground that because the detention of the defendant upon the crime charged, of an assault, resulted in his arrest in this action, that therefore this motion should not be granted; but when we find from the very facts of the case, beyond reasonable doubt, that without the slightest semblance of authority this man Macdonald was exercising dominion over the defendant for the purpose of subjecting him to arrest, no such consideration can prevail. It is said that Howard was convicted of this assault; but how the magistrate could ever have been induced, under the facts appearing in this case, to convict Howard of assault, it is difficult to imagine. But that in no way deprived Howard of the protection of the law; nor could he, therefore, be permitted to be kidnapped for the purpose of bringing him within the power of the sheriff to serve an order of arrest.

It is urged that even if Macdonald, under these circumstances, was, in Brooklyn, only a private citizen, and had forcibly held the defendant until the sheriff arrived, that would be no reason why this court should ignore and defeat its own process by discharging the defendant. It must be recollected that a private citizen has no right to interfere with the liberty of another unless a felony has been committed in his presence, and the person whose liberty is interfered with is guilty of the crime. No such condition of affairs existed in this case. It is necessary, in order that an officer shall be justified in the execution of a civil process, that the right of arrest shall be exercised in his jurisdiction, and that he have present with him his authority to make the arrest; and it is a familiar principle that a man has the right to protect his liberty, using all the force necessary. It is apparent from the conceded facts that these two men seized forcibly upon the defendant for the purpose of subjecting him to the execution of this process. We do not think that such procedure can be tolerated in this court. The motion to discharge him from arrest should have been granted, and the order of arrest vacated, because of the abuse of the process. The order should be reversed, with \$10 costs and disbursements, and the order of arrest vacated, with \$10 costs. All concur.

APPEAL FROM ORDER GIVING JUDGMENT ON THE ANSWER.

VAN BRUNT, P. J. The complaint alleges that the plaintiff consigned to the defendant a large quantity of goods to sell for them; that he sold the goods, and received therefor a certain sum of money, which he refuses to pay over to them, though they demanded it. The answer admits the copartnership of the plaintiffs, and that he was their agent; that they consigned goods to him; that he sold some of such goods, and received the sale price of some of the goods so sold; and denies each and every other allegation in the complaint contained. This is a clear denial of the allegation that he has not paid the money over.

It is urged upon the part of the plaintiff that their cause of action rests simply upon the fact that the defendant, as their agent, has received money belonging to them, which he has not paid over, and that this the answer admits. We fail to see where, in the answer, an admission of the last proposition, viz., that he has not paid the money over, can be found. The answer

admits the sale of some of the goods, and the receipt of some of the money, and denies each and every other allegation. In order that the plaintiffs should succeed, it is admitted that it should allege that this money had not been paid over; and, if that is a necessary part of the complaint, it is difficult to see why a denial does not raise a material issue. It has become a familiar rule that an answer cannot be stricken out as sham or frivolous which raises any general issue.

Some question is made in regard to the form of the denial; that it is not recognized by the Code, and must therefore be disregarded. We fail to see in what respect it is deficient. It shows clearly what it means, and that it denies the allegation that the defendant has not paid over the money received by him as agent. The order should be reversed, with \$10 costs and disbursements. All concur.

APPEAL FROM ORDER DENYING MOTION TO VACATE ORDER OF ARREST UPON THE PAPERS UPON WHICH IT WAS GRANTED.

VAN BRUNT, P. J. The ground upon which the order of arrest in this case was issued was undoubtedly because of the misappropriation by the defendant of money claimed to have been received in a fiduciary capacity. The complaint does not contain the allegations required by section 549 of the Code, which are necessary to sustain an order of arrest. *Bartlett v. Sutornis*, 6 N. Y. Supp. 406. The order appealed from should be reversed, with \$10 costs and disbursements. All concur.

BRADHURST v. FIELD et al.

(Supreme Court, General Term, First Department. June 6, 1890.)

1. DOWER—DEVISE IN LIEU OF—ELECTION.

3 Rev. St. N. Y. (7th Ed.) p. 2198, § 14, as amended by Act 1890, provides that a woman shall have one year from the death of her husband in which to elect whether she will take dower or accept a provision for her in his will, and that where the year has begun to run and has not expired the time for election may be enlarged by order of court upon an affidavit showing the pendency of proceedings to contest or construe the will, or other reasonable cause therefor. By a codicil, a testator revoked a trust created in favor of the wife, and directed that his trustees should "pay to her the sum of \$10,000" in lieu of dower. Held, that an action by the wife to construe the will, brought to enforce her contention that she was entitled to \$10,000 annually, could not be sustained, both because she had only a legal interest in the estate, and because it was entirely clear that she was only to receive \$10,000 in all, and therefore an order extending the time within which she might make her election until 50 days after the termination of such action was improper.

2. SAME.

But as, pending such action, the wife had allowed the year to expire without making an election, it was proper to make an order giving her a reasonable time in which to make such election.

Appeal from special term, New York county.

Action by Laura F. Bradhurst against Augusta C. Field and others, to construe the will of Thomas C. P. Bradhurst, of which defendants were the executors. From an order extending the time within which plaintiff should be required to elect whether she should take dower in the estate of the testator or accept a provision made in lieu thereof defendants appeal.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Charles E. O'Connor and Abram Kling, for appellants. J. F. Kernochan, for respondent.

DANIELS, J. The testator died on the 27th of March, 1889, leaving the plaintiff, his widow, surviving him, and the act under which this order was made became a law shortly before the making of the order. Three days prior to the expiration of one year in which, under the Revised Statutes, (7th Ed. p. 2198, § 14,) the widow was required to elect whether she would accept

her dower, or the provision contained for her benefit in the will of the testator, the order to show cause was made, upon the hearing of which the order in question was made by the court. The law as it has been amended by this act is in the following language: "Sec. 14. When a woman shall be entitled to an election, under either of the two last sections, she shall be deemed to have elected to take such jointure, devise, or pecuniary provision, unless within one year after the death of her husband she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof. Where the time within which such election may be made has begun to run, and has not expired, it may be enlarged by the order of any court competent to pass upon the accounts of executors, administrators, or testamentary trustees, or to admeasure dower, upon an affidavit showing the pendency of a proceeding to contest the probate of the will containing such jointure, devise, or pecuniary provision, or of an action to construe or set aside such will, or that the amount of claims against the estate of the testator cannot be ascertained within the period so limited, or other reasonable cause therefor. Notice of application for such order shall be given to such persons as the court may direct, and such order, when granted, shall be recorded and indexed in the same manner, and as a notice of the pendency of action, in the office of the clerk of each county wherein such lands, or any part thereof, are situated." And the intention animating it is that there shall be reasonable cause for making the order before any extension shall be made of the period within which the widow is required to make this election. That is substantially expressed by the act itself, providing that the order may be made upon either of the facts mentioned in the act, or other reasonable cause. And that is also required by the rules of practice applicable to all legal proceedings; for they are placed upon reasonable grounds, and unless such ground appears in support of the order, as a general principle, it will neither be made nor sustained. This principle of construction is specially applicable to orders made under this act; for their effect must be to arrest the settlement of the estates of deceased persons, the distribution of the property, and the payment of legacies; and the interruption of the ordinary course of proceedings should not be allowed to take place without some adequate reason to support it, and whether such a reason may be discovered must depend upon the statements contained in the papers upon which the order shall be made.

The will of the testator did provide and direct, by its third paragraph, that the executors and trustees of the estate should invest in government bonds of the United States, or securities of the city, county, or state of New York, or upon unincumbered real estate in the city of New York, an amount of money which should be sufficient to realize an income of \$3,000 annually, and to pay that income in semi-annual payments to Mrs. L. F. Seyton during the term of her natural life. The beneficiary named in this part of the will is the plaintiff in this action, who at that time had not intermarried with the testator; but, by a codicil executed afterwards by him, he revoked this third clause of the will, and then directed his trustees to pay to her the sum of \$10,000 in lieu of dower in his estate. These two paragraphs of the codicil are in these words: "*Third.* I have, by the third clause of my will, provided that there shall be paid to Mrs. L. F. Seyton, during the term of her natural life, the sum of three thousand dollars, and as I have, since my making of my said will, become married to her, and have since my said marriage advanced to her large sums of money, and as it is my object and purpose to secure her such further sum as may be necessary for her support, I therefore revoke and declare void the said third clause or subdivision of my said will, which provides for the payment of the said sum of three thousand dollars to said Mrs. L. F. Seyton, and each part thereof. *Fourth.* I further provide and give, devise and bequeath, to my said wife and direct that my said trustees shall pay to her the sum of ten thousand dollars, and the same shall

be in lieu of dower in my said estate." By the first, the trust mentioned in the third paragraph of the will was completely and entirely revoked, and by these two paragraphs of the codicil, which alone apply to the interest intended to be provided for the plaintiff in the estate, an absolute gift, instead of the preceding trust, is what the testator has provided in her behalf. And as no trust was left in the will, or created by the codicil when that was executed, the plaintiff can be entitled to no more than a legal interest in this estate, and no claim or right of action had matured to her as a legatee under the will at the time when her suit was commenced, and, having only this legal interest in the estate, she was not entitled to bring this action as it has been commenced by her, for the object of securing a construction of the will and codicil of the testator, as to her rights or interests under them, and on that account her complaint, as well as the facts averred in it, are insufficient to present a right of action in her behalf.

This subject has frequently employed the attention of courts of justice, and it was considered in the late case of *Anderson v. Anderson*, 112 N. Y. 104, 19 N. E. Rep. 427, where the law was stated to be that "the jurisdiction of courts of equity, in considering doubtful or disputed clauses in a will, has been held, with entire uniformity by the courts of this state, to result from its jurisdiction over trusts, and that exists only when the court is moved on behalf of an executor, trustee, or *cestui que trust*, and to enforce a correct administration of the power conferred by the will." 112 N. Y. 110, 19 N. E. Rep. 430. This is not such an action. Neither has it been authorized by any law or statute of this state. But if it were otherwise, instead of having a reasonable cause to support it, the construction of the will and codicil is in direct hostility to the right claimed by the plaintiff. In support of her action, she has asserted her right to receive from the estate the sum of \$10,000 annually during her life, in lieu of her dower. But that assertion derives no support from the language of this codicil, but, on the contrary, all that the testator has done in his final direction was that the trustees of his estate should pay to the plaintiff the sum of \$10,000. This was a gross amount, intended to be paid to her at one and the same time, and then to be in lieu of her dower in his estate. That there was no misapprehension in the mind of the testator as to the use and import of this language further appears from the third paragraph of the codicil, in which he has stated it to be his object to secure to the plaintiff "such further sum as may be necessary for her support." These are the only occasions in which reference is made to the amount intended to be received by her, and in each instance it is designated as a single sum of money, and amounting to the sum of \$10,000. The language is entirely free from ambiguity, leaving no good reason for doubt as to its construction and effect, and it is in direct conflict with the claim made by her for an annuity of \$10,000. Upon this ground, as well as the other, there is no reasonable foundation for the prosecution by her of this action, and, on account of that deficiency in the case, it will be entirely unjustifiable to postpone the execution of the testator's will, and the distribution of his estate until the termination of this action. But as it has been commenced, and under its pendency the plaintiff has allowed the year to expire without making the election to which she became entitled, the order should not be entirely reversed, but she should still be afforded a reasonable opportunity to make the election in this manner secured to her by the law; and, extending her time to exercise her choice for the period of 60 days after the entry and service of the order to be made upon this decision, ample time will be given to her for the protection of all her rights and interests in this estate. This order should be modified by so reducing the time within which the plaintiff shall make her election whether she will accept the provision contained in the codicil, or take her dower in the estate of the testator, and that modification should be without costs. All concur.

STEPHENS v. HUMPHREYS et al.*(Supreme Court, General Term, First Department. June 6, 1890.)***RIGHT TO JURY TRIAL.**

In an action to foreclose a mortgage, defendant is not entitled, as a matter of right, to a trial by jury of a defense of fraud.

Appeal from special term, New York county.

Action by Melville Stephens against Robert L. Humphreys, impleaded. From an order denying a motion for an order settling issues to be tried by a jury, defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
John K. Van Ness, for appellant. *Smith & White*, for respondent.

VAN BRUNT, P. J. This action was brought by the plaintiff, as assignee, to foreclose a mortgage. The answer set up fraud in obtaining the assignment, and that the plaintiff had not obtained it in good faith, and is not the real party in interest, and that the assignment was obtained by threats and intimidation. On the hearing of the motion the learned justice allowed the plaintiff to read certain affidavits controverting the allegations set up in the answer. The appellants objected to the reading of these affidavits, on the ground that the motion should be decided on the pleadings alone. The court refused to direct issues to be settled to be tried by a jury, and from the order thereupon entered this appeal is taken.

It was probably error upon the part of the court to allow the reading of affidavits upon this motion; but this in no way affected the rights of the defendant. It is claimed that, because the answer set up fraud, intimidation, false representations, champerty, and maintenance, the defendant, as matter of right, was entitled to have those issues tried by a jury; and we are cited, as an authority upon this proposition, to the case of *Conderman v. Conderman*, 44 Hun, 181, in which it was decided that a party had the right to have the issue of adultery in an action for divorce tried by a jury. We fail to see the application of this case, as by the express provisions of the Code a party is, as matter of right, entitled to have that issue tried by a jury; but our attention has not been called to any provision of the Code entitling a party, simply because he sets up the defense of fraud, as matter of right, to a trial of that issue by a jury. The case cited, clearly, has no application to the facts herein presented, and there seems to be no reason whatever why the usual course should not be pursued, and this action tried by the court. The order should be affirmed, with \$10 costs and disbursements. All concur.

ROSENTHAL v. ROSENTHAL.*(Supreme Court, General Term, First Department. June 6, 1890.)***PLEADING—MOTION TO MAKE MORE DEFINITE AND CERTAIN.**

Where the complaint, in an action to recover a sum of money deposited with defendant for investment, which was not made, fails to aver the date of demand, a motion to make more certain and definite will be granted.

Appeal from circuit court, New York county.

Action by Fannie Rosenthal to recover from Joseph Rosenthal money deposited with him for investment which he failed to make. Petition averred demand. Motion to make complaint more definite and certain by inserting date of demand granted. Plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
Jonas F. Mann, for appellant. *Wm. M. Cohen*, for respondent.

BRADY, J. The plaintiff seeks to recover a sum of money deposited with the defendant for investment by him for her, or to be returned to her, and in

the complaint alleging this understanding, and his failure to make an investment, avers a demand. The defendant moved for an order compelling the plaintiff to make the complaint more definite and certain, by inserting the time when the demand was made and the application was granted. The order made in the court below was properly directed. The defendant was entitled to knowledge of the time and place of the demand. If that ceremony or incident is a necessary factor of the plaintiff's case, it should be so averred that the defendant may not only answer it, but be prepared to meet it. It is not an answer that the requirement demands an expose of the plaintiff's evidence. It does not relate to the manner of proof, but to the complete averment of a fact, namely, the time of the occurrence of an important part of the plaintiff's case, and which, being given, may have an equally important bearing upon the answer to be made by the defendant. The Code requires a plain statement of facts in the complaint, and in such detail as will advise the defendant of the claim urged against him. If this be not done, the court may compel the plaintiff to make it more definite and certain, and this is in accord with the general spirit of the Code. Aside from that, the statement asked here should have been given. If it had been, the court below and this court would have been relieved of the necessary burden of hearing and deciding the application and appeal. It too frequently happens that motions which should be wholly unnecessary are made, and appeals equally unnecessary are taken, but which are forced from a disposition to suppress information which should be given in the fair conduct of an action,—a characteristic, doubtless, arising from overprofessional zeal, but which is of no value to the client, often an expense, and is a disturbance of the regular order of procedure. It is not deemed necessary to examine the authorities bearing upon this question, which are numerous, and to some extent discordant, and naturally so, as the applications vary, and it is not possible to formulate a general rule. Discretion substantially must be the prevailing doctrine, and here it was properly exercised. If not, then, as each case may be said to be *sui generis*, the indefiniteness must depend upon the general features and allegations of the complaint taken in connection with that objection. The order made herein, however, was not erroneously directed, and should be affirmed, with \$10 costs and disbursements of this appeal.

VAN BRUNT, P. J., and DANIELS, J., concur in the result.

SMALL v. MINNEAPOLIS ELECTRO-MATRIX CO. *et al.*

(*Supreme Court, General Term, First Department. June 6, 1890.*)

CORPORATIONS—OFFICERS—INJUNCTION.

An injunction will not be granted to restrain the directors of a corporation from transferring its property, assets, and business to another corporation, where it appears from affidavits of the directors that they do not contemplate such action, but merely the leasing of important rights and functions to the other corporation.

Appeal from special term, New York county.

Motion by Sanford S. Small to continue an injunction against the directors of the Minneapolis Electro-Matrix Company, restraining them from transferring its assets, property, and business to another corporation. Motion denied. Plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Paul D. Cravath and John W. Houston, for appellant. Daniel G. Rollins and W. B. Putney, for respondents.

DANIELS, J. The injunction as it was issued, and which the court refused to continue, restrained the Minneapolis Electro-Matrix Company, and the other defendants, forming a majority of its board of directors or trustees,

from leasing or making any other transfer of any of its franchises, property, rights, or assets, pursuant to a resolution which had been adopted, to the American Electro-Matrix Company, and from holding any meeting of the stockholders of the Minneapolis company to ratify any resolutions, leases, or transfers without giving to the plaintiff reasonable notice of the time and place of holding the meeting. To sustain the right of the plaintiff to the injunction, it was alleged—and that appeared to be the fact—that he owned 1,680 shares of the stock of the Minneapolis company, amounting at its par value to the sum of \$84,000 of the company's capital, which was \$1,000,000. It was further set forth and charged that 8 of the 9 directors of the company owned or controlled a majority of the shares of stock, and were disposed to lease and transfer the property and effects of the company for the term of 25 years to the American Electro-Matrix Company, a corporation created under the laws of the state of New Jersey, and, in effect, to transfer its business to that company for one-half the net profits yielded by it; and that this was in contravention of its charter, and the laws of the state of Minnesota, under which it was incorporated. If these facts were satisfactorily established, a case for an injunction would be presented; for the directors or trustees do not appear to have been invested with that power, either by its charter, or the laws of the state in which it exists; and, in the absence of explicit authority to transfer its property, effects, and business to another company, it cannot be presumed to possess that power. At least, the directors or trustees, having only the power to manage and conduct its affairs under the charter, could legally make no such disposition of its property and affairs; for, instead of managing and conducting its business, that would be a destruction of its business, and an abdication of their own powers and authority, which could not take place without violating the law and their own official obligations; and that, even a minority owner of the shares of the company would be entitled by action to restrain and prevent. *Abbot v. Rubber Co.*, 38 Barb. 578, 591. But it is not to be presumed, without ample proof, that a majority of the board would be so far unmindful of their duty as to usurp and attempt the performance of such an illegal act; and that this majority has placed itself in this position depends upon the sworn complaint and affidavits of the plaintiff; for the other affidavits read in support of the right to the injunction add no more than incidental assistance to the case by relating circumstances showing the majority of the board to be inimical and unfriendly to the plaintiff, and inclined to prevent him from exercising his authority as one of its members. The foundation of his right to an injunction is that disclosed by himself, and not by these other affidavits of persons having not even asserted knowledge of the merits of the case.

As the plaintiff, by his affidavits, has made out the case, the majority of the board has adopted a resolution, to be submitted to the votes of the shareholders, of which they themselves control the majority, to transfer the property, assets, and business of their company to the New Jersey corporation, with whose interests and prosperity they have become either directly or indirectly interested; and that would be such a plain violation of their obligations and duty as to sustain an injunction and action to prevent it. But these facts have been as positively denied on the part of the defendants as they have been positively asserted by the plaintiff. It is admitted that a resolution was adopted by the majority of the board, subject to the approval of the shareholders, to execute a lease to the New Jersey corporation of certain important rights and functions of the Minneapolis company. But the intention has been stated to extend the leasehold interests or rights no further than that is permitted by the laws of the state of Minnesota; and to support this statement the resolution, as it is stated to have been adopted, has been made a part of the affidavit of William M. Grosvenor. And it certainly goes no further in its language or fair implication than to this extent, which does not transcend,

but limits itself within, the bounds of the law; for the exercise of lawful authority for the promotion of the interests and prosperity of the company is intrusted to the use and employment of its board of directors or trustees; and when that may, in good faith, be exercised, a case will not be presented for the interposition of a court of equity by injunction. *Beveridge v. Railroad Co.*, 112 N. Y. 1, 19 N. E. Rep. 489. And to sustain the good faith, as well as the expediency of the action and proposed action, of the majority of the board, it has been stated in the affidavits that its financial affairs have become embarrassed, and that adequate assistance can be no otherwise obtained than by subordinating their company to the New Jersey corporation. It is true that the plaintiff states himself to be able to relieve the Minneapolis company from this condition; but that has not been done by him, neither has any tangible offer been made by him to the board to supply this assistance. But the members of the board, so far as their affidavits have been made a part of the case, seem to be impressed with the conviction that the only source from which the necessary assistance can be obtained to advance the business interests of their company is the New Jersey company; and even that cannot be accepted as a certainty, in the condition in which the New Jersey company appears to be placed financially. But this circumstance is a subject which addresses itself more to the consideration of the directors and shareholders of the Minneapolis company than to the court.

The plaintiff swears that he wrote the copy of the resolution relating to the lease to the New Jersey company from what Mr. Grosvenor read to him as the resolution which had been adopted. But in that he is positively contradicted by Mr. Grosvenor, and by the resolution itself, as it is set forth in the affidavit of the latter; and that this affidavit does accurately state the resolution is confirmed by the affidavits of Erastus Wiman, James W. Griffin, Charles S. Travis, Theodore C. Bates, and C. Wright Davison. These persons all deny the intention to do anything not within their authority under the laws of the state of Minnesota, or to prejudice the plaintiff as a shareholder or officer of the company; and together they completely answer the case made by him for an injunction. He has complained of other acts not requiring relief of this description for the purpose of redressing discrimination against him as a member of the board. The meeting at the Astor House, to which he was denied admission, is sworn to be no more than that of a committee, of which he was not a member, and therefore not entitled to be present; and if the adjournments of meetings were irregular, or insufficient notice of a meeting held in this city was given him, as was probably the fact, these irregularities cannot be corrected in this action, which had for its object the restraint of the majority of the board in the dealings proposed with the New Jersey company. As the case is presented by all the affidavits, considered together, no more has been intended than the laws of Minnesota permitted, if the circumstances had arisen on which it could be judicially taken; and that will be for the shareholders themselves to determine, when their action shall be taken under the resolution. The order appealed from should therefore be affirmed; but as the other directors have not been entirely tolerant of the opposition of the plaintiff, nor as civil as it was their duty to be, in their official intercourse with him, it should be without costs.

VAN BRUNT, J. I concur in the opinion of Mr. Justice DANIELS. There is another reason why the order appealed from is correct. The plaintiff is a non-resident of this state; the defendant the Minneapolis Electro-Matrix Co., a necessary defendant, is a foreign corporation; and this action is brought to restrain action by this foreign corporation. The courts of this state have no jurisdiction of such a cause of action. The parties should settle their difficulties in the place of their residence.

BRADY, J., concurs.

SMITH v. FITCHETT.

*(Supreme Court, General Term, Third Department. May, 1890.)***1. PARTNERSHIP—ACCOUNTING—INTERLOCUTORY JUDGMENT.**

In a suit for an accounting between partners, it appearing on a preliminary report of a referee that there are assets of the firm not disposed of, an interlocutory judgment is proper, appointing a receiver and directing that, after passing his final account, the trial be resumed before the same referee.

2. SAME—RIGHTS OF PARTNERS.

Though there are unpaid judgments against the firm, one partner may have an accounting and recover his share of the net surplus in the hands of the other, who holds all the assets.

3. SAME—REVIEW.

Where a referee has taken an account of partnership transactions covering four years, and the books are made part of the case, but not handed up, and no requests were made for findings as to disputed items, and it is practically impossible to re-examine the accounts without great danger of making more mistakes than would be corrected, that will not be done, but the findings of the referee will be affirmed.

Appeal from judgment on report of referee.

Action by Philip W. Smith against Harry Fitchett. There was a judgment for the plaintiff, and the defendant appeals. For former report, see 2 N. Y. Supp. 261.

Argued before LEARNED, P. J., and LONDON and MAYHAM, JJ.

Levi Smith, for appellant. *Norton Chase*, for respondent.

LONDON, J. The parties were copartners. The partnership was dissolved, and the plaintiff brings this action for an accounting and for such judgment in his favor as the accounting should show. The issues were referred, and upon the trial before the referee it appeared that there were partnership property and assets not disposed of. Upon a preliminary report of the referee to that effect, the special term made an order directing an interlocutory judgment, appointing a receiver of the partnership property and assets, and directing the receiver to make disposition thereof and report thereon, and that after passing the receiver's final accounts the trial of the action be resumed and completed before the same referee. Proceedings were had and completed in pursuance of the interlocutory judgment, and thereafter, upon the referee's final report, the judgment was entered, from which this appeal was taken.

We think the practice proper. This is an equity action, in which the court, having full jurisdiction of the parties and the subject-matter, should take such action, by interlocutory judgment or otherwise, as is needful in order that the proper final judgment be rendered. It appeared by the receiver's report that there were outstanding and unpaid a number of judgments against the firm. But it also appeared upon the evidence that the defendant had received the greater part of the moneys of the firm, and that there were no moneys or assets wherewith to pay these judgments, except such as the defendant had received. We assume that the receiver made a proper disposition of all the partnership assets, except the moneys which came to the hands of the defendant. The objection of the defendant that the outstanding judgments against the firm defeat the plaintiff's right to any recovery for his half of the net surplus of partnership assets in the defendant's hands over and above all partnership liabilities is not valid. The defendant owes two duties,—one to the firm creditors to pay them, and the other to the plaintiff to pay him. He cannot allege his own breach of duty to protect himself from liability for such breach. The objection is based upon the rule obtaining in actions by one partner to recover at law against the other upon some breach of partnership obligation. Actions at law, it is said, cannot be maintained, even after dissolution of the partnership, by one partner against the other, except after a full accounting, balance struck, and express promise to pay. *Arnold v. Arnold*, 90 N. Y. 580. See cases cited in *Belanger v. Dana*, 4 N. Y. Supp.

776. But an action in equity lies between the partners, in order, if necessary, to dissolve the partnership, dispose of the assets, pay the debts, state the account, and ascertain and divide the net surplus, and render judgment accordingly. The obstacles to a recovery at law equity removes. The defendant is not prejudiced by retaining in his own hands partnership assets sufficient to pay outstanding judgments against the firm. It is the plaintiff who may be injured by the judgment creditors. But he is clearly entitled to his share of the net surplus.

The defendant alleges that the referee did not give him all the credits to which he was entitled. The plaintiff alleges that the referee did not charge the defendant with all the debits he ought. As the case is presented, we cannot discover that the net balance is not right. There were no formal requests for findings as to disputed items. The testimony is voluminous, and the partnership books are referred to as forming part of the case, but are not handed up. The transactions, covering four years, are grouped in the results stated by expert witnesses. It is practically impossible for us to examine this mass of accounts without great danger of making more mistakes than we should correct. The presumption is that the referee is right, and we affirm his findings, because we cannot see that they are wrong. Judgment affirmed, with costs.

LEARNED, P. J., concurs. MAYHAM, J., takes no part.

DAVIS v. WOOD *et al.*

(*Supreme Court, General Term, Third Department. May, 1890.*)

HUSBAND AND WIFE—ANTENUPTIAL CONTRACT—FRAUD.

A girl sued for breach of promise, pleading seduction and pregnancy in aggravation. On a compromise she withdrew the charge of a promise to marry. After the birth of the child, she was taken to wife by her betrayer, an antenuptial contract providing that neither should have any interest, present or future, in the estate of the other. She was then 21 years old, and had \$1,400. The husband was 65, had three adult children, and was worth \$50,000. *Held*, that the agreement is not so harsh and unequal that fraud or undue advantage taken of her situation can be inferred.

Appeal from judgment on report of referee.

Action by Mary S. Davis against Jacob D. Wood and others, devisees of Jacob H. Davis, deceased. There was a judgment for defendants, and the plaintiff appeals.

Argued before LEARNED, C. J., and LANDON and MAYHAM, JJ.

John E. Van Etten, for appellant. *A. V. Clearwater*, for respondents.

LANDON, J. The plaintiff seeks to set aside the antenuptial contract entered into between herself and her late husband, Jacob H. Davis, who died after the plaintiff took this appeal from the judgment. The parties were married April 24, 1867, and lived together until after this action was brought in 1881. The plaintiff alleges that she executed the antenuptial contract, not knowing its contents or effect, and upon the false representation of her then intended husband, that it was a deed for the sale of a wood lot. Upon conflicting testimony the referee decided this question of fact against the plaintiff. The referee also found that the plaintiff executed the instrument with full knowledge of its contents. We think the finding of the referee is in accord with the clear weight of the testimony.

The learned counsel for the appellant urges that the antenuptial contract was without consideration, and also was so inequitable and unreasonable as to justify the court in presuming fraud, and therefore in setting it aside. The plaintiff had about \$1,400, and the late defendant upwards of \$50,000. She was 21 years of age, and he about 65. He had three adult children by a

former wife. The plaintiff had sued him, alleging her seduction and pregnancy, accomplished under his promise of marriage. That action was settled, the plaintiff withdrawing the allegation of promise of marriage. A child was born to her. The antenuptial contract and marriage followed. The effect of that contract was that each party should retain his and her separate estate, free from the control of the other, or of any ultimate lien upon or interest in it in favor of the other. The plaintiff relies upon *Pierce v. Pierce*, 71 N. Y. 154. The circumstances are different. There is no need to enlarge upon them. The allegation of fraud has reference to the antenuptial contract. It may be that her intended husband had in his past relations done her great wrong, but we cannot fail to see that it must have been of the utmost importance to her to retrieve, so far as possible, her character and standing, by entering into this marriage. Her intended husband, with his adult children, and considerable estate, might well wish at his mature age to remove such grounds for regret as he would naturally expect to encounter. It is not unreasonable to suppose that, so far as this could be done by this antenuptial contract, the plaintiff was quite willing to co-operate. We therefore are not inclined to presume fraud from the smallness of the provision in the wife's favor. Upon the finding of the referee, that the plaintiff understood the contract when she entered into it, the action is barred by the statute of limitations. Fraud not being established, the contract is valid, marriage being an ample consideration to support it. Judgment affirmed, with costs. All concur.

HUMPHREYS *et al.* v. NEW YORK, L. E. & W. R. Co.

(Supreme Court, General Term, First Department. May 23, 1890.)

ASSOCIATIONS—ACTION BY TRUSTEES—PLEADING.

Plaintiffs, as trustees of a voluntary association, sued for semi-annual payments on an agreement by which certain property was leased to defendant. The agreement under which the association was formed, and to which defendant was a party, provided that the trustees to be appointed should be authorized to lease the property, as was done in the agreement with defendant, and that the money to be paid by defendant should be paid to or recovered by them. *Held* that, though they were trustees of an express trust, capable of enforcing the agreement, within Code Civil Proc. N. Y. § 449, the court properly refused to strike from the complaint an allegation that plaintiffs, as trustees, had in a preceding suit recovered other and prior installments on the lease, as this was a material averment showing plaintiffs' right to maintain the action as trustees.

Appeal from special term, New York county.

Action by Solon Humphreys and Edwin D. Morgan against the New York, Lake Erie & Western Railroad Company. From an order denying a motion to strike out certain allegations of the complaint, defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Buchanan & Steele, (Charles Steele, of counsel,) for appellant. *Lord, Day & Lord*, (George De Forest Lord, of counsel,) for respondents.

DANIELS, J. The action has been brought by the plaintiffs, as the trustees of a voluntary association, to recover eight different amounts upon an agreement entered into with the defendant for certain rolling stock delivered to and used by it. This rolling stock was received by the defendant under and pursuant to the agreement, which was made for the term of 10 years from the 1st of November, 1881, unless sooner terminated, as the agreement or lease itself afterwards provided it might be; and by the covenants or stipulations contained in the agreement the defendant bound itself to pay certain sums of money for the use of the rolling stock, and upon the full and complete payment of which it was to become the owner of that stock. A portion of the payments to be made consisted of half-yearly sums during the term, which should be equal to 6 per cent. per annum upon the whole amount

of the principal represented by the certificates of shares issued under the authority of the association, and be outstanding at the time of such payment. On the 17th of March, 1885, a further agreement was entered into, reducing this percentage to the sum of 5 per cent., so far as the reduction had or should be authorized or ratified by the persons holding the certificates of the association. This reduction was qualified by certain other amounts from time to time payable, and not required to be noticed in the decision of the appeal. The holders of a majority of the certificates did ratify or authorize this change in the agreement which originally had been made. But a minority of about \$100,000 in amount declined to do that, and their refusal to ratify the reduction entitled them to the preceding rate of interest agreed to be paid by the defendant; and it was for the recovery of that difference that the action seems to have been brought, and to maintain it eight different causes of action of this description have been set forth in the complaint. It was further alleged that a preceding suit had been brought against the defendant for other and prior installments maturing under the lease or agreement, and that judgment had been recovered in favor of the plaintiffs as trustees for such installments; and it is these allegations relating to the prior recovery which the defendant applied to have stricken from the complaint.

The object of the motion is stated to be to place the defendant at liberty to demur to the complaint on the ground that the plaintiffs are without legal capacity to sue for the recovery of these installments maturing after the commencement of the preceding suit. In support of the motion it has been, apparently, assumed that, inasmuch as the association known as the "Car Trust of New York, No. 2," was voluntary and unincorporated, the plaintiffs as trustees could not maintain an action for the recovery of these installments arising under the lease. But by the agreement under which the association was formed, and to which the defendant was a party, it was agreed that the trustees who were to be appointed should be authorized to lease and provide for the sale of the rolling stock as that was done in the agreement with the defendant, and that the installment or money to be paid by the defendant should be paid to or recovered by them, and that vested these trustees with such power and authority as, under section 449 of the Code of Civil Procedure, empowered them to maintain this action. They were, within the language of that section, trustees of an express trust, capable of enforcing the observance of the agreement with the defendant by action for the benefit of themselves and the associates in this manner represented by them; and so it was considered by the court when the preceding action was disposed of by the general term. 3 N. Y. Supp. 918. The manifest object of setting forth the proceedings in the action already determined was to establish the fact, by way of estoppel against the defendant, that the plaintiffs as trustees were authorized to maintain this action. The design and object of the allegations were to support the position that an adjudication to this extent had already been made in favor of the plaintiffs and against the defendant, and in that manner to prevent further litigation of it by the defendant. There certainly appears to be no good reason for depriving the plaintiffs of this advantage, if it has in this manner been obtained by them. Indeed the court would have no right to divest them of that advantage, for it would be a fact tending to sustain their ability as trustees to prosecute and maintain the action. To strike it out from the complaint would deprive the plaintiffs of a fact existing in their favor, and considered by them to be material to the disposition of the controversy; and that the court should not do simply for the purpose of exposing their complaint to the liability of a demurrer. If the effect of the preceding judgment is to adjudicate the ability of the plaintiffs to maintain an action for the enforcement of the agreement made with the defendants, they are entitled to its benefit, and to all the aid and assistance which may be secured by it in their favor. If their right or ability to sue is dependent upon

this fact, then, by striking out the allegations presenting it, they might be defeated in the action, when, according to the existing circumstances, they would be entitled to maintain it; and there is no good reason for placing them in that position. If under the agreement, or by virtue of the preceding adjudication, or both together, they have obtained the authority to prosecute the defendant for the payment of these installments, they are entitled to the benefit of both, so far as they will contribute to the maintenance of the action. Facts which contribute to the right of the plaintiffs to maintain their action are in no possible sense either irrelevant or redundant, but they are pertinent to the case; and there is no more authority for striking out such facts in one case than there would be in any other. If these allegations could be stricken out to expose the complaint to a demurrer, then material averments might just as well be stricken out in other cases to afford the defendant the opportunity to demur. That practice would be literally trifling with the administration of the law, opposed not only to its spirit, but also to its language. The application was rightly denied, and the order should be affirmed, with \$10 costs, and the disbursements attending the appeal. All concur.

PEARL v. KARST *et al.*

(Supreme Court, General Term, First Department. May 24, 1890.)

NEGLIGENCE—DANGEROUS PREMISES.

Plaintiff was injured by stepping on some loose boards which had been substituted for the sidewalk in front of some buildings in course of erection. Defendant had a contract with the owners of the building by which he was to do the mason, carpenter, and iron work, to dig the cesspools, trenches, etc., to flag the sidewalks, and by which he was to be responsible for accidents happening to individuals through his acts. Others had separate contracts to dig the cellar and do the plumbing. There was evidence that the boards had been placed across an excavation in the sidewalk by the cellar contractor, by direction of the architect. Defendant did not commence work on the sidewalk until after the accident. It appeared, however, that he was the only one who employed a watchman. *Held*, that plaintiff was entitled to go to the jury on the question as to whether defendant had charge of the premises, so as to be responsible for the accident. VAN BRUNT, P. J., dissenting.

Appeal from circuit court, New York county.

Action by Mary Pearl against John D. Karst and John D. Karst, Jr. Judgment was given dismissing the complaint, and plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Herbert Van Dyke, for appellant. *Kurzman & Yeaman*, for respondents.

BRADY, J. This was an action brought to recover for injuries resulting, it was charged, from the negligence of the defendants. On the 6th of October the plaintiff, while walking along Third avenue, between Sixty-Seventh and Sixty-Eighth streets, in this city, was thrown down by the turning of loose boards which had been substituted for the sidewalk. At the time of the accident the defendant was the contractor for the erection of buildings at the *locus in quo*. The flagging had been removed from the sidewalk, and trenches had been made therein for pipes, which had been filled, leaving the earth rough and uneven; and boards had been placed along what, when finished, would be the sidewalk. They were not fastened to the earth, and had no stringers or supports under them. The owners of the land had made a contract with the respondent, which called, on his part, for mason, carpenter, and iron work shown on the specifications, and by general drawings. He was to do all the digging, cesspools, trenches, closets, etc., as shown on the plans, also all flagging, with earth well rammed, soaked, and made solid, to flag the sidewalks, and to make good pavement of adjoining premises, and to be responsible for accidents to individuals. Indeed, the contract in that respect is that he is to be responsible for his own acts, or those of any of his workmen, from accidents to the buildings, to individuals, or to the property

of others, until the work should be fully completed and accepted. Other persons were engaged, as well, by the owners, to do certain parts of the work. One Dugan, who dug out the cellars, and a plumber named McCreery, seem to have had separate contracts affecting the *locus in quo*; and the question was, therefore, *in limine*, who was in possession of the premises at that time. The testimony does not establish beyond doubt and beyond conflict, therefore, which of the three persons named had possession or charge of the premises at the time the accident occurred. That they were all connected with the possession and charge of the premises, there can be no doubt. Whether the cellar digger, Dugan, had fully discharged his duties in reference to the cellar at the time of the injury, was necessarily one of the questions presented by the evidence, for the reason that the planks spoken of, and which occasioned the injury to the plaintiff, were put in the place in which they were found by direction of the architect employed by the owner, who stated, among other things, that he made a contract with Dugan for the digging, and also that there were contracts with him as architect,—one to excavate, another to do the mason and carpenter work, and another to do the trenching in the sidewalk, and get pipes into the house,—and that work on these different departments progressed during the erection of the house. At different stages of the work, there were planks on the sidewalk. In the beginning, when Dugan came there, he had some planks on barrels, and he ordered them put on the sidewalks. He says the trenches made were open when the defendant was building one side; that one trench was running in the center of the six houses. Each two houses had a trench. He further stated that the plumber came in at the same time that Dugan did; that Dugan owned the planks, but he was unable to say whether there were planks on the sidewalk on the 6th of October; and that he had charge of the sidewalk for the owners from the time he got the contract, and was there every day. He further said that nothing was done by defendant on the sidewalk until frost set in, after October 6th, when he ordered the sidewalk down, and the defendant put down the flagging. The defendant had a watchman, and no one else had, although he said he understood the plumber was to pay the watchman for being there.

This statement is quite sufficient to show that the question of possession was an important one, assuming the legal rule to be that the person in charge of the sidewalk under the contract with the owner was the person who was responsible, and this question becomes the more formidable, with regard to the defendant, in view of the provisions in the contract that he was to be responsible for accidents in his department; for, if in possession of the premises, it was in his department, upon which subject the fact that he had a watchman there had an important bearing.

When the evidence was finished, the defendants' counsel renewed his motion to dismiss the complaint—*First*. Upon the ground of a total failure of proof to sustain the cause of action alleged in the complaint, or any cause of action. *Second*. Upon the absence of any proof to show that the defendants, or either of them, interfered in any way with the sidewalk where the plaintiff fell; that they excavated it, or removed the flagging, or placed any boards on it. *Third*. Because there is affirmative proof on behalf of the plaintiff that the defendants, and neither of them, did do such things, but that the flagging was removed by somebody else before the defendants commenced their operations on the buildings. *Fourth*. Because, from the plaintiff's own testimony, if she was hurt at the time and place she stated, she has been guilty of contributory negligence. The court granted the motion, to which ruling there was an exception. The plaintiff's counsel asked to go to the jury on the question of possession and charge of the premises. The motion was denied, and exception was taken.

This was an erroneous ruling, for the suggestion just made, namely, that that was really the important issue in the case. If an excavation is to be made,

it is the duty of the person making it to see that it is properly and carefully covered, so as to make the street as safe for passage as before, and the obligation to keep it safe devolves upon any person who subsequently continues it in an improper or unsafe condition; and notice of a defect which could be discovered by proper examination is not necessary in order to fix this liability. *Irvine v. Wood*, 51 N. Y. 224; *Wolf v. Kilpatrick*, 101 N. Y. 146, 4 N. E. Rep. 188. It follows from these authorities that if the other contractors had performed their different contracts, and left the premises necessarily in the possession of the defendant whose contract was in force, the responsibility for the safety of the public devolved upon him, whether the planks were properly or improperly laid down in the first instance by Dugan or by the plumber. It seems to be very clear, therefore, that the question of possession should have been submitted to the jury, and that the dismissal of the complaint was erroneous. The judgment should be reversed, and a new trial ordered, with costs to appellant, to abide the event.

DANIELS, J., (concurring.) The plaintiff encountered a fall, from which she sustained painful injuries, on the 6th of October, 1885, while walking along the sidewalk on the west side of Third avenue, north of Sixty-Seventh street. Buildings were then in process of erection by John D. Karst, Jr., under a contract with the owner of the property. This contract was made on the 17th of August in the year 1885, for the erection and finishing of six buildings, which by the agreement were to be finished by the 1st of January, 1886; and the work was to be commenced within five days after the execution of the contract, and the proof indicated that it was commenced within or about that time. But prior to the commencement of the erection of the buildings the flagging upon the sidewalk had been taken up by John T. Tripler, and after that Martin M. Dugan excavated the grounds for the buildings, and the removal of the earth and other material therefrom. Three trenches were also excavated across the sidewalk; each two of the six houses on the ground having one trench. They were of the depth of from seven to thirteen feet below the grade, and they were opened to put down sewers, gas, and other pipes; and it was stated that they were dug by Mr. Dugan, which, however, in his own evidence, he denied to be the fact. When the pipes were laid, the trenches were filled up, but the sidewalk was not restored to its former condition. It was covered with loose boards or plank, and these boards were stated to have been placed there by Dugan, which he himself denied having done, but that he laid planks over the drive-way where he crossed to remove the earth from the excavations.

The plaintiff, in walking along the sidewalk, in the early part of the evening, but after it had become dark, by the tilting or moving of these boards, as the result of the uneven condition of the walk, was thrown down, and seriously injured; and it was for that injury this action was brought by her. And it was for the reason that the court considered the defendant John D. Karst, Jr., not responsible for this condition of the sidewalk that the complaint was finally dismissed. But by the specifications, which were made a part of his contract, he, as the mason to whom the erection of the buildings had been let, was obligated to do all the digging for the trenches; and there is, accordingly, reason for believing that, in the opening and filling of the trenches, the persons doing that were acting for him, and under his authority. He was also required by the specifications to do all filling in, to be done with earth well rammed, soaked, and made solid. And, by a further part of the specifications, not only the trenches themselves, and their filling in, but the laying of the sidewalks, were portions of the work to be done by him; and he was also bound, at his own cost, to provide all manner of materials, labor, etc., for the due performance of the work. And it could be inferred, as these were no parts of the contract with or employment of Dugan, that

what he or his men may have done, if they did anything, in the excavation of the trenches, filling them in, and laying the boards, was for the defendant, and in his employment, since this work was included within the work to be done by him, and the boards or plank had been there for such a length of time prior to the accident as reasonably to have apprised him of their condition. The facts were such, although they were controverted by other evidence, as would commit this as a proper subject for the consideration of the jury. Beyond that, he had a watchman employed to look after his work, as well as the materials upon the premises. Such a degree of probability was indicated as would leave the jury at liberty to conclude that he was responsible for this condition of the work; and, if he was, they might very well find that it had been placed not only in an unsafe, but a careless and negligent, condition.

The evidence of the plaintiff and of the policeman, who had frequently observed the vicinity, was sufficient, also, to justify the jury in believing that there was no fault on plaintiff's part contributing to the accident. It is true that the evidence as to these facts is fragmentary in the extreme. It was presented in the most incoherent manner, and without any system which would enable the court or the jury to appreciate its force or effect. But the plaintiff should not be made the sufferer because of the irregular manner in which her interests or rights were presented upon the trial. The case, on the contrary, should have been submitted to the jury; and the judgment, so far as it is in favor of the defendant John D. Karst, Jr., should be set aside, and a new trial directed, with costs to the plaintiff, to abide the event. But, as to the other defendant, there was no evidence connecting him with the cause of the accident, and the judgment in his favor should be affirmed.

VAN BRUNT, P. J., (*dissenting*.) I cannot concur in the result which has been arrived at by Mr. Justice BRADY, and concurred in by Mr. Justice DANIELS, in this case. I fail to find any evidence whatever making these defendants at all responsible for the accident which occurred to the plaintiff. It is true that they were doing work upon the premises in question, and that they had a watchman walking up and down in front of these buildings. But it is also true that there is not the slightest particle of evidence that this defendant had anything whatever to do with the excavation, which was covered with plank, upon which the plaintiff fell; and it is also proved beyond all question that they were not in sole charge of the premises, or that they had any charge thereof, except so far as their own work was concerned; that there were other and independent contractors; and that some one or other of these contractors had made these trenches, covered by the plank in question, over whose movements the defendant had no control, and for whose wrong-doing they were in no way responsible. I think that it is an entirely erroneous conclusion from the testimony to hold that there was any evidence from which a jury could find that these defendants were in charge of the premises in question. It appears conclusively from the evidence that the defendant had nothing to do with these excavations; that their work on the sidewalk had not commenced; and that others were doing work there, or had been, in the course of which these excavations were made, which were covered by plank probably belonging to the cellar digger. Under these circumstances, it is difficult to see how the defendants could be made responsible for the accident which happened. There is no evidence whatever that, in connection with any of the work they were carrying on, they were guilty of any negligence; and, as has already been said, there is no evidence that they were in charge of the premises, so as to direct the movements of the other contractors in reference to the work they were doing. It seems to be held that, because they had a watchman there, (it does not appear for what purpose, but probably to protect their own material which they were using,) that therefore he was to be deemed in sole charge of the building, and liable for the carelessness and negligence of the other con-

tractors. I have searched the evidence in vain for anything whatever connecting the defendants, in any way, shape, or manner, with either the maintaining or the original digging out of the trench covered by this plank. If the defendants had assumed any duty in respect to this trench, there might be another question; but there is no evidence whatever that they put the plank there. It is certain that they did not dig the trench; and, simply because they had a watchman to look after their own interests, they seem to have been held for the negligence of other and independent contractors, over whose movements they had no control. I think the learned court below was correct in dismissing the complaint, as no cause of action whatever was made out against the defendants.

GENET v. DELAWARE & H. C. CO.

(Supreme Court, General Term, First Department. June 6, 1880.)

COSTS—EXTRA ALLOWANCE—DIFFICULT CASES.

Where, on demurrer, a court dismisses a complaint for want of jurisdiction, no costs can be allowed defendant under Code Civil Proc. N. Y. § 8253, which provides that in a difficult and extraordinary case the court may award, as additional costs, a sum not exceeding 5 per cent. of the amount involved. Before the court can award such costs, it must determine that the case itself is difficult and extraordinary, and that question cannot be considered where the court has no jurisdiction.

Appeal from special term, New York county.

Action by Augusta C. Genet against the Delaware & Hudson Canal Company for alleged negligent injuries to property in Pennsylvania. On defendant's demurrer, the complaint was dismissed for lack of jurisdiction. See 8 N. Y. Supp. 822. Defendant then moved for an extra allowance of costs on the ground that the case was difficult and extraordinary. From an order awarding defendant \$500 additional costs plaintiff appeals. For other litigation between the parties, see 4 N. Y. Supp. 633, 880; 6 N. Y. Supp. 959; 21 N. E. Rep. 390.

Code Civil Proc. N. Y. § 8253, provides: "In a difficult and extraordinary case, where a defense has been interposed in any action, the court may also, in its discretion, award to any party [as additional costs] * * * a sum not exceeding 5 per centum upon the sum recovered or claimed, or the value of the subject-matter involved."

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

George C. Genet, for appellant. *Matthews & Smith*, for respondent.

DANIELS, J. This action was determined by the decision of a demurrer to the plaintiff's complaint, in which it was held that this court had no jurisdiction over the cause of action set forth. And the allowance was directed for the reason that the case was difficult and extraordinary. But the court has not considered or decided the case. It has not been either heard or investigated by the court, and it cannot, therefore, be held to be either difficult or extraordinary. Before an additional allowance can be made under the authority of section 8253 of the Code of Civil Procedure, it must be ascertained that the case itself is of that description. It must be determined in some form to be difficult and extraordinary. But in a case over which the court has no jurisdiction that subject cannot regularly be considered at all, and no decision can be made upon it. The sole province of the court is to determine the single point of jurisdiction, and when that has been done adversely to the action, the merits are beyond its reach, and outside of its consideration. The right to recover the costs of the defense made by the demurrer depends upon section 8229 of the Code, which, in general language, provides for the recovery of costs, of course, by the defendant, when the plaintiff shall not be entitled to costs. They result in an action at law, as this action was directly from the final judgment recovered by the defendant. In this respect they are

plainly distinguishable from the additional allowance, which can only be made by further action taken by the court, resulting in the conclusion that the case itself is difficult and extraordinary; and, as that could not be reached for want of jurisdiction over the controversy itself, the order should be reversed and the motion denied. All concur.

FRENCH v. DAUCHY *et al.*

(*Supreme Court, General Term, First Department. June 6, 1890.*)

RECEIVERS—ACCOUNTING—ACTION ON BOND.

An action cannot be maintained against the sureties on the bond of the receiver of a firm without a settlement of the accounts of the receiver having first been had; it appearing that obligations have been incurred in the business of the receivership, and it not appearing that debts of the firm have been paid.

Exceptions from circuit court, New York county.

Action by James C. French against Samuel T. Dauchy and others. Judgment was given for plaintiff, and defendants move for a new trial on exceptions taken at the trial, and ordered to be heard at the general term in the first instance.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Edward D. McCarthy, for plaintiff. *Frederick G. Dow* and *Wm. G. La-throp, Jr.*, (*S. G. Brownell*, of counsel,) for defendants.

VAN BRUNT, P. J. This action was brought upon a receiver's bond given by one A. Dewitt Baldwin upon his appointment as receiver, in the year 1876, in an action for the dissolution and liquidation of the copartnership existing between the plaintiff and one Dauchy; and the only question necessary to consider upon this motion is whether an action can be brought against the sureties upon a receiver's bond without first having the accounts of the receiver duly settled. The evidence in this case showed that the receiver had received some money in 1876; that he had incurred obligations in the business of the receivership; that there were debts of the firm of which he was appointed receiver; that he had died, and that an administratrix had been appointed; and that no proceedings had ever been taken to compel an accounting either by the receiver or his administratrix. We do not think that this action can be maintained without an accounting. There were no insuperable obstacles to an accounting. There was an administratrix of the receiver, who could be called upon to account in proceedings to establish a claim against his estate. The plaintiff claims to treat this bond as though made to himself and his partner, whereas it runs to the people of the state,—is a bond not only for the benefit of the partners, but also their creditors.

It appears that in November, 1884, there were debts unpaid of the firm, and there is no evidence that they have been paid. It also appears that the receiver had incurred liabilities in the performance of his trust; and, although it may be true that these claims are not liens upon the funds in the receiver's hands, and are personal claims, yet they are claims which, if properly incurred, the receiver upon an accounting would be allowed to pay out of the funds in his hands. The claims of creditors, and the disbursements of the receiver, and the claims against him in the administration of the trust, cannot be determined in an action upon the bond. There must be an accounting to settle the amount of the liability of the receiver, and to whom such liability exists, before an action upon the bond will lie. In the case of *Cuddeback v. Kent*, 5 Paige, 96, no such question was involved, and the later case, *Salisbury v. Van Hoesen*, 3 Hill, 77, entirely coincides with the view above taken; and it seems to be absolutely necessary, for the protection of all the parties whom the obliges in the bonds represents, that such a course should be pursued. The motion for a new trial must be granted, with costs to the defendants, to abide the final event.

BRADY, J., concurs.

DANIELS, J. The rule that there should be an accounting settling the receiver's accounts before an action upon his bond can be maintained, is sustained by *State v. Gibson*, 21 Ark. 140; *Bank of Washington v. Creditors*, 86 N. C. 323; and *Atkinson v. Smith*, 89 N. C. 72,—and also by the authorities referred to in the opinions; and the result from it is that this judgment must be reversed, as that is directed in the opinion of the presiding justice.

APOLLINARIS Co., Limited, v. VENABLE *et al.*

(Supreme Court, General Term, First Department. June 6, 1890.)

DEPOSITION—OF WITNESS WITHOUT THE STATE.

Under Code Civil Proc. N. Y. § 887, which permits the testimony of material witnesses "not within the state" to be taken by commission, it is not sufficient to aver in the application that material witnesses are residents of a foreign country, but there must be a distinct allegation that they are not then within the state.

Appeal from special term, New York county.

Action by the Apollinaris Company, Limited, against George W. Venable and Moses Heyman for an infringement of a trade-mark. Defendants moved for a commission to examine witnesses residing at Cologne, Germany. From an order granting the motion, plaintiffs appeal.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Henry Melville, for appellant. I. Albert Englehardt, (John E. Parsons, of counsel,) for respondents.

BRADY, J. The power to issue a commission conferred by sections 887 and 889 of the Code of Civil Procedure exists where it appears by affidavit, on the application of either party, that the testimony of a witness not within this state is material to the applicant. The commission applied for herein was based upon an allegation that certain witnesses named, and who were material, were residents of Prussia, but there was no allegation that they were not at the time of the application within this state; and the affidavit did not, therefore, comply with the requirements of the provisions of the Code, and was insufficient. This result was declared by the general term of the superior court in the action of *Wallace v. Blake*, and reported in 4 N. Y. Supp. 488. A commission to examine witnesses living abroad, who are material, is founded upon necessity, which would not exist if the witness, though residing abroad, were within this state. His examination could then be taken *viva voce*, and the adverse party secured the valuable privilege of such a cross-examination. This view doubtless influenced the adoption of the provision of the statute requiring proof that the non-resident witness was not at the time of the application within this state. It might well be that the witness, though resident abroad, was within this state, either sojourning or upon business; and, if so, he should be examined *de bene esse*, according to the provisions of the Code relating to that procedure.

For these reasons the objection taken to the infirmity of the affidavit thus discussed was a good one, and the motion should have been denied for that reason. The result of this appeal must be, therefore, a reversal of the order, with \$10 costs and disbursements, and without prejudice to another application for a commission, if the defendants think it necessary. No doubt is entertained of the right of the defendants to examine witnesses for the purpose of proving what it is alleged can be substantiated by the affidavits submitted herein. Ordered accordingly. All concur.

STURGIS v. CRESCENT JUTE MANUF'G CO.

*(Supreme Court, General Term, First Department. June 6, 1890.)***FOREIGN CORPORATIONS—SERVICE OF PROCESS.**

Prior to the service of summons upon one B., as officer or managing agent of defendant, a foreign corporation, under Code Civil Proc. N. Y. § 482, B. had resigned his position of president of the corporation, and he made affidavit that subsequently he sustained no relation to defendant except as a member of a firm which was under contract to sell defendant's goods and to advance moneys to defendant. On the day of the service of summons B. gave directions as to the disposition of certain property consigned to defendant, but with such directions B. communicated the fact of his resignation. *Held*, that the service could not be sustained.

Appeal from special term, New York county.

Action by Appleton Sturgis against the Crescent Jute Manufacturing Company. From an order denying a motion to set aside the service of summons defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Wingate & Cullen, for appellant. *Butler, Stillman & Hubbard*, (*Adrian H. Joline* and *Henry H. Whitman*, of counsel,) for respondent.

DANIELS, J. The summons was served by delivering it to William J. Behan. He had been the president of the defendant, which is a corporation existing in the state of Louisiana. It had designated no person within this state upon whom the summons might be served, but it was made to appear that the defendant had property within this state, and the service was made upon Behan, as an officer, or managing agent, of the corporation within this state. The service of the summons was made on the 10th of February, 1890, and the person upon whom it was served stated in his affidavit that he had been president of the defendant prior to the 18th of January of this year, but on that day resigned his office, and on the following day his resignation was accepted by the board of directors, and on the next succeeding day an annual election was held for directors for the ensuing year, and his name was omitted from the new board. These statements were also sustained by the affidavit of the secretary of the defendant, who swore to the same state of facts. And Mr. Behan further stated in his affidavit that his only relation with the defendant was that of a member of a firm, who were commission merchants, doing business in the city of New Orleans, and that the firm had a written contract with the defendant, agreeing to advance money to it for the purposes necessary for conducting its business, and to market the bagging and other products of the defendant upon certain terms as to credit, for a commission on the gross sums for their services; that their employment was as commission merchants, and they were in no sense agents of the company. And this statement was also in like manner sustained by the affidavit of the secretary. To meet and overcome the effect of this evidence it was shown that a cargo of jute butts had arrived in this state on the 10th of February, 1890, for the defendant, and that after its arrival Gustavus Tuckerman, whose affidavit was produced upon the hearing, called upon Mr. Behan at the Victoria Hotel, and mentioned to him the arrival of the vessel, and asked him whether the butts should be shipped to New Orleans or stored here in bond, and he replied that they should be stored. He stated further that he had previously been told by Mr. Behan that he had resigned as president, but that he complied with the instructions given to him, because he thought that having previously been president of the company, and his brother at that time being president, or about to become president, the company would ratify or consent to any instructions he might give to the affiant; and in accordance with what took place the cargo was stored under the instructions of this person. But this affidavit in no way conflicts with the statements before referred to, that the only relation which Behan sustained to the defendant was that of a mem-

ber of this firm, which had obligated itself to loan money to the defendant and to sell its products upon commission. It did not, nor did any other proof presented to the court, prove as a matter of fact that Behan was engaged in the service of the company, or authorized to interfere in its affairs, as its managing agent. He was not its officer in any sense, nor did he sustain any other relation whatever to the company than that of a member of this firm, which had undertaken to loan it money and to dispose of the defendant's manufactured articles for a commission. In *Tuchband v. Railroad Co.*, 115 N.Y. 437, 22 N. E. Rep. 360, the subdivision of section 432 of the Code of Civil Procedure authorizing the service of a summons on a managing agent of a foreign corporation, was considered and construed. But by no construction of the language contained in that case was there sufficient shown here to bring this case within its control. There the person who was served was in charge of the affairs of the corporation in this state, controlling its place of business, while here this corporation does not appear to have had any place of business within this state. Neither does it appear to have conferred any authority upon Mr. Behan to represent it, or interfere with its affairs, otherwise than in the sale of its articles for a commission. The suspicion entertained by the plaintiff, that Mr. Behan had gone through the form of resigning his office to evade the service of process upon him as president of the company, does not aid the case; for if that was the object which induced his resignation, inasmuch as he did actually resign, and the resignation was accepted by the company, he could not afterwards be served with the summons against the company as its officer. To justify this service the fact must exist that the person on whom it is made is either an officer or managing agent of the corporation. In this case neither fact has been proved, but the fact proved is that he was not an officer of the company, and was not its managing agent. The order should be reversed, with \$10 costs and the disbursements of the appeal. All concur.

FLEISCHMANN v. TOPLITZ.

(Supreme Court, General Term, First Department. June 6, 1890.)

LANDLORD AND TENANT—COVENANTS OF LEASE.

Under the covenants of a lease providing that the lessee shall return the premises in good repair, injury by the elements excepted, and that he shall comply with all orders of the city health department at his own expense, he must remove the carcasses of horses destroyed by fire in the building during the term, and the landlord is bound to remove the *débris* to enable the lessee to get at the carcasses.

On exceptions from circuit court, New York county.

Action by Louis Fleischmann against Lippman Toplitz, to recover money expended in removing the carcasses of horses from defendant's building, which plaintiff occupied as lessee. Judgment for plaintiff. Defendant excepts.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

A. J. Dittenhoefer, for appellant. A. R. Dyett, for respondent.

BRADY, J. The plaintiff was the lessee of the premises Nos. 43 and 45 West Thirteenth street under a lease for five years, which would expire on the 1st of November, 1887. On the 25th of July, 1887, the premises were totally destroyed by fire. They were used by the lessee as a stable, and by the fire a number of horses which were on the premises at the time it occurred were destroyed, and formed a part of the *débris*. Immediately after the fire, a notice was served upon the defendant, as owner of the premises, requiring him to remove the same, the object of which seems to have been to dispose of the dead carcasses of the horses, which would become noisome. The parties hereto had a conversation in regard to that notice, and an understanding was arrived at between them by which the plaintiff was to proceed with the removal, and

the defendant to repay him, provided he, and not the plaintiff, were bound to make the removal. The plaintiff proceeded to do as contemplated, and then insisting that the defendant was liable to refund the amount expended, and, the defendant denying such obligation, this action was brought. The lease under which the plaintiff held contained a covenant on his part to surrender the premises at the expiration of the term in good order and repair, ordinary wear and tear and injury by the elements excepted, and also, at his own proper costs, charges, and expenses, to comply with all the rules, orders, and regulations of the department of buildings and the board of health of the city of New York. The defendant insists that under both of these covenants the plaintiff was bound to remove the carcasses mentioned. The plaintiff, on the contrary, contends that no such obligation was imposed. The case is novel, and examination and research has not revealed a kindred case or guide to its decision on authority. The result of a consideration of all the facts and circumstances has resulted, nevertheless, in this conclusion, namely, that the obligations springing from the relations existing between the parties are several. The plaintiff was bound to remove the offensive carcasses from the ground under his agreement to leave the premises in good state and condition, subject only to the impairment of reasonable use, and the defendant was equally bound to remove the *débris*, to enable the plaintiff to get at the same. This is a just and equitable disposition of the controversy. The general *débris*, being a part of the premises rented, is the landlord's, and subject to his control, the term having terminated. The carcasses, connected as they were with the occupation of the premises by the plaintiff and his business, the animals of which they were the remains, having been employed therein, are his. The different amounts expended for the removal of the carcasses and *débris* should therefore be paid by the parties, the plaintiff paying for the former, and the defendant for the latter, namely, the plaintiff \$83.43, the defendant \$465.50; these amounts appearing to be undisputed on the record. No doubt is entertained that the plaintiff abandoned the possession of the premises after the fire, and that such was the understanding of the parties upon which they acted, and none of the exceptions, which have been fully examined, having any value, the only question requiring particular examination is the right of the plaintiff to recover for money expended for the defendant, and, if so, how much? For these reasons the judgment must be modified as suggested, by deducting \$83.43 from the judgment, and the interest charged thereon, and affirmed as to the balance, without costs to either party. All concur.

FOOTE *et al.* v. STRYKER *et al.*

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

FRAUDULENT CONVEYANCES—ASSIGNMENT OF MORTGAGE—CONSIDERATION.

In an action to set aside an assignment of a mortgage for \$2,000 as in fraud of creditors, it appeared that before the assignor became indebted he made a gift of several mortgages to the assignee, his daughter, two of which, aggregating \$3,800, had been foreclosed, and purchased by the assignee for the amount of the mortgage debt; that after the assignor became indebted the assignee conveyed the lands that she had bought at the foreclosure sale to the assignor, to enable him to raise money. *Held*, that the value of the lands so conveyed was the consideration of the assignment sought to be set aside.

Appeal from special term, Kings county.

Action by Warren Foote and F. Seeley Foote against Richard D. Stryker and Anna M. Stryker to set aside, as fraudulent and void as to creditors, two assignments of mortgages made by Richard D. Stryker to his daughter and co-defendant, Anna M. Stryker,—one made April 20, 1875, which assigned six several bonds and mortgages, aggregating \$13,500, in consideration of \$1; and the second assignment, made January 31, 1879, of one bond and mortgage, made by Agnes Haner and husband to the judgment debtor, for

\$2,000, in consideration of "\$1 and love and affection." There was a judgment for plaintiffs, and defendants appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Charles J. Patterson, for appellants. I. Newton Williams, for respondents.

BARNARD, P. J. The plaintiffs are judgment creditors of Richard D. Stryker. The complaint asks that a transfer of several bonds and mortgages made by Richard D. Stryker to his daughter, the other defendant, be set aside as fraudulent. The transfers were made by two assignments,—one dated in 1875, conveying six mortgages. As to this conveyance it appeared on the trial that the assignment was made without fraud or evil intent, and was before the contraction of the plaintiff's debt. The court dismissed the complaint as to this part of the plaintiff's claim. In 1879, Richard D. Stryker conveyed to his daughter a mortgage executed by Agnes Haner to Richard D. Stryker for \$2,000, dated 6th December, 1875. The consideration expressed was \$1 for the assignment from the father to the daughter, and also "love and affection." It was ruled upon the trial that the daughter might prove a real consideration to the extent of \$542, which was allowed by the court, and the assignment was set aside as to all over that sum. The sole question upon the appeal is whether the assignment of the mortgage did not prove a greater consideration. The proof shows that Anna Stryker acquired two pieces of land by foreclosure of two of the mortgages covered by this 1875 assignment. These lands cost her \$3,800, being the amount of the several mortgages,—one of \$2,000 on one piece, and one of \$1,800 on the other. The daughter, upon the request of the judgment debtor, conveyed these lands to him, and he mortgaged them for \$2,800. This money, in fact, went to the plaintiffs; but it is of no importance where the money went to. As between father and daughter, he owed her \$5,500. This is the expressed consideration in the deed; and while there is evidence that the real consideration was only the amount of the mortgages which had been foreclosed, \$3,800, even that sum is largely in excess of the moneys realized on the mortgages in question. If the two pieces of property were worth less than the \$3,800, the debtor should not escape this agreement to pay his daughter below what he borrowed on the property, and that is in excess of the amount of the moneys collected on the mortgage in dispute. There should be a new trial, with costs to abide event. All concur.

HARRIS v. MUTUAL LIFE INS. CO.

(Supreme Court, Special Term, New York County. April 14, 1890.)

COSTS—SECURITY—NON-RESIDENTS—ACTIONS IN FORMA PAUPERIS.

It being in the discretion of the court to allow an action to be prosecuted *in forma pauperis*, (Code Civil Proc. N. Y. §§ 458, 460, 461,) a non-resident plaintiff may be permitted to sue in such form, though section 8366 provides that "defendant, in an action brought in a court of record, may require security for costs to be given * * * where the plaintiff was, when the action was commenced, * * * a person residing without the state."

At chambers. Action by Franziska Harris, a non-resident of the state of New York, against the Mutual Life Insurance Company on an insurance policy issued to Mark Harris for the benefit of his wife, if living, otherwise for the benefit of his infant son. After plaintiff had obtained an order permitting her to sue *in forma pauperis*, she was required to give security for costs. She afterwards procured an order vacating the order requiring security for costs. Defendant now moves to vacate the order permitting plaintiff to sue *in forma pauperis*, and requiring her to give security for costs, and

to stay proceedings until payment of the costs of a former action brought by plaintiff in the court of common pleas, where the complaint was dismissed. The provisions of the Code of Civil Procedure in relation to actions by poor persons are as follows:

"Sec. 458. *Who may petition for leave to prosecute as a poor person.* A poor person, not being of ability to sue, who alleges that he has a cause of action against another person, may apply, by petition, to the court in which the action is pending, or in which it is intended to be brought, for leave to prosecute as a poor person, and to have an attorney and counsel assigned to conduct his action."

Section 459 relates to the contents of the petition.

"Sec. 460. *When and how leave granted.* The court to which the petition is presented, if satisfied of the truth of the facts alleged, and that the applicant has a good cause of action, may, by order, admit him to prosecute as a poor person, and assign to him an attorney and counsel to prosecute his action, who must act therein without compensation.

"Sec. 461. *Not liable for costs and fees.* A person so admitted may prosecute his action without paying fees to any officer; and he shall not be prevented from prosecuting the same by reason of his being liable for the costs of a former action, brought by him against the same defendant. If judgment is rendered against him, or his complaint is dismissed, costs shall not be awarded against him."

In relation to security for costs section 3268 provides that "defendant, in an action brought in a court of record, may require security for costs to be given as prescribed in this title, where the plaintiff was, when the action was commenced, either (1) a person residing without the state; or * * * (5) an infant, whose guardian *ad litem* has not given such security."

Christopher Fine, for plaintiff. *Davies & Rapallo*, for defendant.

ANDREWS, J. It has been held in a number of cases that infant and non-resident plaintiffs cannot be allowed to sue as poor persons. *Alexander v. Meyers*, 8 Daly, 112; *Anon.*, 10 Abb. N. C. 80; *Christian v. Gouge*, Id. 82; *Kleinpeter v. Enell*, 2 Civil Proc. R. 21. That an infant can be allowed to sue as a poor person has been held in *Hotaling v. McKenzis*, 7 Civil Proc. R. 320; *Erickson v. Poey*, 5 Civil Proc. R. 379, 387; affirmed 96 N. Y. 669; *Irving v. Garrity*, 4 Civil Proc. R. 105; *Nichols v. Cammann*, 2 Civil Proc. R. 375; and in *Heckman v. Mackey*, 19 Abb. N. C. 394, it was held by the United States circuit court for the southern district of New York that, under our Code, a non-resident plaintiff can be permitted to sue as a poor person. So far as infants are concerned, the question seems to have been settled by the court of appeals in *Erickson v. Poey*, *supra*. In that case the plaintiff was an infant, and the city court of Brooklyn made an order allowing the plaintiff to prosecute the action as a poor person, and denied the motion of the defendant for an order requiring the plaintiff to file security for costs. Both of these orders were affirmed by the general term and by the court of appeals. The provisions of section 3268 of the Code, which provides that a defendant may require an infant to give security for costs, are the same as those in relation to non-residents, and it necessarily follows that as the court of appeals has decided that an infant plaintiff can be allowed to prosecute as a poor person, that the court, in its discretion, may grant the same privilege to a non-resident plaintiff. The fact that the costs of the action in the court of common pleas have not been paid is not a good reason for refusing to permit the plaintiff in this action to prosecute as a poor person, because section 461 of the Code expressly declares that liability for the costs of a former action shall not prevent the plaintiff from prosecuting as a poor person. I cannot, upon these applications, pass upon or consider the question whether the plaintiff has a good cause of action. The motion to vacate the plaintiff's orders of March 5

and March 25, 1890, and to stay proceedings in this action until the costs of the action in the court of common pleas have been paid, must be denied, with \$10 costs to the plaintiff, to abide the event of the action.

PEOPLE v. FLACK *et al.*

(*Supreme Court, General Term, First Department. June 6, 1890.*)

1. CRIMINAL LAW—INSTRUCTIONS.

In a prosecution for a conspiracy to obtain a divorce by unlawful means, it appeared that a summons and complaint had been served upon the defendant in the divorce proceedings, and M., one of the defendants in the criminal prosecution, was appointed referee; that, the judge objecting to entering a decree on the report of the referee, the latter destroyed the original summons, and substituted a new one, which was signed by one as attorney who had not been authorized to act as such by plaintiff; that a false affidavit of regularity was prepared by M.; that the affidavit of service of the original summons was attached to the new summons, and a new order of reference prepared; and that on these papers, without any service of the new summons, a decree was obtained. *Held*, that it was proper for the court to characterize such decree as fraudulent; the principal question in the prosecution being whether there was a conspiracy to compass the divorce by unlawful means, and that question having been left to the jury by instructions in which the necessity of finding a conspiracy was clearly expressed.

2. SAME—CONDUCT OF TRIAL.

It was shown that, in a deposition taken before the referee, a witness had not told the truth in regard to a certain matter, and in relation to such evidence the court asked whether the referee, if he had done his duty, would have secured from the witness "the truth about that, as she had told it upon the stand." No exception was taken to the use of the word "truth" at the time. *Held*, that such instruction could not be objected to on the ground that it assumed that the witness told the truth on the trial.

3. SAME—PERFORMANCE OF UNLAWFUL ACTS BY DIRECTION OF ANOTHER.

It was no excuse for such acts of M. that they were performed by the consent, or under the direction, of the judge.

4. SAME—NEW TRIAL.

The intrusion of a newspaper reporter into a jury-room during the deliberations of the jury is not a sufficient reason for a new trial, where it appears by the affidavits of the jurors that their verdict was not affected by such intrusion.

5. SAME.

The action of the defendants, after obtaining knowledge of such intrusion, in permitting the trial to go without objection, and in asking for instructions to the jury, is a waiver of such intrusion.

Appeal from court of oyer and terminer, New York county.

Indictment against James A. Flack, Joseph Meeks, and William L. Flack for a conspiracy to obtain a divorce by unlawful means. From a judgment of conviction the defendants James A. Flack and William L. Flack appeal. One of the instructions objected to by appellants was upon the effect of the failure of the defendant Meeks, who was referee in the divorce proceedings, to examine a certain witness, and was as follows: "Suppose, gentlemen, that the referee had done his duty. Would he have secured from her the truth about that as she had told it upon the stand?"

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Horace Russell, for appellants. *John R. Fellows*, Dist. Atty., (*John W. Goff*, of counsel,) for the People.

VAN BRUNT, P. J. The question presented upon this appeal arises entirely upon exceptions taken to the charge of the judge. The appellants, together with one Joseph Meeks, were convicted of a conspiracy for the perversion of justice, and of the due administration of the law, by procuring by unlawful means a decree of divorce. The indictment under which this conviction was had contained many counts, which, however, may be summarized as follows: *First*, a conspiracy to obtain a divorce without the knowledge and consent of the plaintiff therein; *secondly*, a conspiracy to obtain a divorce by unlawful

means. Although a large number of exceptions to the charge of the learned judge who presided at the trial were taken, our attention has been called to the following only:

First. An exception to the statement of the court that "this judgment record [referring to the decree of divorce] is a record of a fraudulent divorce; that of that there can be no doubt whatever; that it is unquestionably fraudulent."

Second. An exception to the following language of the court, contained in instructions to the jury as to the duties of the referee in the taking of the testimony of the witnesses in an action for divorce: "If the referee had done his duty, would she [referring to one of the witnesses] have said she first knew him fifteen years ago as Reynolds? She says now she never did."

Third. That the court erred in its charge that it was no excuse for Meeks if he performed the acts he did perform by the consent of Judge BOOKSTAYER." Our attention is called to the following requests and exceptions in connection with this point: "I ask your honor to charge that Judge BOOKSTAYER was the judge of the regularity of the proceedings and the sufficiency of the papers. (The court so charged.) *Mr. Bird.* I ask your honor to charge that if Judge BOOKSTAYER knew, when the papers were brought back to him, that the changes had been made in them as testified to by the defendant Meeks, that then this jury cannot find Mr. Meeks guilty. (The court declined so to charge. Exception taken.) *Mr. Bird.* I ask your honor to charge that it was in the power of Judge BOOKSTAYER, verbally, to direct changes of the character made here. *The Court.* I decline so to charge, and charge the direct reverse. *Mr. Bird.* I except to that, and to the qualification on behalf of each of the defendants. I ask your honor to charge the jury that Judge BOOKSTAYER, being the judge to whom the papers were presented, was the sole judge of the sufficiency of the proof. *The Court.* Yes. *Mr. Bird.* I ask your honor to charge that, if that is so, this record is not a fraudulent record. *The Court.* I decline so to charge. (Exception taken.)" The counsel for Meeks then asked the court to charge that if Mr. Meeks did what he did—what he has sworn to upon the stand—upon the direction of Judge BOOKSTAYER, without any criminal connection with any other person, but simply obeyed the order of the judge who had obtained jurisdiction over the case, he committed no crime whatever. "*The Court.* I charge the part which refers to his criminal act, but everything in relation to his having done it by the direction of Judge BOOKSTAYER I decline to charge." The counsel then requested the court to charge that "Judge BOOKSTAYER had exclusive power to give directions to Mr. Meeks, he being his referee. *The Court.* He had no authority to direct Mr. Meeks, or anybody else, to change, erase, or make any alterations such as have been made here in that record; and, if he did so, he himself was derelict in his duty." The counsel excepted to the refusal of the charge as requested, and to the qualification as charged. The counsel asked the court to charge that if the jury believed that Judge BOOKSTAYER gave Meeks a verbal order to have a change of attorneys made, and that Meeks effected that purpose, as he has described upon the witness stand without any intent to commit a crime, and that Judge BOOKSTAYER was not imposed upon, but acted upon his own official judgment, and upon the papers presented to him by Meeks, that then they must acquit the defendant Meeks. "*The Court.* I decline to charge that. So far as the criminal intent is concerned, it is correct. Everything about Judge BOOKSTAYER's verbal order, etc., I decline to charge."

Exception was also taken to the following language in the charge: That "Ignorance on the part of the defendants, or any of them, of the meaning of this statute, cannot be a shield to them, if you believe they have committed the acts. If you believe beyond a reasonable doubt that they have committed the acts which constitute the offense as I have defined it to you, then they are guilty." And the court thereupon defined a "criminal intent" to be the do-

ing of an unlawful act, intending to do it, and that ignorance of the law has nothing to do with it.

The court was also asked to charge as follows, which it did: That "mere concert is not conspiracy. Persons who agree to do an act innocent in itself, in good faith, not by the use of criminal means, do not become conspirators because it turns out afterwards that the act was prohibited by statute." The court was also asked to charge the jury, which it did, that the jury must not guess that there was a conspiracy, but that they could only find the same from the legal evidence of the witnesses, proving the same beyond reasonable doubt. The court also charged in the following language: "If, in stating either conceded facts, or the facts proven on one side and controverted on the other, such facts as so stated seem to weigh one way or the other, pray do not consider me as commenting on such facts,—expressing an opinion upon them." Also: "The two questions for you to determine are, first, whether the suit which resulted in this decree was fraudulently and falsely instituted. Then the other question for your consideration is, was this fraudulent decree obtained by fraudulent means?" And also: "Now, when I pronounce this a fraudulent decree, I do not mean to characterize the conduct of the defendants, which I want to leave exclusively to you." Again: "Now, the first question in this case, as you see, is whether the suit itself was falsely instituted. The first is, of course, whether Mrs. Flack is to be credited in her statement that she did not authorize the suit to be brought for an actual divorce. This is a question exclusively for you, and concerning it I desire to express no opinion, nor to affect your judgment in the least." Also: "It will be for you to say, gentlemen, on the facts, whether these defendants are guilty of having obtained this decree of divorce by fraudulent or unlawful means. On that point, it is proper to say, whether there was a genuine cause of action is not the question. The question is whether the law has been abused or perverted by practices which are fraudulent." The court also charged that, if the jury believed the defendant Meeks did all the acts testified to in the case without conspiring with the other defendants or anybody else, they must acquit him. And again: "Now, gentlemen, apply the rule with regard to conspiracy which I have given you, and the general principles of the law which I have stated, and take all the evidence here which is before you uncontradicted, and that which is in conflict, and look at the entire case in its length and breadth. I leave it, then, for you to say whether there is or is not any reasonable doubt of the guilt of those defendants. If there is any reasonable doubt as to the guilt of one of them, he is entitled to it. If there is such doubt as to all of them, they are all entitled to it. If there is no reasonable doubt as to the guilt of any of them, you should so declare by a verdict."

It will be noticed that all these exceptions really relate but to two subjects, viz., the characterization by the judge of the decree of divorce which had been obtained as a fraudulent decree, and to the definition given of a criminal intent. It is urged upon the part of the appellants that by this charge the judge usurped the privileges and functions of the jury, and dictated to them as matter of law, or as a matter of mixed law and fact, what should have been left to them to find as a matter of fact, or as a matter of mixed law and fact, under proper instructions as to the law from the court; and, as an enforcement of this proposition, it is also urged that one of the questions on the trial was whether the divorce was fraudulent, and that the determination of the question involved not only the acts of the defendants, but the intent which was to be inferred by the jury from these acts,—that is, not only the physical but the inferential facts; that it was not enough to secure a conviction that certain unlawful acts were done, but those acts must have been done in pursuance of a conspiracy animated by a corrupt purpose to procure a fraudulent divorce. We think that, upon a consideration of the case, it will be seen that

the learned counsel for the defendants has mistaken the question upon which the jury was called upon to pass, and that the principal question on the trial was not whether the divorce which had been procured was fraudulent, but whether there had been a conspiracy upon the part of each of these defendants, with some other person or persons, for the purpose of procuring a divorce by unlawful means. It is undoubtedly true that in a criminal case the court has no power to charge the jury that the defendants are guilty; and for that reason, upon the trial of an indictment for homicide, it was held to be error for the court to charge that, if they believed the evidence of certain witnesses, the defendant was guilty of murder. This was held to be error because, although the homicide might be established beyond question, yet it was for the jury to say whether the homicide had been committed with the intent to kill, which was a necessary ingredient of the crime of murder; and, as intent is necessarily a mental operation, the existence of which can only be inferred from established words and acts, the jury alone could draw this inference. *McKenna v. People*, 81 N. Y. 360. So it was held that it was error, in the case of a defendant indicted for burglary with intent to commit larceny, for the court to charge that the evidence showed that the burglary had been committed, because, although the evidence may have shown that there had been a breaking into the premises, it did not show that a burglary had been committed, unless it showed a breaking into with intent to steal, the intent being a part of the definition of "burglary," and for the reason already stated the jury alone could draw the inference of intent. *People v. Marks*, 4 Parker, Crim. R. 157. There is another class of cases in which the question of intent must necessarily be submitted to the jury; and that is, where two or more persons are indicted for the crime of conspiracy, it is not enough to prove them guilty to show that they have made an agreement to do an act innocent in itself, and that the act which was the object of the agreement was prohibited, but it must, in addition, be shown that the confederation was corrupt, and that the agreement must have been entered into with an evil purpose, as distinguished from a purpose simply to do an act innocent in itself in ignorance of the prohibition. And it is said: "Persons who agree to do an act innocent in itself, in good faith, and without the use of criminal means, are not converted into conspirators because it turns out that the contemplated act was prohibited by statute. The actual criminal intention belongs to the definition of the offense, and must be shown to justify a conviction." In other words, a confederation to do an act innocent in itself does not become a criminal act unless the agreement to do the act is with knowledge that it is prohibited, because otherwise the confederation cannot be corrupt. *People v. Powell*, 63 N. Y. 88. But this rule has no application to a confederation to do acts which never in themselves can be innocent, and therefore the very confederation to do them makes the confederation corrupt, and the only question, in a case of this description, to be left to the jury, is whether there was a confederation to effect the result by unlawful means; the court necessarily being the judge as to whether the means were lawful or unlawful.

In the case at bar, we find that the defendants were indicted for a conspiracy to procure a divorce by unlawful means. The learned judge, in his charge to the jury, gave the definition of a "conspiracy," as contained in the Penal Code, as follows: "If two or more persons conspire either to falsely institute or maintain an action, or to commit an act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the administration of the law, each of them is guilty of a misdemeanor." The court then called the attention of the jury to the fact that there are two kinds of conspiracy,—one a conspiracy to do an unlawful act, unlawful in itself, even if the most righteous means are resorted to; and, second, a conspiracy to perform a lawful act by unlawful means,—and the jury were instructed that a combination for the accomplishment of

unlawful acts by lawful means, or lawful acts by unlawful means, each constituted a conspiracy. The attention of the jury was then called to the further fact that a conspiracy requires two or more persons to be involved in it, and that there are many acts, which may be performed by one man with impunity, which two or more persons together cannot perform with impunity, and that it is the essence of the conspiracy doctrine that there should be a combination of two or more; and, unless the jury could find a combination between each of these defendants with some other person to procure this default by unlawful means, there must be an acquittal. And in various parts of the charge the attention of the jury is specially called to the fact that, if the acts which were testified to were done by any of these individuals without conspiring with the other defendants or anybody else, they were not guilty. The evidence upon the part of Meeks shows, and this is the foundation of the judge's charge in reference to this matter, that this decree which the court pronounced to be a fraudulent decree was obtained substantially under the following circumstances, and upon the following papers: A summons and complaint had been served upon the defendant James A. Flack in a divorce proceeding, and no answer had been put in. An application had been made for an order of reference, which had been granted. Certain proceedings, the irregularities in which it is not necessary to mention, were had before the referee named in the order, and who made his report. The referee, Mr. Meeks, presented such report, with a proposed decree to the judge of the court in which the action had been brought, and the judge objected to the entering of that decree, whereupon Meeks, by direction of the judge, as he claims, took all the papers, destroyed the original summons, substituted a new one, antedated, saw Wright put his name to it as plaintiff's attorney, and prepared an affidavit of regularity, which Wright swore to. The previous attorney's name was erased from the complaint, and this was also signed by Wright. The affidavit of service of the original summons and complaint was attached to the new summons and complaint, a new order of reference was prepared, and a proposed decree; and all these papers were presented by Meeks, without any service of the summons, within a few days after their creation, to the judge of the court in which the previous action had been commenced, and a decree of divorce procured. It appears from the record that it was claimed upon the trial that these proceedings were irregularities, and it was to meet this argument on the part of the defendants that the learned judge charged the jury that these were not irregularities, because the court had never acquired jurisdiction, and that, because there was not a single paper in that record but which was false, therefore, as matter of law, the decree was fraudulent. Upon the uncontradicted evidence given upon this trial, the court would have been compelled to charge that this decree was void. There was no pretense that the summons upon which it had been granted had ever been served. There was no pretense that Wright had ever been authorized to appear as the plaintiff's attorney. There was no pretense but that the affidavit of the service of the summons and complaint was false, as attached to the summons and complaint upon which the decree was granted. There was no pretense but that the affidavit of regularity was false. There was no pretense but that the report of the referee was untrue, in that no proceedings were taken before the referee subsequent to the order of reference contained in the judgment roll. And it is clear that nobody but the court could judge as to whether, under these circumstances, the court had ever acquired jurisdiction under the decree.

But it is urged that because the learned judge characterized the decree as fraudulent, and because fraud is always a mixed question of law and fact, therefore it was error. If the decree was void, why was it void? Simply because of the fraudulent means used in its procurement. Simply because there was not a single paper in the whole roll which constituted the judg-

ment roll, and which preceded the decree, but was false and fraudulent in law. And, we repeat, who was to judge as to whether the law had been cheated and defrauded by the manner in which this decree had been obtained? Was it for the jury? There was no dispute as to these facts. Was it not, then, for the court to say whether the law had been contravened in the procurement of that decree, rendering it fraudulent and void? If it was void because of fraud, we can see no reason why the court should not characterize its nothingness by the proper appellation. The jury was expressly charged that even these facts did not make any of the defendants guilty of the offense charged in the indictment, because the court said, whether the judgment and these proceedings were the result of a conspiracy entered into by these defendants is the question which the jury must solve in favor of the people, beyond a reasonable doubt, before any one of them could be convicted; and the jury were expressly instructed that an individual accused of a crime is entitled to have it left to the jury to form their own conclusion, upon the evidence, whether he has or has not committed the particular crime charged against him. It clearly was a duty imposed upon the court to instruct the jury as to whether the procedure which was confessed to by the defendant Meeks was a perversion of the law. The jury are not the judges of both the law and the facts. It was for the court to characterize the acts established as having been done by Meeks, and it was not for the jury to determine whether they were in accordance with the statute or not; and this is all that the court did in declaring that this decree was fraudulent because it was not founded upon a single honest paper, the defendant Meeks having full knowledge thereof. The question of the intent with which these acts were done had no bearing upon the guilt or innocence of the defendants, under the rule laid down in the case of *People v. Powell, supra*. It is only when the act done is innocent in itself that the intent with which it is done becomes material. We do not think, however, that any one will have the hardihood to claim that the manufacture of false papers, and the procurement of a divorce thereon, could, under these circumstances, be innocent acts; and therefore the charge of the court that the doing of the acts, intending to do them, showed a criminal intent, was clearly correct, such acts being *malæ in se*.

It is to be observed, however, that these exceptions have no relation whatever to the guilt of the defendant James A. Flack. The jury were instructed that he was not connected directly or indirectly with these fraudulent changes which took place after Wright was consulted, and that the case against him depended upon the manner in which this action was brought,—charging adultery with Susan F. Reynolds,—and upon the acts done with reference to the preparation of the evidence of the witnesses whose depositions appear attached to the referee's report. And the jury were instructed that Meeks was not affected by this consideration, but by what happened after he went to Wright, and that the question of the guilt of William L. Flack depended upon the consideration which the jury gave to the evidence as to his participation throughout in the divorce proceedings which were taken. The learned judge was careful to distinguish between the parts which the various defendants who were then on trial before him took in the proceedings, which culminated in the indictments under which they were being tried; that there was no connection between the acts done by Meeks and the defendant James A. Flack; that, if James A. Flack was guilty, his crime had been committed prior to the time when the fraudulent acts of Meeks commenced; and that he had no connection whatever with those acts, and the connection of the defendant William L. Flack with those subsequent proceedings depended upon the weight which the jury gave to the evidence produced before them. It seems to be clear, therefore, that, in the exceptions to the characterization by the learned judge of this decree as fraudulent, the defendant James A. Flack

has no interest, and that only the defendants William L. Flack and Meeks could possibly be affected by the charge of the court in this respect, even if it were erroneous. But we think it has been clearly shown that the court had the right to judge as to whether Meeks' procedure was lawful or unlawful, and as to whether these proceedings were mere irregularities, or frauds upon the court, and that there was no question whatever for the jury upon this point; and it should be borne in mind, in the consideration of this question, that the court charged expressly that, although Meeks was guilty of these unlawful acts in the procurement of this decree, if he did it alone, he was not guilty of the offense charged, but that it was necessary that the jury should find that he conspired with some other person for the attainment of this end by unlawful means, and thus was guilty of a conspiracy for the perversion of justice and of the due administration of the law. Again and again throughout the charge did the court call the attention of the jury to the necessity of finding a combination between the defendants and some other person or persons to do these acts before a conviction could follow. If it was a fraud upon the court to procure a decree of divorce upon papers every one of which was stamped with confessed dishonesty, then the learned judge would be derelict in his duty to the people by characterizing them otherwise than he has done. In law, at least, fraudulent means can never culminate in honest results.

This brings us to the consideration of the claim that the learned judge erred in his commentaries upon the manner in which Meeks performed his duties as a referee. We can see no error in the charge of the court in that respect. The court was bound to instruct the jury as to what was the regular method of proceeding. It is urged that in the charge the court assumed that one of the witnesses told the truth upon the stand, and did not tell the truth in the deposition taken before Meeks; that this was an inference of fact, and it should not have been charged that the witness told the truth on the stand, and that a different state of facts would have been elicited by Meeks if he had conducted an examination. No such question is raised by the exception to this portion of the charge, and the attention of the court was not called, by anything that was said, to this particular language which was used. But we think that the interpretation placed upon the language by the counsel for the appellant is not correct, upon reading the paragraph in full. It was established by uncontradicted evidence that the depositions as sworn to before Meeks as referee did not contain the truth, and it was because of this fact that the court probably used the language to which attention is now called. All that was intended to be presented to the jury was whether the referee, upon proper examination, would have secured the facts as the witness told them upon the stand, which is evidenced by the next sentence in the charge: "If the referee had elicited that fact by an examination of the witness," etc., clearly leaving the matter wholly open. If the attention of the court had been called to the use of the word "truth" by any properly directed exception, the language would undoubtedly have been changed, as there was no intention exhibited upon the part of the court to usurp the province of the jury in this respect, as the jury were again and again instructed that they were to be the judges of the facts, and not the court, so far as they depended upon the evidence of the witnesses.

The next error claimed is that the court erred in its charge that it was no excuse for Meeks if he performed the acts which he did perform by the consent of Judge BOOKSTAVEN, or under his direction. In support of this proposition, our attention is called to *People v. Crounse*, 4 N. Y. Supp. 266, where a party was indicted and convicted of maintaining a public nuisance in constructing an embankment upon private land, thereby causing surface water to flow upon the public highway. The defendant undertook to give evidence showing that the act done by him was done by the direction of the commissioners of highways;

and the court held that it was competent evidence, basing their decision upon the fact that, although the commissioners of highways might fall in judgment, the act, having been done pursuant to their directions, could not be punished criminally. We fail to see the application of this case to the facts established in the case at bar. Judge BOOKSTAVER had no right to direct Meeks to commit acts which under no circumstances could be other than criminal. Judge BOOKSTAVER had no power to direct the commission of forgery and perjury upon which to found a decree, so as to shield the party following the direction from the consequences of his acts. In the case cited, there was a mere error of judgment on the part of the commissioner of highways. He had a right to direct the act to be done, provided it was done without public injury; and therefore the defendant in the case cited, if acting under such authority, did not act unlawfully, and hence his action would not come within the terms of the Penal Code. But Judge BOOKSTAVER, if he did so direct, had no power to direct the commission of acts which would result in the perpetration of a fraud upon the court. It is to be borne in mind, as the learned judge charged the jury, that the judge is not the court; that he is the mere servant and administrator of the law, and that the judges are the servants of the people to perform their duties in accordance with the law; and that a judge is utterly without jurisdiction to direct the performance of acts which must necessarily result in the perpetration of a fraud upon the court, and render absolutely void all action had thereon. Such a case is not the case of an error of judgment. It is a case of the perversion of judgment.

The only other exception which appears upon the counsel's brief is one which is not argued at length, and it is to the effect that the court erred in denying a motion for a new trial based upon the intrusion of a World reporter into the jury-room during their deliberations. It appearing in the record of this case, from the affidavits of the jurors, that their judgment was in no manner affected by reason of the intrusion of this man, without their knowledge, into the jury-room, it is evident that the defendants have sustained no damage, and consequently the verdict cannot be set aside upon that ground. But it is also clear that, whatever rights the defendants may have had by reason of the happening of this incident, they were waived by the subsequent conduct of the defendants and their counsel. After they had full knowledge of the facts, they permitted the trial to go on, and the jury to be sent back without objection, and asked the court to give instructions to the jury on their behalf, the refusal to give some of which forms one of the grounds upon which this appeal is founded. Under such circumstances the defendants cannot now be heard to claim immunity because of this alleged irregularity. They had their opportunity to object to the sending back of this jury. They did not, and they cannot now be allowed to assume the position of speculating upon the verdict of the jury. If it was in their favor, they would be discharged; if against them, it would be set aside.

An examination of the whole case shows that the learned judge presiding at the trial in no manner usurped the functions of the jury. He repeatedly told the jury that the guilt or innocence of the defendants was a question exclusively for them to determine, and in respect to which he did not wish or intend to influence their judgment. Where conceded acts were frauds upon the court, because wholly unlawful, he so characterized them, as he was bound to do; and it was for him alone so to do. As has already been said, it is not the province of the jury to determine whether an established act was lawful or unlawful. Such question is one of law, exclusively for the court. There do not appear to be any errors which would justify a reversal of the judgment, and it should be affirmed. All concur.

BASSETT *et al.* v. LESLIE *et al.*

(Supreme Court, General Term, First Department. June 6, 1900.)

INTERPLEADER—WHEN LIES.

A purchaser arranged with a bank that it should give the seller its acceptance for the price of the goods, taking the purchaser's acceptance for the same amount. The bank failed before its acceptance to the seller matured, and assigned the purchaser's acceptance to a third person, who sued the purchaser on it; and the seller also brought suit for the price of the goods. *Held*, that interpleader against the seller and the holder of the acceptance would not lie, as they did not claim the same debt of the purchaser.

Appeal from circuit court, New York county.

Action by George F. Bassett and others against Frank Leslie and Alcock & Co. Demurrer to the bill was sustained, and plaintiffs appeal. The opinion of the court below, referred to, is as follows:

"The complaint alleges a sale of the merchandise to plaintiffs, not to the American Exchange. The merchandise was delivered to the American Exchange, as the agent of the plaintiffs, under the agreement between the parties; and the plaintiffs were liable to the sellers for the amount due thereon. The plaintiffs were not liable to the American Exchange until the American Exchange had paid to Alcock & Co. the bill of exchange that they had accepted on account of plaintiffs. That bill of exchange not having been paid, there was no consideration for the acceptance by the plaintiffs of the bill of exchange on the plaintiffs; and, as between the plaintiffs and the American Exchange, the payment of that acceptance could not be enforced. There is, therefore, no liability to any one except the plaintiffs for the merchandise purchased; and the liability of plaintiffs to Alcock & Co. does not at all depend upon the obligation to pay Frank Leslie for the acceptance which was transferred to her. Nor is there any liability to Alcock & Co. on the acceptance of the bill of exchange drawn on plaintiffs. Plaintiffs' liability on that bill depends on the rights acquired by Leslie on the transfer of the bill to her. There are not, therefore, two conflicting claims on the plaintiffs for the same fund or debt; but the liability to one is for goods sold, and to the other on an acceptance of a bill of exchange which, as between the drawer and acceptor, is without consideration, but is claimed by a third party as a *bona fide* transferee, before maturity, for value. If the allegations of the complaint are true, plaintiffs have a defense in an action on the acceptance in the hands of the defendant Leslie; but whether that defense can be sustained or not, the plaintiffs would still be liable to Alcock & Co. for the goods purchased by them. On the complaint, the plaintiffs owe but one debt, and that is to Alcock & Co.; but there liability to pay that debt is entirely independent of the liability to the defendant Leslie. The foundation of the right to maintain an action for an interpleader is that the plaintiff owes but one specific debt or obligation, and that two or more parties claim the payment of the specific debt, or the performance of the obligation. Here two parties present two entirely distinct claims against the plaintiffs, arising upon different instruments, and based upon different obligations of the plaintiffs. The plaintiffs are not, therefore, entitled to any relief in this action; and the demurrer must be sustained, with costs, with leave to the plaintiffs to answer on payment of costs."

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Wing, Shoudy & Putnam, (J. A. Shoudy, of counsel,) for appellants. *Fulleton & Rushmore*, (C. E. Rushmore, of counsel,) for respondents.

VAN BRUNT, P. J. It is hardly necessary to add anything to the opinion of Mr. Justice INGRAHAM, who disposed of the case in the court below. We think that the error under which the appellant labors is the assumption that the plaintiff can only be under one liability, and that there is reasonable doubt whether such liability is to Alcock & Co. or to the defendant Frank Leslie.

The theory upon which bills of interpleader can be maintained is that the plaintiff owes a debt of a conceded sum to one of two or more claimants, to which he cannot tell; and, if he owes this sum to one claimant, the other or others have, of necessity, no claim upon him. The plaintiff is clearly not in this situation. Alcock & Co. claim upon a bill of goods sold. Frank Leslie claims upon an accepted draft. The plaintiff may be liable to Alcock & Co. for the goods, and also to Frank Leslie upon the draft; the question between the plaintiffs and Alcock & Co. being whether the latter sold the goods to the former, and the question between Frank Leslie and the plaintiff is whether Frank Leslie holds this draft under such circumstances as that the plaintiff is liable upon it to her. It may be that under certain contingencies the plaintiff, if liable to Alcock & Co., may not be liable to Frank Leslie; but, as that is not necessarily so, interpleader will not lie. The judgment appealed from should be affirmed, with costs, with leave to the plaintiffs to amend upon payment of the costs of this appeal and of the special term. All concur.

JENKINS V. MAHOPAC IRON-ORE CO.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

1. MASTER AND SERVANT—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

In an action by a miner against a mining company for personal injuries, it appeared that plaintiff was assisting his boss to repair a stairway beside the track on which the lifting cars ran, and that while standing on the track a car came up and struck him. Plaintiff was familiar with the movement of the cars, and gave no warning to have them stopped while he was engaged on the track. Held, that plaintiff was negligent, and could not recover.

2. SAME—FELLOW-SERVANT.

The timber boss who superintended the repairs, and assisted in making them, was plaintiff's fellow-servant.

3. SAME—NEGLIGENCE OF MASTER.

Disputes between the timber boss and the under-ground boss, the former's superior, relative to the management of the lifting cars while repairs were being made in the slope, are inadmissible to show negligence on part of defendant.

Exceptions from circuit court, New York county.

Action by William Jenkins, an employe, against the Mahopac Iron-Ore Company for personal injuries. Plaintiff consulted, and excepts.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

G. W. De Lano and P. Q. Eckerson, for appellant. W. C. Holbrook and Matthew Hale, for respondent.

VAN BRUNT, P. J. This action was brought to recover damages for personal injuries sustained by the plaintiff, while he was in the employ of the defendant, in consequence of its alleged negligence. The defendant was engaged in the mining of iron ore at Mahopac Falls, in this state, and in the customary course of such work used certain cars or skips, running on an inclined railway from the outer surface of the mine to the interior, for the purpose of conveying ore from the interior to the surface. The plaintiff first went to work in the defendant's mine in 1882 to load iron and rock into the skips, and send them to the top. In March, 1886, he went into what was called the "timber gang," whose duties were to keep the slopes, stairways, etc., in repair. At the time of the accident one Berryman was the boss timberman. The accident which resulted in the injury complained of happened in one of the slopes of the mine over which double tracks ran, from the surface to the lowest part of the mine, upon which the cars or skips were operated. On the south side of the slope there was a stairway running to the bottom of the mine, separated from the south track adjacent thereto by a hand-rail. This stairway was for the protection and safety of the employes in going down to, and ascending from, the mine. The skips were lowered and hoisted by steam and machinery in the engine-room, on the surface, by means of a wire rope run-

ning over a drum in the engine-room. The skips were hoisted and lowered by signals given by the bellman stationed in the slope, although these signals could be given at any place in the slope. On the morning of the accident the plaintiff went down the stairway of the slope with Berryman. Upon their way down they saw an upright of the hand-rail of the stairs out of place. The plaintiff was sent by Berryman to the surface to get a piece of scantling. He went and got it and returned. Berryman cut off its proper length, and told plaintiff to get over upon the track, and hold up that end while he nailed it. The plaintiff got over the rail, and upon the inside of the track. He testified that he knew the skip was below him, from the position of the rope, and also that the skip was not running; that the rope was still, otherwise he would not have gone there; and that he knew, when he stepped on the track for the purpose of doing the work, that his safety depended upon the skips not starting—not running up—while he was there, and that he was only safe so long as the skip did not move. He further testified that unless he had supposed that the bellman had been notified not to start the skip he would not have gone there. While he was standing there the skip came up, struck the plaintiff, and he was injured; and for these injuries this action was brought. Upon the trial the court dismissed the complaint, and ordered the exceptions thereto to be heard in the first instance at the general term.

We see no reason for interfering with the conclusion at which the learned justice has arrived. It is clear, from the testimony of the plaintiff, that he was fully aware of the danger which he ran in getting into this position without taking some precautions against the starting of the skip, or watching for its coming. It appears further, from the uncontradicted evidence in the case, that repairs of this kind had been accustomed to be made between skips; and this accounts for the fact that the plaintiff took no means for the stopping of the skip during the making of these repairs. He assumed that he would have time before the skip came up to complete his work, and therefore kept no watch for the coming of the skip, which, by the moving of the cable by which it was drawn up past the plaintiff, was easily ascertainable. It is true, the plaintiff testifies that he would not have gone into this position had he not supposed that his fellow-laborer had given directions for the stopping of the skip. But the evidence shows that work of this description was accustomed to be done between skips; and that is the reason why plaintiff took no steps to notify the engineer, when he passed the engine-house to get the scantling, that they were going to do this work upon the slope, and that the skip must not be started until it was completed. Even if the view claimed upon the part of the plaintiff, that he supposed that Berryman, his co-laborer, had given the signal not to start the skip, be taken, yet the happening of the accident was the result of the carelessness of Berryman, his co-laborer; and the defendant, under the circumstances, would not be responsible.

It is claimed, however, that Berryman was not a co-laborer of the plaintiff, but his boss, whose commands he was bound to obey. It is undoubtedly true that Berryman had the direction of this work; but he was not a superintendent, but was a man who did the work itself,—regulating the manner in which it was to be done, to be sure, but was not in any respect the *alter ego* of the defendant. It appears from the way in which the work was being done at the time of the accident that this man Berryman was a fellow-servant. It was Berryman who was doing the work, and it was the plaintiff who was assisting him; and they in no way occupied independent relations. These two men formed the gang which was doing this work, and therefore the relations of fellow-servants plainly existed between them. We fail to see, therefore, how the plaintiff can recover, because the evidence showed that the plaintiff had been guilty of contributory negligence, in the *first* place; and, *secondly*, that, if it was negligence that caused the accident, it was the negligence of Berryman, his fellow-servant.

Our attention is called to an exception to the exclusion of evidence. It appeared that one Case was the superintendent of the mine, and one Lewald was the under-ground boss, who was the superior of Berryman. Both gave instructions to Berryman as to the work to be done; and Berryman having testified that the instructions that he had as to the doing of the work were that it should be done between skips, and that he had never stopped the skip. He was then asked the question: "Did or did not you and Lewald ever have any quarrel in regard to the skip matter?" *Answer.* Yes, sir; many a time. Q. What were the occasion of these troubles?" This question was objected to, and the objection sustained, and an exception taken. It is claimed that this was error, as the evidence might have shed light on the alleged neglect of the defendant to properly guard the plaintiff in the prosecution of his work. We do not see that the disturbances between Berryman and Lewald could have had any such results. The plaintiff was perfectly familiar with the working of the mine, and the manner in which the work was required to be done. He knew the dangers; and, if he accepted the employment knowing the dangers, he took the risk; and simply because Berryman was of the opinion that the work should be done in a different way, which was all that his evidence would tend to establish, it in no way relieved the plaintiff from his own negligence in not looking out for the skip, when he knew that he had placed himself in a position of danger. Upon the whole case, therefore, we do not see any reason to disturb the ruling of the court below, and the exceptions must be overruled, the motion for a new trial denied, and judgment ordered for the defendant, with costs. All concur.

CARPENTER v. CARPENTER *et al.*

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

SPECIFIC PERFORMANCE—INEQUITABLE CONTRACT—HUSBAND AND WIFE.

Defendant, being in need of \$2,000 to complete a purchase made by him, agreed that, if plaintiff, his wife, would join him in a mortgage for that amount of his farm of 52 acres, which she had refused to do, he would convey to her 10 acres of the land, including the buildings, which part was worth \$7,000. *Held*, that the agreement was inequitable, and would not be enforced.

Appeal from special term, Queens county.

Action by Sarah F. Carpenter against William T. Carpenter, the respondent, and Ann Augusta Carpenter. Plaintiff and respondent are husband and wife, and prior to August, 1886, they resided at Glen Cove, in Queens county, the respondent then being engaged in the occupation of farming upon the premises which are the subject of the action, being a farm of 52 acres, with a dwelling-house and out-buildings thereon. In that month they came to live in the city of Brooklyn, where the appellant set up a boarding-house with the consent of the respondent. In the summer of 1888 respondent purchased a livery stable and business for \$2,500. He paid \$1,000 at the time of making the contract, and agreed to pay the remainder (\$1,500) on the 22d day of August. Not having this latter sum at his disposal, it was arranged between plaintiff and her husband, the respondent, that he should borrow the sum of \$2,000 upon his bond to be secured by his mortgage upon the farm at Glen Cove. Plaintiff applied to several persons for the loan, among others to George W. Eastman, Esq., of the firm of Garretson & Eastman, of the city of New York, who agreed to undertake to furnish the money as soon as the question of the security could be submitted to his client. Meanwhile, as the time for completing the purchase of the livery stable was near at hand, and the loan by Mr. Eastman's client was delayed, plaintiff applied to Mr. William F. Redmond, of Madison, N. J., at his office in New York city, for assistance in the emergency, and he agreed to loan to the respondent the sum of \$2,000 temporarily until the permanent loan could be completed. Plaintiff called again upon

Mr. Eastman, and arranged with him for the preparation of the necessary papers. She told him that there was considerable urgency about the matter; that unless the money was obtained within 8 or 10 days her husband would lose the chance to buy the livery stable. Plaintiff told Mr. Eastman that her husband was to convey to her a portion of the farm at Glen Cove, being 10.49 acres thereof, with the dwelling-house and other improvements thereon, at the same time that the mortgage was to be made. The 20th of August was fixed upon for the execution of the papers at Mr. Eastman's office. Mr. Eastman misapprehended the plaintiff's instructions, and prepared a deed of the whole farm of 52 acres to her from respondent, and a mortgage for \$2,000 thereon to be executed by plaintiff to Mr. Redmond. On the 21st August plaintiff, her husband, and Mr. Redmond met at Mr. Eastman's office, that being the first occasion when respondent saw Mr. Eastman. It then became apparent that the deed and mortgage had been erroneously prepared, and the closing of the matter was postponed until the following day. When the same parties again appeared, and, Mr. Eastman not having been able to prepare the deed of the 10.49 acre portion of the farm for the lack of *data* from which to make the description, it was agreed that the bond and mortgage to Mr. Redmond should be executed, and the matter of the deed of the 10.49 acres should stand over until the final closing of the permanent loan. The mortgage which had been prepared was thereupon executed by the respondent and plaintiff to Mr. Redmond for \$2,000. It having been originally drawn for execution by plaintiff Sarah F. Carpenter, as owner, the original draft was before execution altered from her name to that of William F. Carpenter, the respondent, and amount of loan was paid over. On August 23d, plaintiff and respondent came to Mr. Eastman's office; he being then ready to close the permanent loan. He had prepared a new bond and mortgage to a Mr. Van Cott, and a deed for the 10.49 acres, with the buildings thereon, to be executed by the respondent to plaintiff. The respondent refused to execute this deed, and plaintiff refused to sign the mortgage. This deed of the 10.49 acres was never executed; nor was the original deed of the whole farm, which had been in the first instance prepared by mistake. Subsequently Mr. Redmond received from the respondent \$1,000 on account of the principal of the mortgage made to him, and released the 10.49 acres from the lien thereof. The mortgage to Mr. Redmond contained the following words in the body thereof, following immediately after the descriptive words of the boundaries of the mortgage premises: "And being a part of the same premises devised to William T. Carpenter, aforesaid, by the will of his father, William C. Carpenter, and being also the same premises conveyed to the said Sarah F. Carpenter by the said William T. Carpenter by deed dated August 20, 1888." Plaintiff asked judgment that she be adjudged to be the owner of the whole farm of 52 acres, or of the 10.49 acre part thereof. That respondent and his mother and co-defendant, Ann Augusta Carpenter, deliver up the deed referred to in the mortgage to Redmond, (she having alleged its execution in fact, and that respondent's mother was possessed of it and withheld it from the appellant,) offering, if the court deemed it equitable to reconvey to the respondent that part of the farm other than the 10.49 acres, or that the respondent execute to her a deed of the 10.49 acres, and for such other equitable and just relief as to the court should seem meet. The trial court dismissed the complaint upon the merits as to defendant Ann Augusta Carpenter, and from the judgment entered in her favor plaintiff does not now appeal.

The opinion delivered at special term was as follows: "CULLEN, J. If this action be considered, as claimed by plaintiff's counsel, as one to obtain possession of a title-deed, it must fail, because the evidence conclusively shows that no deed from defendant to plaintiff was ever executed or delivered. If it is to be considered as an action for specific performance, equity should not decree the execution of the contract to convey, for the alleged contract was

equitable. The sole consideration of the contract was the execution by the plaintiff of a mortgage for \$2,000 by which she subjected her dower right to the lien of such mortgage. Her inchoate right to dower could not exceed in value a few hundred dollars. For this she claims she was to receive a conveyance of lands worth \$7,000. The husband required the money, and the plaintiff took advantage of his necessities to extort the promise to convey. Such an agreement should not be enforced, especially as the defendant offers to pay off the mortgage, which will restore the plaintiff to her original position. The plaintiff should be relegated to her action at law. If the recital in the mortgage concludes the parties, and estops defendant from denying a conveyance to the plaintiff, then the plaintiff has no necessity for a resort to equity, but must establish her title by an action in ejectment. Judgment for defendant, without costs." Judgment was entered accordingly, and plaintiff appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Wray & Pilsbury, (Arthur R. Robertson and L. A. Wray, of counsel,) for appellant. *John Oakey*, (Garret J. Garretson, of counsel,) for respondent.

PRATT, J. The decision of this case at special term was placed upon the grounds—*First*, that it would be inequitable to grant the relief demanded; and, *second*, that if the recital in the mortgage estopped the defendant from denying a conveyance to the plaintiff, her proper remedy was an action at law in ejectment. The first ground was sufficient to warrant the judgment, and it was amply supported by the evidence in the case. The offer of defendant upon the trial to pay off the mortgage evinced a desire to restore plaintiff to her original position, and was all that plaintiff could properly claim in any event, upon the facts proved. It is unnecessary to comment upon the propositions and authorities contained in the elaborate brief of the appellant. We have examined the exceptions, and find none sufficient to warrant reversing the judgment. We think, however, it would be equitable to hold the defendant to his offer to pay off the mortgage, and thus reinstate the plaintiff to her dower right, and the judgment is affirmed upon such offer being executed within a reasonable time, without costs. All concur.

MAN *et al.* v. ELKINS *et al.*

(Supreme Court, General Term, Second Department. May 12, 1890.)

MORTGAGES—LIEN—RIGHTS OF JUNIOR MORTGAGEES.

In an action for foreclosure, it appeared that the mortgage was originally given to secure one H. against losses, past and future, in certain stock transactions, and that afterwards plaintiff loaned money to the mortgagor, who procured from H. an assignment of the mortgage to plaintiff. *Held*, that the mortgage could not be enforced as against a second mortgage executed before the assignment to plaintiff, unless something was due to H. under the transactions which the first mortgage was given to secure.

Appeal from special term, Kings county.

Action by Albon P. Man and William Man, as trustees, etc., against Mary C. Elkins and Georgiana Elkins individually, and as administratrices with the will annexed of George B. Elkins, deceased; Fanny Elkins, Ida Elkins, Ambrose Snow, Ann S. Young, William H. Young, and Charles E. Bogert, as surviving executors of the will of John S. Young, deceased; and George Wallis, Edward J. O'Flynn, and William M. Evarts,—to foreclose a mortgage.

Plaintiffs are the assignees of a bond made by George B. Elkins to Walter T. Hatch, May 4, 1869, and also of a mortgage accompanying the same, covering property in the city of Brooklyn. These papers are in the usual form, and purport to be an obligation for \$7,500. They were not, however, given for any debt of Elkins, but purely as collateral security to secure the firm of

W. T. Hatch & Son, bankers, against loss in certain stock transactions, past and future, between that firm and one W. W. Badger, and were made in pursuance of a written agreement whereby Elkins agreed to execute the said bond and mortgage for that purpose in Badger's behalf. At the time the bond and mortgage were delivered, there was no money transaction whatever between Elkins and Hatch & Son, and they were given entirely in fulfillment of the written agreement. Hatch undertook to foreclose, and recovered judgment, which was, however, reversed by the court of appeals. The case is reported in 65 N. Y. 490. These defendants are the personal representatives of John S. Young, to whom Elkins gave a second mortgage for \$6,000 upon a portion of the same premises, dated June 1, 1874. In August, 1884, the plaintiffs loaned Elkins about \$1,500, and as security therefor Elkins procured Hatch to assign the bond and mortgage in suit, and also procured his daughter to execute a mortgage upon property owned by her. Plaintiffs had no actual knowledge of the circumstances under which the bond and mortgage in suit were given, but both bore marks of having been used as exhibits in litigation. On the trial, plaintiffs proved the bond and mortgage, and rested. These defendants then proved by Walter T. Hatch the circumstances under which they were given as security for stock transactions of Badger. Plaintiffs gave no evidence to the contrary, and made no proof whatever of any debt from Badger to Hatch, or of any circumstances showing any rights in Hatch & Son to realize upon the security deposited by Elkins. These defendants requested the court to find that they were entitled to judgment by reason of plaintiffs having failed to prove that any amount was due to Hatch at the time of the assignment to plaintiffs. The court refused so to find, and defendants appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Richard Ingraham, (Edward E. Sprague and Fred. Ingraham, of counsel,) for appellants. Henry H. Man, for respondents.

PRATT, J. The production of the bond and mortgage made out a *prima facie* case of indebtedness thereon to the amount of \$7,500 and interest, which, by the concession of plaintiffs, was reduced to \$1,541. The subsequent evidence showed that the mortgage was not given for a fixed sum, but to indemnify the mortgagees against an uncertain amount of losses. The losses for which the bond and mortgage are an available security are not shown by any testimony that is competent against the second mortgagees. The language of Elkins at the time the \$1,500 was advanced might be sufficient to show it a valid security as against him for that amount. But the second mortgage was in existence, and no admission of Elkins could affect it. It might be that no losses had occurred, or that they had been paid. If so, a loan to Elkins and an assignment by Hatch could not revive the mortgage against the second mortgagees. The judgment must be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.

MICHEL v. HALHEIMER *et al.*

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

SET-OFF AND COUNTER-CLAIM—CONTRACT TO SELL LAND.

In an action for partition of land purchased by defendant, and conveyed to plaintiff and defendant jointly, under an agreement between them that plaintiff should pay a certain part of the purchase money and make certain improvements, an answer which alleges that plaintiff entered into the contract fraudulently, as a mere device to obtain the half interest in the land, and that he never performed and never intended to perform his part of the contract, states a good counter-claim.

Appeal from special term, Kings county.

Action by Leopold Michel against Max Halheimer, Esther Halheimer, and Rachel Michel for a partition of lands in Brooklyn, upon an allegation that plaintiff and defendant Max Halheimer were tenants in common in equal shares. The defense was that in May, 1887, the appellant was the equitable owner of the lands under a contract for their purchase at the price of \$9,000, whereas they were worth \$14,000, and the plaintiff applied to the appellant to be admitted to a half interest in the purchase. Thereupon Halheimer and Michel, after negotiations, entered into a written agreement which provided that the title should be taken in the names of both, and that Michel should pay the remainder of the purchase money to the grantors, and should advance all the money necessary to improve the land by the erection of seven or more three-story tenement houses, which should be sold after their completion, and out of the proceeds both parties were to be repaid their advances and the profits equally divided. The erection of the houses was to be begun within six months after the sewer was laid in the street, and Halheimer was not to be required to lay out any money in connection with the enterprise. The deeds were taken in the names of Michel and Halheimer, pursuant to this contract. Michel failed to pay all the purchase money as he had agreed, and Halheimer paid half of it. The plaintiff never performed any part of this agreement, and did not advance any money to improve the property, nor in any way provide for the erection of the houses as agreed, although the sewer was laid in the street in August, 1888. The contract for the purchase was a valuable one, because the price at which the lots were to be purchased was about \$5,000 below their value, and the only consideration for plaintiff's admission into a half ownership in the purchase was his agreement to furnish money to buy and build. The answer alleges that the plaintiff entered into the contract fraudulently, as a mere device to obtain the half interest in the lands, and fully intending never to perform the stipulations on his part, and he afterwards willfully broke all the stipulations which he had made, and never performed any part of his contract. Also that there is no adequate remedy at law for the breach of the agreement, because the damages are indefinite. After the breach of the contract and the discovery by the defendant Halheimer of plaintiff's dishonesty, defendant rescinded the agreement admitting the plaintiff to a half interest in the lands, and offered to restore the plaintiff to the situation he was in before entering into the agreement, and thereupon demanded a conveyance of the half interest the plaintiff had procured, which was refused, and upon this the defendant demanded such reconveyance as relief in this action. The court decided that the facts alleged by defendant Halheimer did not entitle him to any relief, and directed a verdict for the plaintiff, and defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Charles J. Patterson, for appellant. *Ira Leo Bamberger*, for respondent.

PRATT, J. We think that a valid counter-claim is set up in the answer, and that defendant should have been allowed to introduce his proofs. If it be that, as a general rule, a failure to perform an agreement upon which land is conveyed will not afford ground to rescind the conveyance, an exception to that rule must arise when the remedy at law for the breach of the agreement would not give adequate relief. In the case at bar the contract for the improvement of the land is not sufficiently specific to enable a court to decree performance. Nor could the injured party prove damages with adequate precision. No one can tell exactly what profits defendant would have made had plaintiff carried out the contract with entire good faith. Perhaps no profits would have been realized, but defendant was entitled to the chance. For that supposed advantage he was willing to yield certain rights to the plaintiff. Now that the consideration is withheld on which those rights were given, defendant should be reinstated in his title, on such terms as shall be

just. To hold otherwise would hold out a bounty to bad faith. Judgment reversed, and new trial, with costs to defendant to abide the event. All concur.

In re HODGMAN'S ESTATE.

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

1. EXECUTORS AND ADMINISTRATORS—SETTLEMENT AND ACCOUNTING.

A will provided that \$10,000 should be held by the executors until the death of Angeline M. Cobb, and then paid to Frederick D. Cobb, if he survived her, and arrived at 21 years,—if not, to fall into the residue,—and that the other legacies should be paid when the estate was ready for settlement, and that, if there was not enough to pay the legacies in full, they should abate equally. *Held*, the estate could not be settled until the happening of the contingencies determining the disposition of the \$10,000, and limitation did not begin to run before that time against the authority of the surrogate to order an accounting.

2. SAME—CONSOLIDATION OF ACTIONS.

Where three separate petitions were filed, requiring different surviving executors, and executors of deceased executors, to file accounts, and that all persons interested should be cited to attend a final settlement of the estate, an order requiring an executor to account will not be reversed because the surrogate heard all the proceedings together, when no evil result is shown; and, where the rights of all persons were protected, it was immaterial whether the proceedings were consolidated, and a single order made, or were separately entitled, and separate orders entered.

3. SAME—ACCOUNTING.

Code Civil Proc. N. Y. § 2606, authorizes a surviving executor, who is also personally interested in the estate, to cite the executors of a deceased executor to account.

4. SAME—EVIDENCE—INVENTORY.

In the hearing upon such citation, an inventory signed by the deceased executor was properly admitted in evidence against his executor.

Appeal from surrogate's court, Albany county.

Proceedings to require an accounting by the surviving executors, and the executors of deceased executors, of the will of Frederick D. Hodgman, deceased.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

C. H. Sturges, for appellants. Lyman H. Northrup, for respondent Hodgman. Charles S. Foote, for respondent Yates.

LEARNED, P. J. This is an appeal from that part of a surrogate's order which required Asabel R. Wing, as executor of Philander C. Hitchcock, to render an account of the proceedings of said Hitchcock as executor of Frederick D. Hodgman, deceased. Letters testamentary on the will of Hodgman were issued February 13, 1874, to Mary E. Hodgman, (now Mary E. Yates,) Alfred C. Hodgman, Philander C. Hitchcock, and James Cheesman. Cheesman died April 26, 1882, and letters testamentary on his will were issued to James H. and Olive Cheesman. Philander C. Hitchcock died August 27, 1888, and letters testamentary on his will were issued to Asabel R. Wing, December 12, 1888. Alfred C. Hodgman and Mary E. Yates survive. July 24, 1889, Alfred C. Hodgman filed a petition that Mrs. Yates, surviving executrix, Wing as executor of Hitchcock, James H. and Olive Cheesman, executor and executrix of Cheesman, deceased, render an account of the proceedings of said Mrs. Yates and of Cheesman, deceased, and Hitchcock, deceased, as executors of Hodgman, deceased. On the return-day, Mrs. Yates filed a petition that Alfred C. Hodgman, executor, be cited to account. Subsequently, she filed a further petition setting forth the persons interested in the estate of Hodgman, deceased, and praying that Cheesman and Cheesman, executor and executrix of Cheesman, deceased, and Wing, executor of Hitchcock, deceased, be cited to render their accounts, and that all persons interested be cited to attend a final settlement. Wing, executor, objected that the

surrogate had no jurisdiction to entertain the accounting as prayed for in the petition of Hodgman and in that of Mrs. Yates. He also put in an answer setting up, among other things, the statute of limitations. Cheesman and Cheesman, executor and executrix, also put in an answer setting up that statute and other matters. On the hearing the surrogate ordered that, to save labor and costs, the proceedings be heard together as one consolidated proceeding, to which Wing excepted. The proceedings then went on, and testimony was taken; and in conclusion the surrogate ordered that Mrs. Yates be permitted to settle her account as executrix; that Hodgman settle his account as executor; that the Cheesmans, executor and executrix, settle the account of their testator as executor; and that Wing, executor, render and settle the account of his testator as executor of Hodgman, deceased. It is from this last part that Wing, executor, appeals.

We see no objection to the practice of the surrogate in hearing these matters together. The case shows that on September 11, 1889, when Mrs. Yates' petition was filed, an order was made that the proceedings be consolidated. No appeal from that order appears. When a hearing was had, December 10, 1889, the surrogate directed that the proceedings "be heard together as one consolidated proceeding." It is hardly necessary to inquire whether a formal consolidation could be made. It would be proper enough, unless some evil should be shown, to hear these matters together. And whether the proceedings should be separately entitled, or whether separate orders should be drawn, cannot, we think, be very material, as long as the rights of the parties are protected.

Section 2606, as amended, (Laws 1884, c. 399,) authorized Alfred C. Hodgman, either as surviving executor or as a person interested in the estate, both of which the petition showed him to be, to cite Wing, executor, to account. *Clark v. Ford*, 1 Abb. Dec. 359, cited by appellant, was decided under the Revised Statutes. Whether the surrogate, on the accounting, could decree payment of the legacy owing to Alfred C. Hodgman, is a question not before us. The appellant urges that Hodgman, as legatee, could cite Mrs. Yates, but could not as executor. However that may be, Mrs. Yates does not appeal, and it is not for Wing to take this objection. The only question for him is whether he, as executor, ought to account. The appellant further objects that there is no authority for a general citation of persons interested, and that he is liable to be called to account by successive petitioners. *Crawford v. Crawford*, 5 Dem. Sur. 37. Whether this be so or not, it can do no harm to this appellant that persons interested in the Hodgman estate were cited on the petition of Mrs. Yates. If those parties were properly before the court, this accounting by Wing may preclude them from citing him again. If they were not, we see no harm to him.

It is objected that the inventory was improperly admitted in evidence. It was signed by the deceased executor, Hitchcock, and was therefore evidence against him, and against his executor. Some other objections to evidence are taken. But we do not see that it is material to discuss them. Nothing is decided against appellant by the order except that he render an account. Now, all that is needed to entitle the petitioner to this is to show that Hitchcock was one of the executors of Hodgman, that he has died, and that Wing is his executor. About these facts there is no dispute.

The important question is whether the proceeding is barred by the statute of limitations. The case of *Butler v. Johnson*, 111 N. Y. 204, 18 N. E. Rep. 543, is important on this point; and it is desirable to understand what was there decided, and the grounds of the decision. At page 213 the court speaks of several remedies of a legatee,—one to a decree for payment of the legacy, another to have an accounting. At page 217 it seems to be held that the cause of action for a legacy, and the other proceedings for the recovery of a legacy, are barred by the six-year limitation. Thus the same view is taken

in this respect which was held in *Re Van Dyke*, 44 Hun, at 397, viz., that an action to recover a legacy was one to enforce an obligation,—a liability not arising on a sealed instrument, (Code, § 382, subd. 1.)—which is, in substance, the provision of the Revised Statutes. See cases cited in *Re Van Dyke*, 5 Dem. Sur. 331. It does not seem to have been considered in either of those cases that wills are often executed under seal, (the one in question was apparently so;) and, though a seal is not necessary, yet in *Dewitnelle v. Edey*, 102 N. Y. 423, 7 N. E. Rep. 422, where a co-partnership contract was under seal, although a seal was not necessary, the court held that an action on an agreement therein was not barred until 20 years. Similarly, *Long v. Stafford*, 108 N. Y. 274, 8 N. E. Rep. 522. See, however, *Loder v. Hatfield*, 71 N. Y. at 104, and *Society v. Hebard*, 51 Barb. 552. The case of *Butler v. Johnson* was an action to restrain an executrix from selling real estate to pay debts and legacies, and hence the inquiry whether the legacies were not barred by the six-years limit. In regard to the limit on an accounting, we do not see that any reference has been made to the language of section 2735, Code Civil Proc., that the surrogate may at any time make an order requiring the accounting party to make and file his account, or to the language of section 2724, that the surrogate may from time to time compel a judicial settlement. But we do not propose to discuss the matters thus suggested. Even under the Code of Civil Procedure, it could not be claimed that the statute of limitations begins to run until the right to relief by action, special proceeding, or otherwise, accrues. Section 414.

Now, if we look at the will in this case, we find that \$10,000 are to be held till the death of Angeline M. Cobb, and then to be paid to Frederick D. Cobb, if he survives her, and arrive at 21 years; if not, to fall into the residuum. She is living. Furthermore, the legacies to the wife of the deceased Hodgman are to be paid as soon as convenient, but the other legacies are to be paid when the estate is ready for a settlement; then, if there is not enough to pay the legacies in full, they are to abate equally. Now, could it be said that the estate was ready for a settlement, so that a legatee could have sued? The failure to account seems to indicate that it is not ready yet. And can there be a settlement, within the meaning of that clause, until it shall be determined whether the \$10,000 go to Frederick D. Cobb, or fall into the residuum? Nothing is found as to his age. We do not mean that a partial settlement could not have been made, and some part of the legacies paid. But it could not be determined to whom these \$10,000 were to be paid until the death of Mrs. Cobb, or perhaps until Frederick D. arrived at 21 years. It appears by the findings that some of the pecuniary legacies have been paid, and as to others nothing is found, and, after the payment of these legacies, there is a bequest of the residue to certain parties. Assuming, however, the argument of the appellant, that the six years within which the deceased executor could have been called to account, would have expired August 18, 1881, we have section 1819 of the Code of Civil Procedure taking effect before that date, and declaring that the cause of action is deemed to have accrued when the executor's account is judicially settled, and not before. Now, it must be noticed that in *Butler v. Johnson*, at page 212, the court recognize the effect of section 1819, and say that the reasoning in that case depends on the question whether the action was barred before that time. If not, the court practically admits the effect of that section. We are aware of the conflicting decisions of *In re Lutz*, 38 Hun, 618, and *In re Van Dyke*, above cited. Perhaps it may not be necessary to decide between them. But we would remark that section 414 declares that the rules of limitation of that chapter apply, and are the only rules applicable, to an action or special proceeding, classing the two together. Section 415 states when the limitation begins to run, and section 1819 states when the cause of action is deemed to accrue. Furthermore, after judgment has been recovered against an executor for a sum of

money, execution cannot be issued without an order of the surrogate, (section 1825,) and the proceeding to obtain such order seems necessarily to involve an accounting of some kind; (section 1826;) for it is necessary to show that the executor has assets above expenses and above prior claims, and also what is plaintiff's just proportion of such surplus of assets. It seems to us that that proceeding looks very much like an accounting. But, in the present case, we consider it enough to refer to what has been already said as to the time when the legacies under this will were payable. When an executor dies, he may be in debt to the estate of his testator, and he may also be in possession of unadministered assets. The unadministered assets, if they come to the possession of his executor, do not belong to him; and the debt, if any, owing by the deceased executor to the estate of his testator, is a claim against the estate of the deceased executor. In respect to each of these matters, therefore, the executor of a deceased executor has a right to be heard; and such hearing is probably provided for by section 2606. We think the order of the surrogate should be affirmed, with \$10 costs and printing disbursements to each respondent. All concur.

HAUSEE v. FIERO.

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

1. HUSBAND AND WIFE—ACTION AGAINST WIFE.

Cverture is a matter of defense only, and a default judgment against a married woman as indorser of a note is valid though the complaint does not aver that she charged her separate estate.

2. JUDGMENT—WAIVER.

On a motion for leave to issue execution upon a default judgment against a married woman, she, by leave of court, filed an answer, pleading coverture, whereupon plaintiff was required either to submit to a dismissal or amend his complaint. He elected to amend, and afterwards prosecuted the case to judgment. *Held*, that this did not constitute a waiver of the original judgment, and it still remained in force.

3. EXECUTION—ISSUANCE—NUNC PRO TUNC.

After the return unsatisfied of an execution upon the new judgment, an order was made allowing plaintiff to issue execution upon the original judgment as of the date of his first motion therefor. *Held* that, under Code Civil Proc. § 1877, subd. 2, which provides that after five years execution may issue by leave of the court, it was proper to allow such execution, but improper to grant it *nunc pro tunc*, and a new execution may be issued as of the present date.

Appeal from special term, Albany county.

Action by John Hausee against Rachel C. Fiero. Defendant appeals from an order granting leave to issue an execution against her.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

John E. Van Etten, for appellant. William J. Groo, for respondent.

MAYHAM, J. On the 11th day of August, 1875, the plaintiff recovered a judgment in the supreme court, by default, against Rachel C. Fiero, Bingham F. Decker, and Adaline Decker, on a note purporting to have been made by said Decker, and indorsed by the defendant Fiero. At the time of making and indorsement of the note, and entry of the judgment thereon, the defendant Rachel C. Fiero was a married woman, which fact was not alleged in the complaint. No execution was issued on the judgment within five years after the entry thereof. A motion for leave to issue execution was noticed for a special term to be held September 18, 1884, which motion was adjourned from time to time until August 10, 1885, when an order was made granting leave to issue execution on the judgment, as of the date of September 18, 1884, unless the defendant Fiero should within 10 days from the service of the order serve a verified answer. On the 15th day of August, 1885, this defendant served an answer as required by the order, after which no proceedings

were taken in the action until the trial thereof, June 21, 1888, when the defendant Fiero moved to dismiss the complaint as to her on the ground that it did not state a cause of action against her as a married woman, whereupon the court gave the plaintiff his election to submit to a dismissal of the complaint, or amend the same so as to state a cause of action. The plaintiff elected to amend, and the trial proceeded, resulting in a verdict and judgment for plaintiff for the amount of the note, interest, and costs, which judgment was entered September 25, 1888. On this judgment an execution was issued against all the defendants, and returned wholly unsatisfied. On the 8th day of June, 1889, thereafter, plaintiff made another motion for leave to issue execution on the judgment of August 11, 1875, upon the above facts, which was opposed by the defendant Fiero, on which an order was made granting leave to issue an execution *nunc pro tunc* as of the date of September 13, 1884. From this order the defendant Fiero appeals to this court.

The appellant insists that the election of the plaintiff to amend his complaint on the trial was, in legal effect, a concession that the original judgment was unauthorized and invalid as against the defendant Fiero; that the making of such election was a concession on his part, in open court, that the original complaint did not state a cause of action against the defendant Fiero, and that the judgment was therefore, as to her, unauthorized; and that both parties, having acted upon that concession, followed by the recovery of a new and different judgment, and an attempted enforcement of the same by the plaintiff by execution, are concluded. We cannot agree with the appellant in his contention that the first judgment, for want of the allegation in the complaint that she expressly charged her separate estate, was unauthorized and invalid. It was never necessary, in order to recover against a married woman, to allege in the complaint the facts which, if controverted, would have to be proved to charge her. It is enough to complain generally upon the contract or obligation. She may be sued and declared against as a *feme sole*, and her coverture is a matter of defense only. In *Smith v. Dunning*, which was an action upon a note of a married woman, the defense of coverture was set up. In discussing that question the court says: "She was bound by the note, and could be sued upon it as if she were unmarried. It was wholly unnecessary to allude in the complaint, in any way, to her coverture or her separate estate. Her coverture was matter of defense, to be set up if available." *Smith v. Dunning*, 61 N. Y. 251. To the same effect is *Hier v. Staples*, 51 N. Y. 136; also, *Freckling v. Rolland*, 58 N. Y. 422.

The first judgment, therefore, not having been paid or reversed, must, for the purposes of this motion, be regarded as valid, unless the same was, by the acts of the defendant in the prosecution of the action and the recovery of the second judgment, expressly waived, or merged in the second recovery. The defendant insists that such was the effect of the election of the plaintiff to amend his answer, and that he cannot now, for that reason, enforce the old judgment by execution; and several cases are cited to show that a party by his own act may waive a right, and, after his adversary has acted upon such waiver, he cannot disregard the same, and assume and enforce for his own benefit the right which he has thus waived. But none of the cases cited hold that a judgment can be thus waived, or that the recovery of a second judgment for the same cause of action is a merger or extinguishment of the first. In *Lansing v. Caswell*, 4 Paige, 519, it was held that, when a party had appealed from the decision of the commissioners of highways in laying out a highway, if he afterwards participated in the assessment of damages he thereby waived his appeal. In *Brady v. Donnelly*, 1 N. Y. 126, the defendant demurred to a bill in equity, and the demurrer was overruled by the vice-chancellor, whereupon the defendant appealed to the court of appeals, but pending such appeal answered the bill upon its merits. It was held that by answering he had waived his appeal. In *Bennett v. Van Syckel*, 18 N. Y.

481, the party, by a judgment, was decreed to receive certain advancement, and be indemnified against certain covenants, and was then to assign certain leases. Held, that he could not, after adopting the beneficial part, repudiate that which was of benefit to the other party, but that he had waived his right to object to the performance of the part which operated to his prejudice. In *Smith v. Rathburn*, 75 N. Y. 122, the plaintiff applied to the referee for leave to amend his complaint, which was granted upon condition that the defendant might demur to the amended complaint. After amending his complaint the plaintiff objected that defendant had no right to demur to an amendment made on the trial. Held that, having availed himself of the conditional order, he was bound by the condition, and had waived his right to object. But it will be seen that in none of these cases has a valid judgment been extinguished by waiver; nor have we been able to find a case which goes to that length. Nor do we see how on this motion the judgment of August 11, 1875, can be held invalid or extinguished. Ordinarily a judgment of a court of record can only be extinguished by payment, release, satisfaction of record, or lapse of 20 years. None of these facts exist as to this judgment, and the court cannot on this appeal hold that it has been extinguished, superseded by the latter judgment, or merged in it. It is true that at the time of the making of the order by Judge WESTBROOK, to which effect is given by the order from which this appeal is taken; more than 10 years had elapsed after the entry of the judgment, and the same had, at the time the order was made, ceased to be a lien on the real estate, and an order for the issuing of an execution could not revoke the lien. In cases where defaults are opened, it is a common practice to allow the judgment already entered to stand as security, and the learned judge who granted the order appealed from held that effect should be given to the order of Judge WESTBROOK.

It is insisted by the defendant that the order made by the special term after the lapse of 10 years, although by its terms *nunc pro tunc* as of a date prior to that time, is unjust, as its object was to revive a lien already extinct. It is by no means certain that order could have any such effect, or that the court could, by its order actually made after a judgment had ceased to be a lien, revive the same. That, in effect, would be reviving and creating a lien barred by a statute. There does not seem to be any limit of time during the life of a judgment within which an execution may issue, under subdivision 2 of section 1377 of the Code; and, without determining what property of the judgment debtor under it could be taken upon execution, we think the order granting leave to issue execution should be so far modified as to allow an execution to issue on the original judgment as of this date, but not *nunc pro tunc*.

LEARNED, P. J. The plaintiff recovered a judgment against all the defendants, August 11, 1875. On a subsequent motion for leave to issue execution, an order was made, August 10, 1885, granting such leave, unless said defendant Fiero should serve an answer in 10 days, in which case the judgment was to stand as security. This order gave leave to issue such execution, in case no answer was served, "as of the date of September 18, 1884," which was the day for which the motion had been noticed. The defendant Fiero thereupon answered. Therefore the leave to issue execution was practically refused, because it was not granted if the defendant Fiero should answer. The cause went to trial in June, 1888; and on the trial the plaintiff amended his complaint by adding certain allegations showing that the defendant Fiero, a married woman, had in writing charged her separate property. The plaintiff recovered, and entered judgment September 25, 1888. On this judgment execution was issued, and returned unsatisfied. The plaintiff then moved, June 8, 1889, for leave to issue execution on the judgment of August 11, 1875, which motion was opposed. The court granted leave to issue exe-

cution *nunc pro tunc* as of September 13, 1884. From this order the defendant Fiero appeals.

The customary order, that on opening a default the judgment shall stand as security, simply retains the judgment as a lien upon any land of the defendant. If it extends the time of the lien, under section 1255, Code Civil Proc., it does not extend it against purchasers, creditors, and mortgagees in good faith; and in this case it could be, in any event, an extension only from August 10, 1885, to September 25, 1888, a period of three years and one month and a half. As the lien of the judgment of August 11, 1875, had nearly expired when the order was made, the lien of that judgment, even if extended by the order, expired during September, 1888. It had ceased to be a lien long before the order of June 8, 1889. Although, therefore, the order made August 10, 1885, directed that the judgment should stand as security, it could not have the effect to extend the lien beyond the 10 years provided for by the Code, § 1251, or the additional time under section 1255, above cited; and the provision in that order that execution might issue as of September 13, 1884, was, as we have seen, entirely nugatory. Since the defendant answered, as she was allowed to do, and therefore no privilege of issuing any execution was granted by the order of August 10, 1885, all that plaintiff obtained was that the original judgment should stand as security. Supposing, then, the original judgment does stand as security, the plaintiff may then ask leave to issue execution under section 1377; and this may properly be granted. But there is no propriety in issuing the execution *nunc pro tunc*. If the plaintiff desires to levy on land which the debtor has when the execution is issued, the mode is prescribed in section 1252. If he desires to revive the lien as against purchasers, etc., that he has no right to do. To insert a clause of *nunc pro tunc* is only to expose persons not before the court to the risk of litigation. The plaintiff's lien on his original judgment has expired long ago, and very possibly rights of purchasers or creditors have arisen. We ought to do nothing which will indicate danger to them where no danger really exists; and, as has been shown above, there is no more reason for a *nunc pro tunc* clause taking the execution back to August 10, 1885, than for one taking it back to August 11, 1875; for the order of August 10, 1885, in regard to the execution, had no effect in case the defendant answered, as she did in fact. Very possibly this *nunc pro tunc* clause will not in fact harm *bona fide* purchasers and creditors. But it may alarm them, and perhaps induce them to buy their peace, when there is no valid claim against them. It ought not to be allowed to serve any such purpose. The execution, without that clause, will give the plaintiff all he is entitled to. Order amended by striking out the *nunc pro tunc* clause. No costs to either party. All concur.

POST-EXPRESS PRINTING CO. v. COURSEY.

(Supreme Court, General Term, Fifth Department. June 30, 1890.)

1. CORPORATION—TERM OF DIRECTORS.

Laws N. Y. 1875, c. 611, § 6, subd. 2, requires that the by-laws of a corporation shall prescribe the term of office of the directors, which shall not exceed one year. The record of an election of the first directors of a limited corporation organized thereunder, held in October, 1886, shows that they were to hold until their successors were elected. The by-laws adopted at the same meeting prescribed that the annual election of directors should be held on the first Monday of January in each year, and that the term should be "one year, and until such time as their successors are chosen, but in no case to hold longer than three months after the expiration of the year." There was no election in January, 1887. Held, that the directors elected in October, 1886, held office until at least one year from their election.

2. APPEAL—REVIEW—HARMLESS ERROR.

In an action against a director for the debt of a corporation, upon the ground of failure to file an annual report, it was not prejudicial error to admit the judgment.

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ment roll of a judgment against the corporation for the same debt, for the purpose only of proving the costs in that action, which plaintiff claimed a right to recover, when the finding was against such claim.

Appeal from judgment on report of referee.

Action by the Post-Express Printing Company against Stephen Coursey. The judgment was in favor of the plaintiff, from which defendant appealed. Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.
G. L. Bachman, for appellant. *J. S. Hun*, for respondent.

DWIGHT, P. J. The action was against a director of the Geneva Mineral Springs Company, Limited, to enforce the statutory liability for failure of the directors to make and file an annual report. The corporation named became fully organized on the 14th day of October, 1886, under the provisions of chapter 611 of the Laws of 1875; the subscribers to its capital stock having, as one step in its organization, on the 6th day of the same month, elected five directors, of whom the defendant was one. These directors, as shown by the record of their election, were to hold their office until their successors should be chosen. Such subscribers, as prescribed by the statute, (section 5,) at the same time adopted by-laws which fixed the time for the annual meeting of stockholders, and the election of directors, for the first Monday of January in each year. On the 11th day of the same month the directors elected officers of the corporation, one Steele being elected president. The directors held several meetings in 1886. The notice required by statute of the annual meeting of stockholders for the first Monday of January, 1887, was given; but the meeting was not held, and no directors were ever chosen to succeed those elected in October. No annual report, as required by the statute, was made in January, or at any other time. From that time the directors elected in October seem to have given but little, if any, attention to the business of the company, but permitted it to be carried on by the president, in the corporate name, during the spring and summer of 1887. It was during that time that Steele contracted the debt for the recovery of which this action was brought. The debt was for the printing of circulars and advertisements of the company's waters, all of which was done, and the correspondence with the plaintiff was carried on, in the name of the company. For a portion of the debt so contracted, Steele gave a note in August, 1887, signed by him as president of the company. In the fall of 1887 the plaintiff commenced an action against the corporation for the debt above mentioned. The answer admitted that the defendant therein was a corporation, as alleged, and the defendant herein, on the 8th day of November, verified that answer, stating in his verification that he was at that time the treasurer of such corporation; and as late as December, 1887, on the trial of that action, the defendant Coursey testified as a witness that he was at the outset, and was still, one of its directors. So, too, on the 6th day of October, 1887, the defendant as treasurer, with Steele as president, and one Picot as secretary, of the Geneva Mineral Springs Company, Limited, executed in the name of the corporation a chattel mortgage on certain of its personal property; and Steele and the defendant attached thereto a consent signed by them, in which they described themselves as "stockholders owning at least two-thirds of the capital stock of said corporation."

There was no room for question, upon the evidence, that this corporation was in existence, and the defendant one of its directors, during the time when the debt to the plaintiff was contracted. No steps had ever been taken to dissolve the corporation, and business was done by its president during all that time in the corporate name. The defendant himself, as we have seen, repeatedly recognized its existence during that time, and his relation to it as its treasurer and director; and as late as December, 1887, solemnly verified both those facts by his oath. The statute under which the company was organized (Laws 1875, c. 611, supra) does not prescribe the term of office of the direct-

ors to be chosen at the first meeting of subscribers, nor of those to be chosen subsequently, except by the requirement (section 6, subd. 2) that the by-laws to be adopted at the same meeting shall prescribe the term of office of the directors, which shall not exceed one year. In this case the directors chosen at the meeting of subscribers were, as we have seen, elected to hold their office until their successors were chosen. The by-laws, adopted at the same meeting, fixed the term of office of directors at "one year, and until such time as their successors are chosen, but in no case to hold longer than three months after the expiration of the year." The by-laws also named the first Monday of January as the time for the annual meeting of stockholders and the election of directors; but as that meeting was not held in 1887, and no successors to the first-elected directors were even chosen, there can be no doubt that, under the provisions of the statute and the by-laws, the first-elected directors, of whom the defendant was one, held their office for at least one year from the date of their election. We have, therefore, no difficulty in concluding that the defendant was not only *de facto* but *de jure* a director of the corporation in question at the time of the contraction of the debt to the plaintiff.

The debt was, we think, sufficiently established by competent evidence. The immediate transaction was with one Kennedy, whose agency and authority to contract for the work done by the plaintiff were repeatedly recognized, and his contracts affirmed, by Steele, as president and manager of the company. It was only after several such acts of recognition and affirmance of his contracts, sufficient to constitute a course of dealing between the company and the plaintiff, that Steele, for the first time, questioned the authority of the agent to order the particular work for which this action was brought.

There were many exceptions taken by the defendant to rulings of the referee in the admission of evidence, the most of which seem not to require particular attention. The judgment roll in the action against the debtor corporation for the same debt was received in evidence under the defendant's objection, in substance, that it was no evidence of the debt against the present defendant. The ground of the objection was tenable, (*Miller v. White*, 50 N. Y. 137,) but the objection was obviated by the fact that the evidence was not offered or received for the purpose mentioned. The purpose of the offer was expressly limited to proof of the costs awarded by that judgment, which the plaintiff claimed to recover in addition to the debt, under, as it seems, the supposed authority of *Allen v. Clark*, 108 N. Y. 269, 15 N. E. Rep. 387. But the referee found against the claim of the plaintiff in this respect, and so the judgment roll went for nothing as evidence in the case.

The objection to evidence of the acts and declarations of Steele, the president of the company, which constituted part of the *res gesta* of the transactions with the plaintiff, were properly overruled. If not relating to the particular debt sued upon, they were more or less pertinent upon the question of the authority of the agent, as tending to show the course of dealing between the parties. We find no error in the rulings or in the findings and decision of the referee which vitiate the judgment. The judgment should be affirmed.

All concur.

CITY OF ROCHESTER v. SIMPSON.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

1. MUNICIPAL CORPORATIONS—ORDINANCE—NUISANCE.

Under the authority of Rochester City Charter, § 276, which empowers the common council to provide by ordinance for the filling up, draining, and cleansing of any damp, foul, or unwholesome yards, slips, or cellars, the ordinance of October 26, 1887, § 4, provides that every owner or occupant of a stone-quarry shall either cause the same to be filled level with the ground, or the water therein to be drained, and the quarry kept dry. *Held*, the ordinance was intended for the abatement of nuisances dangerous to public health, and does not apply to a large pond which has

existed in an abandoned quarry for more than 40 years, is fed by a copious spring, discharges into a sewer, contains bass and other valuable fish, and has been used as an ice pond for many years.

2. SAME—EVIDENCE.

The fact that in summer it sometimes emits an unpleasant odor, and a green scum gathers at the edge, that dead animals, such as cats and dogs, have been taken from it, and that when raised to a certain height the water soaks from it into neighboring cellars, does not, in view of the other circumstances, make it a nuisance to which the ordinance can be applied.

Appeal from county court, Monroe county.

Action by the city of Rochester against Benjamin Simpson, in the municipal court. The judgment was for the defendant, which was affirmed by the county court. Plaintiff appealed.

Argued before DWIGHT, P. J., and CORLETT, J.

R. E. White, for appellant. *G. D. Forsyth*, for respondent.

DWIGHT, P. J. The action was to recover a penalty imposed by an ordinance of the city of Rochester, passed October 25, 1887, in the following terms: "Sec. 4. Every owner, occupant, or lessee of any stone-quarry, or premises heretofore used for quarrying stone therefrom, within the city of Rochester, shall cause the same to be filled with earth, even with the surface of the ground, before any excavations are made, or shall cause the water therein to be drained therefrom, and said quarries or excavations kept dry, and the water prevented from accumulating or standing therein, under a penalty of fifty dollars for each offense, to be sued for and recovered from the owner, occupant, or lessee thereof, severally and respectively." This ordinance was based upon the following provisions of the statute which constitutes the charter of the city of Rochester. "Sec. 276. The common council shall have power to pass and enact such by-laws and ordinances as they shall from time to time deem necessary and proper, for the filling up, draining, cleansing, cleaning, and regulating of any grounds, yards, slips, or cellars within the said city, that shall be sunken, damp, foul, incumbered with filth and rubbish, or unwholesome."

It is manifest that both of these enactments must have reasonable interpretation and reasonable application, or they are liable to become the instruments of oppression, and to violate the rights of citizens. The whole tenor of the provision of the charter shows that it was intended to provide for the prevention and abatement of nuisances injurious to the public health, and, among other things, to prevent the accumulation of pools of stagnant and impure water in sunken places within the city. The ordinance quoted, resting, as it does, wholly upon the authority of this provision of the charter, must be interpreted by reference thereto, and can have no force or application except within the lines and to the intent and purpose indicated by the statute. Upon the principles thus briefly stated, we are of opinion that the case presented by this appeal does not fall within the scope of the ordinance upon which this action is brought. It is not a reasonable interpretation of that ordinance that it requires every excavation or depression in the surface of lands within the city which may at any time, however remote, have been made by the quarrying of stone, whatever its present condition or use, to be filled up even with the surface of the surrounding lands; nor that it forbids that any such excavation should be utilized for an ornamental pond, or for a fish or ice pond, fed and filled from a living source of pure water. Such an application of the ordinance would violate the natural and constitutional right of the citizen to use and enjoy his property in his own way, so long as such use interferes with no other public or private right. *People v. Marx*, 99 N. Y. 386, 2 N. E. Rep. 29; *In re Jacobs*, 98 N. Y. 98, 110. The provision of the statute quoted was evidently made in the interest of the public health, and the ordinance has no sanction or authority, except as it tends to promote the same general purpose

Babcock v. Buffalo, 1 Sheld. 321, affirmed 56 N. Y. 268; *In re Jacobs, supra*, 112; *People v. Rochester*, 44 Hun, 169.

This action was apparently brought upon the theory of a literal construction of the ordinance in question. The complaint contains no allegation that the water in the defendant's pond was either stagnant or impure, nor that the existence of the pond was in any manner detrimental to the public health, or to public or private comfort or convenience. The allegation was merely that the land had been formerly used as a stone-quarry, and that it had been permitted to be and remain filled, or nearly filled, with water for several months. So, too, on the trial, the complainant rested his case on proving the above facts, but, after a motion for a nonsuit, obtained leave, without amending his complaint, to introduce further evidence for the purpose of showing that the pond was "a nuisance and unwholesome." Some evidence was thereupon received tending to show that in the hot summer months an unpleasant odor sometimes arises from the pond; that there is sometimes a "green scum" on a portion of its surface near its edge; that the bodies of dead animals—cats and dogs—have been taken from it; and that when raised to a certain height water leaches or soaks from the pond into some neighboring cellars. This evidence was objected to, and might properly have been excluded as not within the allegations of the complaint; but, upon the whole evidence in the case, we think it was not established that the pond was within the condemnation of the ordinance in question, reasonably construed. It appeared from undisputed evidence that the pond had existed, as such, for upwards of 40 years; that it is of about 2 acres in extent, and from 8 to 17 feet deep; that it is fed by a copious living spring in one corner; that ice was cut from it at least 34 years ago; that the plaintiff has used it for an ice pond about 19 years, and has erected ice-houses on its bank for the storage of ice; that it is inhabited by fish of various kinds,—bass of three pounds weight having been taken from it; that about 17 years ago the plaintiff pumped out the water, as far as was possible, by means of a large steam-pump, and enlarged and deepened the pond by taking out stone; that he was obliged to run his steam-pump three nights in the week to keep the water out sufficiently to enable him to carry on the work, and that when so emptied the water could be seen pouring, in large volume, from the spring above mentioned. It also appears that the pond has an outlet into the Genessee-Street sewer, which carries off the surplus water beyond that which escapes through fissures in the rock. There is no evidence that the pond receives any considerable amount of surface water, nor any drainage of an objectionable character. The minute vegetable growth, often called "green scum," at the edge of the pond, and the unpleasant odor from the water in mid-summer, are conditions to which all bodies of fresh water, not aerated by rapid motion, are subject; and the plaintiff's pond is not to be condemned because mischievous or evil disposed persons have sometimes thrown into it the dead bodies of animals. Should the pond become foul from these or other causes, so as to be injurious to the health or comfort of the neighborhood, a case would arise for the application of an ordinance, based upon the provisions of the statute, requiring it to be cleansed; and it is probable that the board of health of Rochester have already ordinances in force adequate for that purpose. It seems to us clear that, upon the evidence before us, the ordinance under which this action was brought can have no application to the case except upon a literal construction of its terms, not warranted by the statute under which it was framed, and which in this case would be unreasonable, oppressive, and subversive of the rights of the plaintiff. We think the judgments of the county court and of the municipal court must be reversed. Judgment of the county court and of the municipal court of Rochester reversed, with costs of this appeal and in the county court.

STEVENS v. AYERS.

*(Supreme Court, General Term, Fifth Department. June 30, 1890.)***ACCOUNT STATED—WHAT CONSTITUTES.**

An account presented by plaintiff against the estate of a decedent showed that the principal item in it originated in a transaction between plaintiff and one P. There was evidence that, when the account was presented to decedent, he expressed surprise at the amount of it, said that P. ought to have paid it, and suggested a counter-claim. Afterwards he said that he would pay the account, and have no trouble about it. *Held* insufficient to show an account stated between plaintiff and decedent.

Appeal from special term, Monroe county.

Action by Emmett Stevens against Marshall J. Ayers, administrator, etc. From an order denying defendant's motion to confirm the report of a referee, and granting plaintiff's motion for a new trial, defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Est Soule, for appellant. *De M. Page*, for respondent.

DWIGHT, P. J. The claim referred was against the estate of Thomas Hallett, deceased, as upon an account stated in his life-time. The evidence in support of it was the testimony of an attorney, who presented a statement of the account to Mr. Hallett a month before his death, and who gave the following version of what took place: "I think he took it, and looked at it, and said the account was larger than he thought it was, and said that Perry ought to have paid it. I said that I did not know anything about that, but that it was left with me to sue if not paid at once. He said Emmett better not sue it, as he was carrying a watch that belonged to him. I said that had nothing to do with it, as my instructions were to sue it. He then says: 'I will see Emmett, and pay it. I will have no trouble about it.'" This narrative, substantially repeated on cross-examination, is all the evidence in the case in support of the plaintiff's claim. We think it falls short of establishing an account stated between the plaintiff and the deceased. It is essential to an account stated that the party to be charged should, either expressly or by implication, admit the correctness of the account as a claim against him. In this case the deceased began by expressing surprise at the amount of the bill; then declared that it belonged to another person to pay it; then suggested a possible defense or counter-claim, and ended by a naked promise to pay to avoid trouble. All this, it is true, he might have done if the indebtedness had been his own and the amount undoubtedly correct; but what he said was no admission of either of those facts, while his promise to pay rather than have trouble indicated an unwillingness to concede that the account represented a just debt, which he was bound to pay. Moreover, the account as presented to the administrator shows on its face that the principal item originated in transactions between the plaintiff and Perry Hallett, the person mentioned by the deceased as the one who ought to have paid the account. The item referred to is as follows: "Sept. 1, 1882. To amount due on dissolution of partnership between Perry J. Hallett and Emmett Stevens, \$112.00." The item is entirely unexplained by the evidence. There is nothing to suggest a reason why Thomas Hallett should have been asked to pay it. In order to charge his estate with its payment after his death, on the principle of an account stated, the evidence of his admission of its correctness, as a charge against him, should be clear and unequivocal. Of course, there could be no recovery upon the promise of the deceased, as such. An account stated consists, not in a promise to pay, but in an admission that the account is just and true. The promise is of no effect except by way of admission that the debt is that of the promisor. If it is that of another, such a promise is without consideration, and void by the statute of frauds. The evidence being undisputed, it was a question of law whether the facts constituted an

account stated. *Lockwood v. Thorne*, 18 N. Y. 285, 288. We think the referee was justified in this case in holding that an account stated was not established, and that his report dismissing the claim should have been confirmed. The order of the special term should be reversed, and the report of the referee confirmed. Order of the special term reversed, and the report of the referee confirmed, with costs of this appeal and of the special term. All concur.

NAGEL v. GLASBURGER.

(*Supreme Court, General Term, Fifth Department. June 30, 1890.*)

INSURANCE—MUTUAL BENEFIT ASSOCIATIONS.

A by-law of defendant, that if a member is in arrears when taken sick he shall not be entitled, by paying up such arrearages, to benefits during such sickness, is not waived by the acceptance of arrearages from a member.

Appeal from Monroe county court.

Action by George Nagel against Joseph Glasburger, treasurer, etc. Judgment was given for plaintiff, and defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

D. C. Feeley, for appellant. *H. Pierce*, for respondent.

DWIGHT, P. J. The action was, under section 1919 of the Code of Civil Procedure, against the treasurer of an unincorporated association known as the "Brewery Workman's Assembly No. 1,796," to recover a "sick benefit" of \$3 a week for ten weeks, to which the plaintiff claimed to be entitled as a member of the association. Article 9 of the by-laws of the association provides as follows: "Every brother who has been a member of the assembly six months, who has promptly paid all dues, * * * shall, in case of sickness or disability from bodily accident, * * * be entitled to receive the sum of \$3 a week for thirteen weeks during such sickness, if declared by sick committee unable to pursue his duties. * * *" "Sec. 5. Provided, also, that, in case a brother is in arrears when taken sick or disabled, he shall not, by paying up his arrearages, be entitled to benefits during such sickness." And section 4 of article 5 provides: "The dues shall be 30 cents each month, payable in advance." It is shown that the plaintiff was in arrears for the month of January, 1889; that he was taken sick in that month; that his fees in arrears were paid on the 16th of that month, when his sickness was reported to the association, and that the sick committee took no action in his case, for the reason that he was in arrears at the time he was taken sick. Judgment of the municipal court in favor of the plaintiff was affirmed in the county court, on the ground that it was a question of fact for the jury whether, by receiving the arrearages of plaintiff's dues on the 16th of January, the association did not "waive the condition of its by-laws." We are not able to see that this view of the case was warranted by the facts. The acceptance of the January dues on the 16th of the month was, no doubt, a waiver of the requirement that they should be paid in advance, and restored the member to his standing in the association, so that, for any future sickness, if he continued to pay his dues in the mean time, he would be entitled to his benefit. But it was no waiver of the express provision of section 5 of article 9, above quoted, to the effect that, if the member is in arrears when taken sick, payment of such arrearages shall not entitle him to benefits during such sickness. The plaintiff must be presumed to have paid his arrearages for January in view of this provision of the by-laws which constituted his contract with the association. We can readily see how such a provision may be important in the management of an association of this character. But for it members might often withhold payment of their dues so long as they continued in good health, and pay only when in condition to claim a benefit.

There could be no waiver of this provision of the contract by accepting payment of arrearages, because this provision expressly declares what the effect of such payment shall be. Both the judgments below should be reversed. Judgment of the county court and of the municipal court of Rochester reversed. All concur.

LIPSKI v. PETH.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

PAROL EVIDENCE.

In an action for compensation for selling land for defendant, the latter introduced testimony that after the contract of sale was made it was agreed that plaintiff's compensation should be paid when the vendee should pay the balance of the purchase money on the day named in the contract of sale. *Held* that, it appearing that the purchase was not completed on the day named because of an outstanding lease, oral testimony was admissible, as against plaintiff, to show that when the contract of sale was entered into it was understood by both plaintiff and the vendee that the latter was to take his deed subject to the lease.

Appeal from Monroe county court.

Action by Rachel Lipski against Frederick Peth. Judgment was given for plaintiff, and defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Wm. E. Werner, for appellant. H. G. Pierce, for respondent.

DWIGHT, P. J. The action was on a special contract for services rendered by the plaintiff in the sale of real estate for the defendant. The contract between the parties to the action was oral. It is undisputed that the plaintiff was employed to make the sale of the house and lot in question at the price of \$4,000; that she produced a customer who executed a contract of purchase in duplicate, and paid \$100 down. By the contract, which was not dated, but, it seems, was executed on the 20th day of September, 1887, \$1,000 was payable May 1, 1888. A mortgage was to be given for \$1,500, and the balance was to be paid by the assumption of a prior mortgage on the property. The evidence was conflicting as to the amount of compensation to be paid to the plaintiff for procuring a purchaser, but the evidence on the part of the plaintiff amply sustained the verdict of the jury in that respect. There was also a conflict of evidence as to the time when compensation should be payable; the evidence on the part of the plaintiff tending to show that her commission of 2½ per cent., or \$100, was earned whenever she produced a purchaser who was accepted by the defendant, while that on the part of the defendant tended to show that the compensation of \$50 was not payable until the customer should complete the purchase on the 1st day of May, 1888, by paying the balance of the \$1,000, and giving the mortgage for \$1,500. Here, then, was a material question of fact for the jury which, if it should be determined in favor of the defendant, must defeat the plaintiff's action,—since it appeared that the purchase was never completed,—unless it also appeared that the non-performance on the part of the purchaser was excused by the refusal or inability of the defendant to perform on his part. And this brings us to an important question in the case, which was raised by various exceptions to rulings of the court upon the admission of evidence and to the charge of the court to the jury. It will be observed that the contract of purchase was silent as to the time when possession of the property should be given to the purchaser, and the evidence tended to show that the purchase was not completed on the 1st day of May because the defendant was unable to give possession on that day, by reason of an outstanding lease of the premises for two years from that date. It was in view of this evidence that the defendant offered to prove, by at least two witnesses, that at the time the contract of purchase was entered into, and before, according to the testimony

of the defendant, the agreement was made with the plaintiff as to the amount and time of payment of her compensation, the defendant communicated to both the plaintiff and the proposed purchaser the fact of such lease, and that it was understood by both that the purchaser should take his deed subject to the lease, and that he was not to have possession of the property until the expiration of the term mentioned. This evidence was objected to, and the objection sustained, on the ground that its effect was to vary the terms of a written instrument. We think this ruling was erroneous, and that the evidence offered was both material and competent as against the plaintiff. It is not necessary now to decide whether it would have been admissible as against a purchaser in an action for specific performance of the contract or for recovery of the money agreed to be paid on the 1st day of May; and, since it appears by the evidence in this case that an action is pending between the parties to the contract, we shall not unnecessarily anticipate any question which may arise in that case; but, as between the defendant and the plaintiff here, who was not a party to the written contract, the rule upon which the objection was founded does not apply. *New Berlin v. Norwich*, 10 Johns. 229; *Juilliard v. Chaffee*, 92 N. Y. 534. As we have seen, according to the testimony on the part of the defendant, there was no special contract fixing the amount and time of payment for the plaintiff's services, until after the contract of purchase was entered into; and then the time of payment of such compensation was made to depend upon the completion of the purchase, and the payment by the purchaser of the balance of the \$1,000 on the day named. If that was true, the agreement between the plaintiff and the defendant must be supposed to have been made in view of the actual terms of the contract between the purchaser and the defendant, as understood by the plaintiff as well as the parties to the contract, whether fully evidenced by the writing or not. And so, the \$1,000 never having been paid, it became a material question in this action, upon the defendant's version of his agreement with the plaintiff, whether the defendant was chargeable with default in the performance of the contract of purchase as actually made, to the knowledge of the plaintiff. For the error indicated we think the judgment and order appealed from must be reversed, and a new trial granted. Judgment and order appealed from reversed, and a new trial granted in the county court, with costs to abide the event. All concur.

BEUERLEIN v. HODGES.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

APPEAL—FROM JUSTICE OF THE PEACE—TIME OF TAKING.

Code Civil Proc. N. Y. § 8140, provides that a justice of the peace must keep a docket-book in which he must enter the judgment, and section 8046 provides that an appeal must be taken within 20 days after the entry of judgment in the justice's docket. *Held*, that the time for taking an appeal from the judgment of a justice is to be reckoned from the entry of the judgment in his docket-book, and not from the entry in his minutes.

Appeal from Livingston county court.

Action by Fred Beuerlein against Benjamin F. Hodges. From an order dismissing defendant's appeal from a judgment of the justice's court, on the ground that it was not taken in time, defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.
J. M. Hastings, for appellant. *J. F. O'Connor*, for respondent.

DWIGHT, P. J. We are at a loss to know upon what ground the order appealed from was made. The order itself recites that it appeared from the return of the justice, and by the oral stipulation of the parties in open court, that the justice's judgment was rendered and entered in his minutes on the

28th day of September, but was not entered in the docket-book of the justice until the 28th day of October, and that the notice of appeal therefrom was served on the last-mentioned day. Section 3140 of the Code of Civil Procedure provides that "a justice of the peace must keep a docket-book in which he must enter," among other things relating to "every action or special proceeding commenced before him," "(11) the judgment or final order, and the time of entering it." And section 3046 provides that "an appeal must be taken within twenty days after the entry of the judgment in the justice's docket." Here seems to be no room for construction. It would be quibbling to attempt to distinguish between "docket" and "docket-book," and the entry in the minutes of the justice was not an entry in the docket. The minutes of the justice are not recognized by the statute. They are mere memoranda, made by the justice for his own convenience and as an aid to his memory. The docket-book is a record prescribed by the statute for the express purpose, among other things, of receiving the entry of the judgment. It is a public record because, by section 3141, the justice is required to keep it open, during the hours when a sheriff's office must be kept open, "for search and examination by any person, upon his reasonable request." One purpose served by this provision is to enable any party against whom a judgment has been rendered, and who may desire to appeal, to ascertain when the judgment was entered, and when, accordingly, his time to appeal will expire. There seems to us no room for doubt that this appeal, taken within 20 days after the entry of the judgment in the docket-book, was taken in time. The order appealed from should be reversed. Order of county court reversed, with \$10 costs and disbursements. All concur.

REDMOND v. TONE.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

1. TRIAL—ARGUMENTS OF COUNSEL—RIGHT TO OPEN AND CLOSE.

In an action upon a promissory note, where defendant denies the making and delivery of the note, except for the purposes of stating the defenses of fraud and failure of consideration, defendant is not entitled to open and close.

2. SAME.

An exception that defendant was improperly denied the affirmative of the issues became unavailing when the court directed a verdict for plaintiff.

3. ACTION ON NOTE—QUESTION FOR JURY.

Plaintiff had worked for defendant for a period of 22 weeks under a contract by which he was to be paid \$25 per week for that period, and the note sued on was given for a balance, admitted not to have been paid. *Held*, that it was proper to refuse to submit to the jury the defenses of failure of consideration, and of fraud in estimating the value of the work done.

Appeal from Monroe county court.

Action by Edward M. Redmond against Joseph G. Tone. Judgment was given for plaintiff, and defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.
J. Van Voorhies, for appellant. R. C. Webster, for respondent.

DWIGHT, P. J. The motion for a new trial was based upon two exceptions: (1) To the denial to the defendant of the affirmative of the issues, and the consequent right to open and close the case; and (2) to the denial of the defendant's request to go to the jury on the question of fraud, and failure of consideration. We think neither exception was well taken. The action was on a promissory note alleged to have been made and delivered to the plaintiff by the defendant. The answer averred "that the note in suit was given to the plaintiff for supposed services which the plaintiff had rendered the defendant in arranging a book for publication; that at the time the note was given the plaintiff falsely represented to the defendant that he had rendered 22 weeks' services, and that the services were of the value of over \$550, at the rate of

\$25 per week. The defendant had already paid him upwards of \$250 at that time, and, relying upon the truth of his representations as to the amount and value of his services, he was induced to give him the note in suit, for \$290." The answer then proceeds to aver in detail the falsity of the alleged representations, the knowledge of such falsity on the part of the plaintiff, and his intent thereby to defraud the defendant. It also avers a total failure of consideration for the note, by reason of the same facts above mentioned, and ends by denying "each and every allegation of the complaint, except as in this answer admitted." This denial put in issue the fact of the making and delivery of the note. The answer contained no admission of that fact, except as a part of the defense of fraud and failure of consideration, and the plaintiff was not entitled to avail himself of the admission without admitting the defense of which it formed a part. Moreover, even if the exception had been well taken, it became unavailing when the court held that the evidence presented no question of fact for the jury, and directed a verdict for the plaintiff. *Fuller v. Electric Co.*, 22 Wkly. Dig. 813.

Upon the evidence, there was clearly no question of fact for the jury. The work was done under a written contract which fixed the compensation of the plaintiff at the sum of \$25 a week for not more than five months from the 29th day of August, which was the same time (22 weeks) for which, according to the answer, the plaintiff's compensation was computed. Upon the question whether the plaintiff was actually employed in the work during that time, the evidence is undisputed. The plaintiff so testified, and no one assumed to deny it. No charge of fraud can be predicated upon representations of the value of the work. That was, at the most, a matter of opinion, and not the subject of fraudulent representation. The defense of total failure of consideration was negatived by the undisputed evidence above referred to. We find no error in the disposition of the case by the learned county judge. Judgment and order appealed from must be affirmed. Judgment and order appealed from affirmed, with costs. All concur.

VAN NUYS v. FITSWORTH.

(Supreme Court, General Term, Fifth Department. June 30, 1890.)

COMPROMISE—MOTION TO SET ASIDE—DISCRETION OF COURT.

Where plaintiff unadvisedly enters into an agreement for the settlement of the matters in controversy for the sole purpose of escaping the injurious effects to his health caused by protracted litigation, and it immediately thereafter appears that such settlement will result in a series of future onerous litigations, it is within the discretion of the court, if not too late to place the parties *in statu quo*, to set aside the agreement and subsequent stipulations made in pursuance thereof.

Appeal from special term, Livingston county.

Action by Webster B. Van Nuyt against Josiah E. Fitworth and others upon a partnership account. After the case was partially tried, an agreement for a settlement was made, and a stipulation thereof entered on the minutes of the referee. Subsequently, on the application of the plaintiff, an order was made setting aside the agreement. From this order defendant Fitworth appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

F. C. Peck, for appellant. *F. W. Noyes* and *C. J. Bissell*, for respondent.

DWIGHT, P. J. Agreements and stipulations made between the parties to a pending action, and relating to its prosecution or discontinuance, are regarded as specially within the supervision and control of the court, and a wide discretion is exercised in relieving parties from such agreements, even though made upon sufficient consideration, if only both parties can be restored to the same condition as when the agreement was made. It is not necessary in such

case to show fraud, deceit, or mutual mistake, overreaching, or undue influence. It is sufficient if it appear that either party has inadvertently, unadvisedly, or improvidently entered into an agreement which will take the case out of the due and ordinary course of proceeding in the action, and in so doing may work to his prejudice. *Becker v. Lamont*, 13 How. Pr. 23, and the cases and authorities cited; *Barry v. Insurance Co.*, 53 N. Y. 536. In the case first cited Judge MASON quotes a remark of Lord LYNTHURST in *Furnival v. Boyle*, 4 Russ. 149, when relieving a party from an important order entered by consent. The lord chancellor said: "I am the more disposed to come to this conclusion because, though the plaintiff will lose the benefit of the stipulation, he will not lose any advantage which the merits of the case entitle him to." The remark, though apologetic in form, indicates the principle upon which this power of the court is exercised, viz., that the court to which the rights of the parties have once been submitted will exercise a supervision of all proceedings in the action, even though taken by consent, and will control such proceedings with a view to a final disposition of the case according to its merits. This action was for the settlement of a partnership account, and was brought by the plaintiff as assignee of the interest of his brother in the copartnership, which had been transferred to the former in consideration of an indebtedness due to him from the latter. The proceedings in the action had been protracted. The plaintiff was an invalid, and his health was injuriously affected by the trouble and anxiety incident to the trial, and he seems to have been chiefly induced to enter into the agreement for a compromise of his claim and a settlement of the action by his desire to escape further litigation. He entered into the agreement against the advice of his attorney and the counsel who had assisted in the trial, and the agreement was drawn by an attorney not engaged in the case. Developments which occurred soon after the execution of the agreement tended to show that, instead of buying his peace by the concessions he had made, he had thereby involved himself in future litigation, likely to be even more serious and protracted. It was then, for the first time, that he discovered the fact that there were large judgments against his brother and assignor, and that, immediately upon the fact of the settlement of this action becoming known, the owner of two of those judgments, amounting to some \$12,000, had commenced proceedings supplementary to execution thereon. Here was an indication of an intention on the part of the creditors to inquire into the circumstances of the transfer by the debtor of his interest in the copartnership, and the disposition of that interest, with a view, possibly, of charging the assignee with the value of that interest over and above the amount of the debt in consideration of which the transfer was made. It was upon learning of these facts, and of his liability to be made defendant in another litigation, or series of litigations, even more onerous than that which he had sought to escape, that he appealed to the court to be relieved from the agreement and stipulation in this action. In view of the principles briefly stated above, we think it was not in excess of the discretion of the court at special term to make the order appealed from, which restores all parties to the *status quo*, and in no way prejudices the merits of the action. We think the order appealed from should be affirmed, without costs of this appeal to either party.

MACOMBER, J., concurs. CORLETT, J., not voting.

HENRY v. NEW YORK, L. E. & W. R. Co.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

1. WITNESS—COMPETENCY—PHYSICIANS AND SURGEONS.

A surgeon who had been requested to examine plaintiff by his attending physician two weeks after the accident resulting in the alleged injury occurred, is not

disqualified from testifying against plaintiff as to the existence of the alleged injuries by Code Civil Proc. § 884, which prohibits a physician from disclosing "information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity," where it does not appear that the witness was requested or expected to treat or prescribe for plaintiff, or that he did either.

2. SAME—DISQUALIFICATION—BURDEN OF PROOF.

The burden is on the party urging the disqualification of a witness as an objection to his testimony to show the existence of the facts which disqualify him from testifying.

Appeal from circuit court, Chautauqua county.

Action by George Henry against the New York, Lake Erie & Western Railroad Company, for injuries sustained while riding on a train of defendant as a passenger. Judgment on a verdict for plaintiff, and an order denying a motion for a new trial on the minutes, were entered, and defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

J. H. Stevens, for appellant. *Ansley & Davis*, for respondent.

DWIGHT, P. J. The single exception taken by the defendant in this case must be fatal to the judgment. The action was for a personal injury alleged to have been sustained by the plaintiff when a passenger on the defendant's road. The question litigated was of the existence and extent of the injury, the principal injury complained of being a broken rib. The defendant called as a witness a physician and surgeon, Dr. Wilcox, who testified that some two weeks after the accident the attending physician of the plaintiff brought the latter to the office of the witness, and asked him to examine the plaintiff, and see what was the matter with him, and that he made such examination, and among other things examined his ribs. He was thereupon asked, "Did you find any fractured rib?" To this question the plaintiff objected as incompetent under section 884 of the Code of Civil Procedure. The objection was sustained, and the defendant excepted.

We think the question was not shown to be within the exclusion of the statute referred to. The statute is specific in its definition of the matters which the physician is forbidden to disclose. The exclusion is confined to "information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." It is clear that, to bring the case within the provision of the statute, it must appear that the relation of physician and patient existed between the examining physician and the person examined. And even that is not sufficient. It must also appear that the information obtained was necessary to enable the physician to act in that capacity. There is nothing in this case to show that Dr. Wilcox was requested or expected to treat or prescribe for the plaintiff, nor to advise in respect to his treatment, nor that he did either. So far as appears, the purpose of procuring the examination was to qualify—or, as counsel for the defendant suggests, to disqualify—the physician as a witness on the trial of the plaintiff's action. The error of the learned court at the circuit was in holding that it was the duty of the defendant offering the testimony, to show the relation of physician and patient did not exist, and therefore that the objection did not apply. Clearly, it was incumbent upon the plaintiff to support his objection by proof of the facts necessary to bring the case within the definition upon which the objection was based. For the error of the exclusion of the testimony of Dr. Wilcox, as the case stood, the judgment and order must be reversed, and a new trial granted. Judgment and order appealed from reversed, and a new trial granted, with costs to abide the event. All concur.

SEXTON v. BREESE.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

MORTGAGES—RIGHTS OF MORTGAGEE.

A mortgagee who, before foreclosure, goes into possession of the mortgaged land under an agreement with the mortgagor authorizing him to do so, and to apply the net income of the land to the mortgage, does not thereby acquire any title to the land, and he is not entitled to a crop, growing upon the land at the time of the agreement, which had previously been sold to a third person.

Motion for new trial.

Action by Pliny T. Sexton against Henry Brees. Verdict was rendered for defendant, and plaintiff moves for a new trial on a case and exceptions.

Argued before DWIGHT, P. J., and CORLETT, J.

Charles McLouth, for plaintiff. Jas. Willing, for defendant.

DWIGHT, P. J. The action was replevin for a crop of wheat in the straw, of the value of \$75. The plaintiff was the holder of a mortgage on the farm of one Mumford, which had been given by the latter to the firm of Cuyler & Sexton, of which the plaintiff was the survivor, as a general continuing collateral security for obligations and liabilities to be incurred by the mortgagor, and which, by its terms, was to become due one month after demand. At the time of the transactions out of which this action grew, Mumford was largely indebted to the plaintiff on the security of the mortgage, the amount of such indebtedness being unliquidated, and no demand for its payment having been made. On the 17th day of April, 1877, Mumford executed to the plaintiff an instrument in writing by which he authorized the latter to take possession of the farm, and rent the same, or any portion of it, as he should see fit, and, after paying all expenses, to apply the net income upon the indebtedness of Mumford; and accordingly, within a few days thereafter, the plaintiff took possession of the farm, and put a man in charge for him. In the previous fall, Mumford had sowed the small crop of wheat in question, and on the 1st day of March, 1879, he sold the growing crop to the defendant by a bill of sale which, in terms, gave to the latter "full power, right, authority, and license to enter upon said premises, and secure and harvest the same." When the wheat was ripe, the defendant went onto the farm for the purpose of cutting it, claiming the right to do so under his bill of sale, which he exhibited to the plaintiff. The latter denied his right, forbade his cutting the wheat, and went on and cut it himself, leaving it in shocks on the field. Early the next morning the defendant went onto the field and drew away the crop, whereupon this action was brought to recover its possession. There was evidence tending to show that at the time the plaintiff took possession of the farm he applied to the wife of Mumford, who was in the neighborhood,—her husband having gone to the west,—for the keys of the house on the farm, and, in answer to an inquiry on that subject, declared that his taking possession would have no effect upon the defendant's interest in the wheat; that he made no claim to the wheat, and that it belonged to the defendant. This evidence, being controverted, was submitted to the jury upon the question whether the plaintiff by such declaration, as part of the *res gesta*, qualified or limited his possession of the farm, and excluded the wheat therefrom, and the jury found for the defendant upon the question so submitted. We are inclined to think that the submission of that question to the jury was unnecessary, and that the defendant was entitled to a verdict on the principal question, and on the undisputed evidence in the case. The growing crop of wheat was a chattel, and subject to sale like other personal property. *Frank v. Harrington*, 36 Barb. 415; *Whipple v. Foot*, 2 Johns. 418; *Stewart v. Doughty*, 9 Johns. 112. The plaintiff, by taking possession of the farm under the consent of the mortgagor, for the purpose stated in the agreement above men-

tioned, acquired no title to the farm. This he could do, in the absence of a conveyance, only by foreclosure of his mortgage. Until foreclosure, whether in or out of possession, he was a mortgagee merely, holding his mortgage as security for the payment of his debt. *Packer v. Railroad Co.*, 17 N. Y. 283, 295; *Trimm v. Marsh*, 54 N. Y. 599. The agreement under which the plaintiff went into possession did not purport to transfer to the plaintiff any title to the land, nor to change his relation thereto as mortgagee. On the contrary, it expressly recognized that relation as continuing, and gave to the plaintiff the right only to receive the rents and profits of the farm, and apply them in reduction of the indebtedness secured by the mortgage; and this attached only at the time of taking possession, or, at the most, at the date of the agreement under which possession was taken. It could not affect the right of a previous purchaser of a crop, nor give to the plaintiff any right superior to that which the mortgagor himself had at the time he transferred the rents and profits to the mortgagee. We think the cases referred to by counsel for the plaintiff, as authority for the proposition that a mortgagee in possession, after forfeiture, has all the rights of a purchaser at a sale on foreclosure, are not applicable to this case. In the first place there seems to be a failure of proof to establish a forfeiture at the time the plaintiff took possession of the farm. The mortgage, as we have seen, was by its terms not enforceable until one month after demand of the amount due thereon. The only evidence of a demand of payment relates to a time shortly after the death of the plaintiff's partner, Mr. Cuyler, in July, 1876, when, as the plaintiff testifies, he had a talk with Mumford about settling and paying what he owed, with a view to closing up the partnership affairs, and he testified that he asked for payment of the mortgage at that time. There is nothing in the case to show what was due to the plaintiff at that time. The mortgage was a general continuing security for indebtedness to be incurred. The amount and consideration of such indebtedness was changing from time to time, and the undisputed evidence, furnished by the statement rendered by the plaintiff to Mumford on the 1st of April, 1881, is to the effect that the whole of the indebtedness existing at the time possession was taken by the plaintiff had been incurred after the date of the demand, if such it was, in July, 1876, and for the payment of that indebtedness there is no evidence that any demand was ever made. But, secondly, the plaintiff can claim nothing by virtue of his possession under the mortgage beyond what is declared by the instrument under which the possession was taken; and this, as we have seen, plainly excludes the theory of any acquisition of title to the mortgaged premises, and confines the mortgagee to the receipt of the rents and profits to apply on the indebtedness secured. We think that, upon the grounds here considered, the defendant was entitled to the verdict taken at the circuit, and that the motion for a new trial should be denied.

Motion for a new trial denied, and judgment ordered for the defendant on the verdict.

PEOPLE *ex rel.* GOODWIN v. MARTIN *et al.*

(Supreme Court, General Term, First Department. June 6, 1890.)

POLICE COMMISSIONERS—CERTIORARI.

Where the police commissioners accept the voluntary resignation of a police officer, no proceedings having been instituted by them for his removal, their action cannot be inquired into on certiorari.

Certiorari to police commissioners.

Proceedings by the people, on the relation of John W. Goodwin, against James J. Martin and others, to inquire into the cause of the removal of the relator from the police force.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Ambrose H. Purdy, for relator. *E. H. Howke, Jr.*, for respondents.

BRADY, J. The relator has mistaken his remedy. He was not removed from the force by virtue of any proceeding against him by the respondents. He resigned, and, as appears from the paper which he signed, voluntarily. The respondents accepted the resignation, not as a judgment, or in a proceeding of any kind against him, but in accordance with his expressed wishes. If the charge can be made against any member of the force, whoever it may be, whether captain or sergeant, that the relator was forced to resign, that would doubtless furnish a good and sufficient reason why he should be reinstated on a proper application to the respondents for that purpose, and which, if denied, might be the subject of review in a proper proceeding; but that is not this case. The relator has proceeded upon the theory of his removal, while in fact the respondents acted upon his resignation, presented in the usual form, and containing the usual statements, one of which was that the resignation was not caused by any threat of punishment or act of coercion from his superior officer, or any other person connected with the police department. The writ charges the respondents with having removed the relator in a proceeding before them for that purpose; and the pleader knew, therefore, that a determination in a proceeding, and a hostile one, was necessary. There must be a determination by a body or officer, (sections 2122, 2129, Code Civil Proc.,) and a person aggrieved by it, (section 2127.) There is no such person, and there is no record to return, therefore. For these reasons the writ must be dismissed. Ordered accordingly.

VAN BRUNT, J., concurs.

DANIELS, J. There was no determination made by the commissioners, and no case which can be reviewed by the writ of *certiorari*. I therefore agree that the writ should be dismissed.

COONLEY v. CITY OF ALBANY.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

1. MUNICIPAL CORPORATIONS—ORDINANCE—NEGLECT TO ENFORCE.

Albany city charter (Laws N. Y. 1838, c. 298, tit. 8, § 14, subd. 37) makes the common council commissioners of highways, with power to pass ordinances "in relation to the construction, repairs, care, and use of the markets, docks, wharves, piers," etc. Section 44 provides that nothing contained in the act shall be construed to render the city liable in damages for failure to pass or to enforce any ordinances pursuant to the provisions thereof. By Ordinances Albany, c. 49, § 15, it is provided that when any vessel is sunk in the Hudson river opposite the city, and within its jurisdiction, the street commissioners shall, after notice to the owner to remove it, and his failure to do so, take possession, remove, and sell the same, or so much of its load as will pay the expense of the removal. Held that, where the commissioners refused to remove a vessel sunk near plaintiff's dock, he has no right of recovery against the city for the expense of removal, or for damages caused by the obstruction.

2. SAME—AUTHORITY TO ENACT.

Title 8, § 14, empowers the city to enforce its ordinances by ordaining penalties for a violation not to exceed \$100, but no power is conferred in the charter to confiscate private property under any circumstance, and therefore so much of the above ordinance as directs a sale of sunken boats or cargoes to pay the expense of removal is void.

3. SAME—CONSTRUCTION OF STATUTES.

Laws N. Y. 1836, c. 185, § 15, relating to the city of Albany, declares that the common council are constituted commissioners of highways, "and shall and may pass ordinances" to remove any nuisances in any street or wharf, and "to prevent all obstructions in the river near or opposite to such wharves, docks, or slips," etc. Held, that the statute does not impose the duty of keeping the river clear, and plaintiff cannot recover against the city by virtue thereof.

4. NAVIGABLE WATERS—HIGHWAY.

The Hudson river is not a highway of the city of Albany.

Appeal from special term, Albany county.

Action by George W. Coonley for damages against the city of Albany. Appeal by plaintiff from a judgment sustaining a demurrer to his petition.

The complaint alleges that the plaintiff was the owner of a dock upon the Hudson river, within the city of Albany, adapted to and valuable for the lading, unlading, and storage of merchandise from vessels; that on the 26th day of September, 1888, a canal-boat loaded with iron, while navigating the river, sunk at the said dock, and thereby obstructed its use, to plaintiff's damage; that the defendant assumed the duty of keeping the river free from obstructions by section 10, c. 42, of the ordinances of the city of Albany, which reads as follows: "Whenever any vessel, loaded or empty, shall, by accident or otherwise, be sunk at any dock, wharf, or slip, or anywhere in the Hudson river opposite to the city of Albany, and within jurisdiction thereof, it shall be the duty of the street commissioner, under the direction of the mayor, to give notice to the owner, proprietor, or other person sailing such vessel to remove the same within twenty-four hours; and in case the owner or proprietor is unknown, and there is no one that sails the same, to give notice in one of the newspapers printed in the city of Albany at least one week, directing the removal of such vessel as aforesaid; and, if the said notice is not complied with, then it shall be lawful for the street commissioner to take possession of such vessel, craft, boat, or flat, and to remove the same, and at public auction to sell such vessel, or as much of the loading thereof as will pay the expenses of such removal." That on the 28th and 29th days of September, 1888, written notices of such facts, stating the name and owner of the boat, and requesting the removal of the same, were served upon the street commissioner and the mayor, a copy of which notice is annexed to the complaint; that on the 29th day of September, 1888, the mayor gave the street commissioner written directions to remove said boat; that said street commissioner took the preliminary steps, as provided by the city ordinance, to accomplish that result, and notified the owner to remove the boat, but finally, on or about the 26th day of October, 1888, declined to remove the same, or to do anything more towards that end; that thereupon plaintiff employed the firm of Payne & Co. to remove the said boat, and paid them for the work \$314.79, besides having suffered other damage, to the amount of \$1,000, by reason of said sunken boat not being removed by said street commissioner within a reasonable time. By reason of said facts plaintiff asks for judgment against the city of Albany for \$1,414.79.

Laws 1826, c. 185, § 15, at pages 191, 192, relating to the city of Albany, among other things, provides as follows: "That the said common council are hereby constituted and declared commissioners of highways in and for the said city, and shall and may from time to time pass ordinances * * * to abate or remove any nuisances in any street or wharf, * * * to regulate, keep in repair, and alter the streets, highways, bridges, wharves, and slips, * * * to prevent all obstructions in the river near or opposite to such wharves, docks, or slips, * * * and generally to make all such rules, by-laws, and regulations for the good order and government of the said city, and to the commerce and trade thereof, as they may deem expedient, not repugnant to the constitution or laws of this state." The defendant demurred, upon the ground that the facts stated did not constitute a cause of action.

Argued before MAYHAM and LANDON, JJ.

Ward & Cameron, for appellant. *D. Cady Herrick*, for respondent.

LANDON, J. The fact that the defendant has adopted an ordinance providing a method for the removal of vessels sunken at any of the docks of the city does not charge it with the duty of enforcing the ordinance, nor make it liable for its non-enforcement. Section 44 of title 3 of its charter (chapter 298, Laws 1883) reads as follows: "Nothing contained in this act shall be so

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construed as to render the city of Albany, or any of its officers, liable in damages, or otherwise, to any person or persons or corporation, for any omission to pass any ordinance, regulation, or resolution pursuant to the provisions hereof, or for a failure to enforce the same." That a city does not enforce its own ordinance does not render it liable. Its liability must arise from its failure of duty with respect to the subject-matter in question. *Stillwell v. Mayor*, 17 Jones & S. 860, 96 N. Y. 649. The present charter of the city (section 14, subd. 27, tit. 3, c. 298, Laws 1888) makes the common council commissioners of highways for said city, with power to make ordinances "in relation to the construction, repairs, care, and use of the markets, docks, wharves, piers, slips, and squares of the city." Obstructions in the river itself are not here embraced. But the learned counsel for the appellant cites chapter 185, Laws 1826, § 15, which declares that the common council are constituted commissioners of highways, with power to pass ordinances "to prevent all obstructions in the river near or opposite to such wharves, docks, or slips," and alleges that it is still in force. Assuming this claim to be true, it will be observed that the act of 1826 does not require the city of Albany to keep the navigable waters within the city free from obstructions, but vests it with the legislative power to enact an ordinance to that end. *Winterpenny v. Philadelphia*, 65 Pa. St. 135, is cited. There the statute required the city to keep the navigable waters within its limits free from obstruction, and the city was held liable for injuries consequent upon its neglect to observe the requirement. In *Hart v. Mayor*, 9 Wend. 571, an ordinance like the one in question was held void, for the reason, among others, that the power given to the city to enforce its ordinances was limited to a penalty upon the violators not exceeding \$25, whereas the ordinance then, like the ordinance now, provided for the removal and sale of the sunken boat; that is, its confiscation. The present charter confers no power to authorize or direct the sale of the boat, but does confer power upon the city to enforce its ordinances by ordaining penalties for each and every violation, not exceeding \$100. Section 14, tit. 3.

An ordinance in excess of the legislative power of the common council is void. This ordinance, so far as it directs the sale of private property, is therefore void. It is urged that the sunken canal-boat was a nuisance, in that it obstructed navigation. No doubt it was, and, if there was no other practicable way to abate it except by its destruction, it might have been destroyed. But whoever undertook to act for the public, and to destroy it, must be prepared to show that he did it under the requirement of a great and overruling public necessity. *Hicks v. Dorn*, 42 N. Y. 47. So far as the case shows, the necessity for its destruction was rather private than public. It injured the business usually coming to the plaintiff's dock. *People v. Corporation of Albany*, 11 Wend. 539, is cited. It was there held that the city was indictable for not abating a public nuisance, injurious to the public health, caused by the accumulations in the Albany basin of noxious substances. The court cited the act of 1826, and held that the city had the power to cleanse the basin, and it was therefore its duty to do it, if that act was necessary to protect the public health. But the court held that the city had no power to destroy a bulk-head, which was private property, but which by its situation caused the noxious materials to settle in the basin instead of being carried along by the current. The bulk-head was no nuisance, though the cause of one. In such a case it is obvious that, if the public authorities do not abate the nuisance, it will remain unabated. There is a plain difference between the protection of the public health and the protection of the plaintiff's business from accidental obstruction; it may be the duty of the government to provide for the one, and of the plaintiff to provide for the other. But, in the case of a public nuisance injurious to health, we do not think that an individual whose health becomes thereby impaired can maintain an action against the city for the medical expenses he incurs and the loss of business

he sustains in consequence of his impaired health, or if he should choose to abate the nuisance, for the expense which he incurs in so doing. If the city is liable, it is liable for the direct, and not the remote and contingent, consequences of its negligence. The city had no agency in sinking the boat. If liable at all, its liability would be limited to the damages naturally consequent upon its failure to remove it. The expenses incurred by the plaintiff would not be thus incurred. They would be incurred or not, at the plaintiff's election. Damage to his business or impairment of the value of his property might naturally follow. We find nothing in any statute requiring the city to relieve the plaintiff from the burden of protecting his own business and property from loss occasioned by the obstruction and burden caused by the act or omission of third parties. Beside, the Hudson river, within the city of Albany, is part of the highway for state, interstate, and foreign commerce, and is subject to regulations and improvement by congress. The state may exercise such control as does not interfere with the power vested in congress, and may require the city of Albany to provide such control with respect to the portion of the river within its limits. *Mobile Co. v. Kimball*, 102 U. S. 691. So far as the state has authorized the city to aid its commerce by removal of obstructions in the river, the authority is in the nature of a privilege, which under its charter the city ought to exercise for the general corporate welfare, but not to relieve private owners of docks from proper private expense. The river is not a highway of the city. *Seaman v. Mayor*, 80 N. Y. 289. Judgment affirmed, with costs.

IN RE FOULKS' ESTATE.

(Surrogate's Court, Kings County. March 31, 1890.)

JUDGMENT—VACATING—IRREGULARITY.

Where it appears from a surrogate's decree that certain matters were litigated and passed on, when in fact the surrogate declined to consider such matters for want of jurisdiction, there is an "irregularity" for which the decree may be set aside under Code Civil Proc. N. Y. § 1282, made applicable to surrogate's courts by section 2481, subd. 6.

Motion by John W. Foulks to vacate or modify certain decrees of the surrogate confirming the report of the referee to the effect that the accounts of the executors of the will of William Foulks, deceased, were correct, and deciding that the referee did not have jurisdiction to try certain objections made to the accounts, and ordering distribution of the estate in pursuance of the will. For action by John W. Foulks against the executors for a legacy, see 6 N. Y. Supp. 112.

Goodrich, Deady & Goodrich, for John W. Foulks. *Lawton & New*, for the executors.

ABBOTT, S. This motion is made, under subdivision 6 of section 2481 of the Code of Civil Procedure, to open, vacate, modify, or set aside the decrees of this court made and entered in the above-entitled matter on or about the 23d and 27th days of November, 1888. "Subd. 6. The powers, conferred by this subdivision must be exercised only in a like case, and in the same manner, as a court of record and of general jurisdiction exercises the same powers." Section 1282 of the Code sets forth the manner in which a court of record and general jurisdiction exercises the powers. "Sec. 1282. A motion to set aside a final judgment for irregularity shall not be heard after the expiration of one year since the filing of the judgment roll." The petitioner herein does not claim that there was any fraud or collusion practiced upon him by the executors, but simply that the decrees do not state the facts which were presented to the surrogate. From the said decrees, it appears as if certain objections to said accounts were litigated and passed on by the referee

and surrogate, whereas the fact is they both refused to entertain or pass upon said objections, on the ground that they did not have jurisdiction. It is well settled that anything unwarranted introduced into a judgment is an irregularity, for which the remedy is by motion to be made within one year after the filing of the judgment roll in the court of original jurisdiction. This question has been recently passed upon by the court of appeals in *Bank v. Blye*, 23 N. E. Rep. 805. See, also, *In re Tilden*, 98 N. Y. 494; also, *In re Hawley*, 100 N. Y. 206, 3 N. E. Rep. 68. More than one year having expired since the entry of the decrees, the motion must be denied.

In re RIEMANN.

In re HOLZER.

(Superior Court of Buffalo, Special Term. April 9, 1890.)

PARENT AND CHILD—CUSTODY—RIGHTS OF FATHER.

On *habeas corpus* by the grandfather of a child two and a half years old, it appeared that the child's mother had died at the house of petitioner, her father; that the child remained there about one and a half years, when defendant, her father, obtained custody of her, and immediately placed her in an asylum for destitute children; that defendant had not married again, and had no home to which he could take his daughter, and no person who could take care of her; and that petitioner is able to give the child such care as one of her years should have. *Held*, that custody would be awarded to petitioner.

Petition by David F. Riemann for *habeas corpus* to the German Roman Catholic Orphan Asylum and Andrew Holzer to produce the body of Mary Holzer, an infant.

Fitch & Braunelein, for petitioner. *Henry W. Brendel*, for defendant Holzer.

TITUS, J. David F. Riemann, the petitioner, procured a writ of *habeas corpus* to be issued out of this court, directed to the German Roman Catholic Orphan Asylum of Buffalo and Andrew Holzer, to produce the body of Mary Holzer. Mary Holzer is the infant child, two years and a half old, of Andrew Holzer, who married Mary Riemann, the daughter of David F. Riemann. About two years ago she died at the house of her father, leaving her surviving her husband, Andrew Holzer, and Mary, her only child. Mary Holzer, the child, continued to live with her grandfather up to about the 13th day of November, 1889, when she was, by direction of the court, placed in the possession of her father, Andrew Holzer. It appears that the father immediately took the child, and placed it in the care of the German Roman Catholic Orphan Asylum, an institution for the care of destitute and homeless children. It remained in the custody of the asylum authorities until about the 26th day of November, when David F. Riemann instituted this proceeding to recover possession of the child. The asylum authorities make no claim to the child, and, from the testimony of the trustees and managers, it appears that they do not want the child, and do not think the asylum is a proper place when a suitable home can be provided for it. It appears that David F. Riemann is a reputable citizen of this city, possessed of considerable property, having a good home, and abundantly able to provide suitable accommodations and such care to the child as one of its tender years should have. It further appears that Mr. Riemann and his family are much attached to the child, having had the care of it since the death of its mother. Andrew Holzer, since the death of his wife, has remained unmarried. He has no female relatives in this country, and no person of his own kindred who can take charge of and care for the child. He is not keeping a house of his own, and, at the time these proceedings were instituted, was boarding with a family by the name of Grimm. It appears that Mr. Grimm is a widower, keeping house with his grown-up children, having a daughter about 80 years old. He oc-

cuples a comparatively small house, and, in addition to himself and four children, has three men boarders. There is some evidence that Holzer is a man of irritable disposition, violent temper, and often gives away to fits of passion. This, Mr. Holzer, by his own affidavit and the affidavits of others who have known him for some time, denies. It is claimed for him that he is a man of quiet, peaceable disposition, of a kindly nature, slow to anger, and never violent.

On the return of this writ it was intimated by the court that the father had the legal right to the custody of his child, and unless it could be made to appear to the satisfaction of the court that he was not a suitable person, or that his circumstances were not such as would promote the best interests of the child, in case she was given to him, the writ would have to be dismissed. Further proof, by affidavit, has been made by both the petitioner and Holzer. On an examination of the authorities, it seems to be the rule, followed in this state in numerous cases, that while the father is the legal custodian of his children, this right is by no means absolute, but is required to yield when the circumstances are such that its observance would be injurious to the children themselves, and the courts have frequently recognized and applied this principle in similar cases. *Mercer v. People*, 25 Wend. 64; *In re Watson*, 10 Abb. N. C. 215. The principle recognized, and which seems to govern the courts in the disposition of cases of this character, is the interest of the child. And in some cases the question of the care, health, education, and even future welfare as to matters of property, have been considered sufficient reasons for refusing the father the custody of the child. *In re Welch*, 74 N. Y. 299. In that case it was held by the court of appeals that considerations affecting the health and welfare of a child which, in the judgment of the court, rendered it expedient to leave it temporarily in the custody of an aunt, to whose care it was committed, although its father and mother were at the time living, and of sufficient means to provide and care for it, may justify the court in withholding its custody from them. It seems to me, therefore, that it is only necessary to determine whether the father, as he is at present situated, can give such care to this child as its interests demand, or whether its grandfather is not better calculated, by reason of his family, his attachment to the child, and their affection and ability, to give it better care.

A careful examination of the affidavits presented in the case lead me to the conclusion that, at present at least, the father should not have the custody of the child. The evidence is quite convincing that his desire to get the custody of the child is less on account of his affection for it than his disposition to deprive its grandfather, and especially Agnes Riemann, of it. It is not questioned that at the time the father obtained possession of it the child was receiving every kind and gentle treatment which loving and affectionate relatives could give it; that their affection for the child is unquestioned; that its care and education will be looked after without expense to Holzer; that Mr. Riemann promises, in his affidavit, that if the child shall continue to live with him the interest in his property to which its mother would have been entitled shall go to it on his decease. On the contrary, when the father took the child on the 18th day of November, he at once took it to the asylum, with a view to placing it there. The asylum authorities refused to receive the child without some reason being shown, when he went away, and at night returned with it, with a statement that he had been unable to find any place for it, when they consented to take it on the agreement that he should at once take steps to procure the consent of the trustees of the institution. It appears that at this time there were 125 homeless and destitute children in the asylum; that many of them were sick, and some had died from contagious disease. With this state of things the child was permitted by the father to remain here until he was sent for by the managers on the following Sunday, without once calling to inquire after its comfort or welfare. This, of itself, indi-

cates strongly to my mind that Holzer had no affection for the child, and only cared to deprive its grandfather of the custody of it.

Orphan asylums, although the means of accomplishing much in the way of providing homes for the destitute and homeless, are a necessary evil, and are not designed as homes for children who have relatives able and willing to support them and bring them up as they should be. The child should be in a family, surrounded by its friends, and under their direction; it should have the beneficial influences with which a home life surrounds it. To take a child from such a home, and place it in an asylum, is contrary to every principle relating to the training, education, and government of children. It is the aim of these institutions to find homes among respectable families for the children under their charge, and they are uniformly placed in such homes as soon as such places can be found for them. It may be claimed for Holzer that when he placed the child in this asylum he honestly thought the child would be properly treated and as well cared for as at the home of its grandfather; that it was a proper place for such a child; and that it was but a temporary expedient until he could find a suitable place in some family. He now claims that he has found such a home in the family of Mr. Grimm, who is, undoubtedly, a reputable man, and would not suffer harm to come to the child if he knew it.

It is also claimed that, inasmuch as Holzer is now boarding at the house of Grimm, it places the child under his immediate care and supervision, and that it will be equally well cared for and nourished as at the house of Mr. Riemann. I cannot agree in this view of the facts. Mr. Grimm and Mr. Holzer are necessarily away from home at work during the day, and cannot know how the child is being treated or cared for in their absence. He has no wife to take a motherly interest in the child, but it would be left to the care of one of his unmarried daughters, who could not be expected to give it that tender care and patient attention which one occupying the place of a mother can only give. The child is so young that, if it should not be properly cared for through the long hours of the day, it has no one to befriend it and make complaint of its treatment to the father on his return at night, if it should be necessary. Besides, the proposed home for the child is only temporary, and its future one uncertain. It may go from Grimm's to some other place to-morrow, and the assurances which we now have of a present care and home do not furnish very substantial evidence that, so long as the father is without a home, the child may not soon find its way to some asylum.

In the disposition of this case, I recognize and place stress upon the fact that the father has now no home except of such a temporary character as that the interests of the child will be promoted by being permitted, for the present at least, to remain with its grandfather. When he establishes a home for himself, suitable for the child, with some one in charge having his interest at heart, it may then be entirely proper to give him the custody of his child, but until such time it is best that the child should be kept where it now is. The order of the court, therefore, is, that the custody of the child, Mary Holzer, is awarded to David F. Riemann, its grandfather; that Andrew Holzer, the father, may at any and all reasonable time or times visit his child at the house of said Riemann for such reasonable length of time on such visits as a due regard for the convenience of said David F. Riemann will allow; that this order is made without prejudice to the said Andrew Holzer, at sometime in the future, on new papers, to make another and further application to the court for the custody of his said child.

LIPPE v. METROPOLITAN EL. RY. CO. *et al.*

(Superior Court of New York City, General Term. June 27, 1890.)

TRIAL—FINDINGS OF FACT—AMENDMENT.

In an action to restrain the operation of defendants' railway on the avenue in front of plaintiff's property, the court first found that such avenue was kept open in like manner as other streets in the city "are, and of right ought to be." Subsequent findings were to the effect that such avenue was used by defendants for unauthorized purposes, and judgment was given for plaintiff. *Held*, that the court had power at the next term of court to amend the first finding so as to make it conform to the other findings and the decision.

Appeal from special term.

Action by Charles Lippe against the Metropolitan Elevated Railway Company and the Manhattan Railway Company, to restrain the operation of defendants' railway in front of plaintiff's property. The second finding of fact of the court was to the effect that the avenue on which plaintiff's property abutted was kept open for a public highway "in like manner as the other public streets and avenues" in the city "are, and of right ought to be." Subsequent findings were to the effect that the said avenue had been devoted by defendants to purposes inconsistent with the purposes for which it was opened, and the court gave judgment for plaintiff. At the next term of court an order was made amending the second finding of fact by inserting at the end thereof the words "except as hereinafter found," the object of the amendment being to make the finding conform to the other findings, and to the decision actually made.

From such order defendants appeal.

Argued before TRUAX and DUGRO, JJ.

Davies & Rapallo, for appellants. *Sackett & Bennett*, for respondent.

TRUAX, J. The order appealed from is affirmed, with costs, on the opinion of the court of appeals in *Bohlen v. Railway Co.*, 24 N. E. Rep. 982, (decided June 17, 1890.)

ROBERTS v. BAUMGARTEN *et al.*

(Superior Court of New York City, Special Term. February 12, 1890.)

NEW TRIAL—JUDGMENT ABSOLUTE BY COURT OF APPEALS.

A judgment in ejectment entered by the court of appeals, pursuant to a stipulation by appellant under Code Civil Proc. N. Y. § 191, subd. 1, that judgment absolute should be entered against him, if the order of the general term granting a new trial should be affirmed, is not within section 1526, providing that a new trial may be had as a matter of right "after a final judgment rendered upon an issue of fact."

Ejectment by Edward Roberts against August Baumgarten and others. The cause was tried by the court, a jury having been waived, and judgment was given for plaintiff. Defendant appealed to the general term, where the judgment was reversed, (51 N. Y. Super. Ct. 482,) and on appeal by plaintiff the court of appeals affirmed the order of the general term, (18 N. E. Rep. 96.) Plaintiff, on his appeal to the court of appeals, stipulated that, if the order of the general term should be affirmed, judgment absolute should be entered for defendant. After the decision by the court of appeals a new trial was granted on plaintiff's motion. Defendants now move to vacate such order. The provisions of the Code of Civil Procedure referred to in the opinion are as follows: Section 191, subd. 1: "An appeal cannot be taken from an order granting a new trial, on a case or exceptions, unless the notice of appeal contains an assent, on the part of the appellant, that, if the order is affirmed, judgment absolute shall be rendered against the appellant." Section 1524: "Except in a case where it is otherwise expressly prescribed in this act, a final judgment in an action specified in this article, rendered upon the trial of

an issue of fact, is conclusive, as to the title established in the action, upon each party against whom it is rendered, and every person claiming from, through, or under him, by title accruing, either after the judgment roll is filed, or after a notice of the pendency of the action is filed in the proper county clerk's office, as prescribed in article ninth of this title." Section 1525: "The court, at any time within three years after such a judgment is rendered, and the judgment roll is filed, upon the application of the party against whom it was rendered, his heir, devisee, or assignee, and upon payment of all costs and all damages, other than for rents and profits, or for use and occupation, awarded thereby to the adverse party, must make an order vacating the judgment, and granting a new trial in the action. The court, upon a like application, made within two years after the second final judgment is rendered, and the judgment roll is final, may make an order vacating the second judgment, and granting a new trial, upon the like terms, if it is satisfied that justice will be thereby promoted, and the rights of the parties more satisfactorily ascertained and established. Not more than two new trials shall be granted under this section."

D. G. Rollins, for plaintiff. *Cephas Bratnerd*, for defendants.

DUGRO, J. It seems that the Code provisions requiring a stipulation for judgment absolute against an appellant, if an order granting a new trial is affirmed, (subdivision 1, § 191, Code Civil Proc.; subdivision 2, § 11, Code Proc.,) remained substantially unchanged, so far as they affect the question under consideration, during the existence of at least four different provisions as to new trials in ejectment actions; so that, in endeavoring to interpret subdivision 1, § 191, and sections 1524, 1525, Code Civil Proc., with respect to each other, the question is chiefly as to the intention of the law-makers in originally requiring the assent, and as to their intention in enacting sections 1524, 1525, of the present Code. In 1857, section 11 of the Code of Procedure was amended so as to require a stipulation for judgment absolute in cases where an appeal was taken to the court of appeals from an order granting a new trial. At that time, and up to the passage of the act of 1861, the Revised Statutes provided that in ejectment actions a second trial, as a matter of right, could be had after judgment, where the judgment had been rendered upon a verdict. This right was allowed in order to afford a way for relief against the accidents and misfortunes to which jury trials are peculiarly liable. *Bay v. Gage*, 36 Barb. 448. In cases where the judgment had been entered after the stipulation, the assent being optional, none of the risks incident to jury trials were incurred. So the reason which induced the allowance of a new trial in cases where a judgment had been rendered on a verdict would not apply to cases where the judgment had been rendered upon the stipulation. It therefore appears that the stipulation required was one for judgment absolute as against the right of an appellant, inclusive of his right to a new trial after judgment, and the giving of the stipulation operated accordingly. Chapter 221, Laws 1861, amended the Revised Statutes so that a new trial as a matter of right could be had after any judgment in an action of ejectment, but this sweeping privilege was speedily cut down by an amendment, (chapter 485, Laws 1862,) which provided, in effect, that a new trial could be had as of right in an action of ejectment after "judgment rendered upon a verdict of a jury or a report of a referee upon the facts, or upon a decision of a single judge upon the facts." By the Code of Civil Procedure the law was again changed, so that it is now provided that a new trial may be had as a matter of right in the actions referred to "after a final judgment * * * rendered upon the trial of an issue of fact." Sections 1524, 1525. From a consideration of these changes in the law, I am unable to discern any reason which would afford a fair basis for opinion that the effect of making the stipulation as to judgment absolute is now otherwise than it was in 1857, when the assent was

first required. In addition, it may be said that, in the present action, there is no judgment which was rendered upon a trial; the only one now in existence was rendered upon a stipulation, and it stands, in effect, as a judgment entered by consent. For these reasons it seems that the judgment rendered by the court of appeals in this action was not such a judgment as is referred to in section 1525 of the Code of Civil Procedure. The necessary conclusion is that in an action of ejectment, after judgment absolute rendered by the court of appeals upon the right of an appellant who has assented, as required by section 191 of the Code, no right to a new trial exists by virtue of section 1525. The motion to vacate the order of January 17th is granted.

HAMILTON v. GIBBS *et al.*

(City Court of New York, Special Term. January 22, 1890.)

PLEADING—VERIFICATION—PRIOR PLEADING VERIFIED.

On the service of a copy of the complaint on him, defendant admitted due service of the complaint. The complaint was properly verified, but the copy served on defendant was not. Defendant then served an unverified answer, and, on its return for want of verification, notified plaintiff that the copy of the complaint served on him was not verified, but declined to allow plaintiff to correct the copy, whereupon plaintiff served a true copy of the complaint. *Held*, that defendant would be required to file a verified answer.

Action by Archibald W. Hamilton against Richard H. Gibbs and Walter G. Murphy on an account stated. A copy of the complaint was served on defendants, who then admitted due service of the complaint. The complaint was duly verified, but the copy which was served on defendants was defective as to the verification. Defendants served an answer, which was returned to them because it was not verified. Defendants then notified plaintiff that the copy of the complaint which was served on them was not verified. Plaintiff then requested defendants to allow a correction of the copy of the complaint, but defendants refused to allow it. Plaintiff then served a true copy of the complaint, and he now moves for judgment as for failure to answer.

Ely & Walker, (James R. Ely, of counsel,) for plaintiff. *J. D. Hallen*, for defendants.

VAN WYOK, J. Motion granted, unless within six days the attorney for defendant Gibbs serves the verified answer of said defendant.

DAVIDSON v. CORNELL *et al.*

(City Court of Brooklyn, General Term. June 23, 1890.)

1. MASTER AND SERVANT—NEGLIGENCE.

In the construction of an elevated railroad by defendant, iron columns were erected on each side of the street. Girders, resting on the top of the columns, were stretched across the street, and two girders on each side of the street were stretched from column to column; their ends resting on seat plates placed on the transverse girders, and also resting below on iron brackets extending out from the cross-girders. Two bolts were inserted through the flanges on the longitudinal girders and the seat plates. Upon the longitudinal girders was placed a platform or traveler which carried a weight of 10 or 12 tons. The platform was moved by means of a rope fastened to a post on the platform, carried forward about 60 feet to a leading block, and then returned to a block in the center of the platform. The leading block was attached by a clamp to an inside longitudinal girder on the same side of the street as the post on the platform. Plaintiff, working on the platform, was injured through the giving away of the longitudinal girders while the platform was in motion. Plaintiff contended that lateral bracings should have been put in between the longitudinal girders; that the ends thereof should have been fastened with bolts at the bottom, as well as at the top; that one of the longitudinal girders was bent, and that, by fastening the clamp to a longitudinal girder instead of a transverse one, the structure was subjected to a strain which helped to cause the fall. *Held*, that the question of the negligence of defendant was for the jury.

2. SAME—EVIDENCE.

Plaintiff was properly allowed to testify as to whether he knew what the effect would be of not supplying braces to the longitudinal girders, and of leading the traveler towards the side with a rope.

3. SAME.

Evidence was admissible as to the usual method employed in building overhead iron structures.

4. EVIDENCE—HEARSAY.

Evidence of a physician, who examined plaintiff's injuries, as to statements made to him by plaintiff during the examination, was properly admitted on the understanding that it should be stricken out unless the truth of such statements should be proven.

Appeal from trial term.

Action by William S. Davidson against John B. Cornell and Henry Cornell.

Judgment was given for plaintiff, and defendants appeal.

Argued before CLEMENT, C. J., and OSBORNE, J.

Lemuel Skidmore, for appellants. *Charles J. Patterson*, for respondent.

OSBORNE, J. In 1888, defendants were contractors for, and were engaged in, constructing an elevated railroad on Broadway, in this city; and plaintiff was employed by them in such construction. On February 14, 1888, an accident occurred by which plaintiff was severely injured; and he brought this action to recover damages for such injuries, on the ground that they were occasioned by the negligence of the defendants. Plaintiff, on the trial, recovered a verdict for \$2,500; and from the judgment entered thereon, and from an order denying a motion for a new trial, this appeal is taken.

The method of construction of said elevated railroad, in so far as it related to the points in dispute herein, may be briefly described as follows: Iron columns were first firmly inserted on each side of the street at or near the curb, transversely opposite each other, and longitudinally 50 to 60 feet apart. These columns were spanned by transverse girders, which rested on top of the columns, and were bolted to the brackets on top of the columns. Four longitudinal girders, two on each side of the street, extending from column to column, were then placed on the transverse girders, the ends resting on the cross-girders on top, on iron saddles or seat plates placed on the transverse girders for that purpose, and also resting below on iron brackets extending out from the cross-girders to receive the lower part of the ends of the longitudinal girders. Then two bolts were inserted in bolt-holes made for that purpose, through the flanges on the longitudinal girders and the seat plates on the transverse girders; these bolts being screwed up with nuts tightened by hand. After the first two or three longitudinal girders were placed in position, a structure was placed thereon, designated as a "platform" or "traveler." This consisted of a platform resting on axles, with 12 wheels,—3 wheels running on each of the 4 longitudinal girders; the wheels being about 24 inches in diameter, and having flanges on the outside about 3 inches in depth. The platform over the wheels was about 25 feet wide and 30 feet long, and was constructed of heavy timbers. On this platform was a small frame house, in which was a steam-engine, boiler, and winch, sometimes called the "Gypsy." On the front of the platform was what is called a "gallows frame," consisting of four posts secured by a cross-piece on top. The outer two of the posts were located 9 or 10 feet from the edges of the platform, one on each side; the two inner posts being on a line with the outer posts, and about equidistant therefrom and from each other. On this platform were also kept ropes, blocks, necessary tools and implements. The workmen required to work it were generally thereon, and its weight, including its contents and appliances, was about 10 or 12 tons. Wooden chock-blocks were used to keep the platform in place when it was not in motion; and there was also a rope in the rear of the platform fastened to a side girder some distance in the rear, called a "heel rope" or "check rope," which was used to prevent the platform, when in motion on a down grade, from going

too rapidly. In front of the platform, but not connected with it, was a light derrick, weighing about three tons, called the "Grasshopper," which was used for the purpose, in connection with the engine on the platform, of hoisting up the girders from the street, in order to place them in position. As its use or construction, however, had no immediate connection with the happening of the accident by which plaintiff was injured, any particular description of it here is unnecessary. When a set of longitudinal girders had been hoisted, placed in position, and bolted, the Grasshopper and platform were then moved forward another span, so as to be in position for lifting the next set of girders. The method of moving the platform was as follows: A leading block was taken forward about 60 feet, and attached by a clamp to the top of the inside left-hand longitudinal girder. A rope was fastened to one of the legs of the gallows frame on the same side as the leading block, carried forward to the leading block, passed through it, and then returned to a block in the center of the platform, and thence to the drum of the Gypsy, where a turn or two was taken, and the end held behind the drum by a workman who took in the slack rope as the engine revolved the drum, and drew the platform ahead. This rope was called the "traction rope." The elevated railroad had been constructed by the defendants for a distance of about three-fourths of a mile. Plaintiff, who had previously worked for defendants, had been employed on the traveler and about the construction for about two months prior to February 14, 1888. On that day, while the traveler was being moved forward in substantially the manner above described, and when it was about half-way across a 60-foot span, the four longitudinal girders on which it was moving suddenly gave way, and fell into the street, carrying with them the platform and the plaintiff, who was standing on it at the time, thereby causing the injuries of which he complains.

Plaintiff's contention on the trial was that the structure was insecure and unsafe, and that the method of construction was a dangerous one, and that defendants neglected the usual precautions to strengthen it, and make it safe, before subjecting it to the strain of the heavy weight that was put upon it. He claimed that lateral bracings should have been put in between the longitudinal girders; that the ends thereof should have been fastened with bolts at the bottom, as well as the top, in the bolt-holes provided for that purpose; that one of the longitudinal girders over which the platform was passing at the time it fell was bent; and that, by reason of fastening the clamp to a longitudinal girder instead of to a transverse girder, the structure was subjected to a dangerous lateral strain, which helped to cause its fall. Evidence was introduced on the part of the plaintiff to sustain the foregoing contentions.

At the close of plaintiff's case the learned counsel for the defendants moved to dismiss the complaint on the grounds that no negligence had been shown on the part of the defendants; that the negligence, if any, was that of fellow-servants; and that the plaintiff assumed the risks of his employment. This motion was denied, and defendants' counsel excepted. We think the motion was properly denied. Enough had been shown by the plaintiff to require the submission to the jury of the question as to whether defendants had been negligent in the duty that they owed to plaintiff. They were bound to take all usual and reasonable precautions to make the structure secure, and to insure, as far as they reasonably could, the plaintiff's safety; and, unless they had done so in the first instance, even the negligence of fellow-workmen of the plaintiff would not excuse them. While it is true that plaintiff assumed the risks of his employment, yet it is well settled that the risks assumed must be patent and apparent. To hold that, in the erection of a structure of this character, plaintiff must have been, or ought to have been, aware of the results that would naturally follow each step taken in the course of the work, would be crediting him with the possession of a knowledge that no one would expect from a workman of his grade of employment. He had a right to rely

on the superior knowledge of his employers as to all those matters in which he could not foresee what might happen in following out the plan of construction devised by them. At the close of the testimony the motion to dismiss was renewed, denied, and an exception taken. We cannot see that the submission of the defendant's testimony had so utterly refuted the testimony on the part of the plaintiff as to authorize the learned trial judge to take the case from the consideration of the jury. All the contentions of the plaintiff had been controverted and put in issue by the defendant's evidence, but there was no such preponderance of testimony in favor of the defendants as would have justified the court in dismissing the complaint. The testimony on both sides was voluminous, and on many points contradictory. It was just such a case as called for the verdict of a jury on the questions involved, and we think it would have been error to have held otherwise.

At pages 54 and 55, plaintiff was asked if he knew what the effect would be if braces were not supplied to the longitudinal girders, and also what the effect, if any, would be to lead the traveler towards the side with a rope; and he was allowed to answer these questions, under objections and exceptions. We think the questions were properly allowed. Plaintiff had a right to show, if he could, his ignorance of the effects arising from the matters inquired of. If he knew of the effects, it might reasonably be claimed that they were included in the risks of his employment, or that he was guilty of contributory negligence. Those questions, and plaintiff's answers, went to show that the risks, if any, arising from the alleged defects inquired about, were not patent, and that plaintiff knew nothing of the consequences that might ensue therefrom.

Various other exceptions were taken by the learned counsel for the defendants to the admission of the evidence of experts as to the usual methods adopted in the building of overhead iron structures, and as to the precautions it was customary to adopt. Plaintiff claimed that defendant's negligence consisted in part of a failure to adopt usual and well-known precautions to insure safety. We think, therefore, that this class of evidence was admissible to enable him, if he could, to sustain his contention.

Plaintiff was examined by Dr. Corey on the Saturday previous to the trial, and the doctor was called as a witness on the trial as to the extent of plaintiff's injuries. The learned counsel for the defendants objected to the admission of any statements made in the course of the examination by plaintiff to Dr. Corey. This evidence was admitted by the court with the understanding that it would be stricken out unless the truth of such statements was proven; and plaintiff subsequently was recalled, and swore that the statements so made by him to the doctor were true. We think that this was a proper disposition of the objection, and preserved all defendants' rights. These statements of plaintiff were incidental to the medical examination, and contributed to its completeness and efficiency. We are aware that similar statements made to a layman have heretofore been held inadmissible on the ground, in part, that they were hearsay, and in part that it afforded an opportunity to unduly exaggerate the injuries complained of. These objections, however, were removed by the plaintiff's testimony that the statements made by him to Dr. Corey were true.

The testimony given by the witness Salisbury on cross-examination (pages 213-215) as to the manner of constructing the Sands-Street road after the accident was properly admitted. Counsel for defendants had on the direct examination examined the witness as to the construction of that road, (folio 625,) and the questions put by plaintiff's counsel constituted a fair cross-examination on that point.

This case was submitted to the jury in a lucid and exhaustive charge, which, in our opinion, fully and fairly covered the legal rights and duties of the plaintiff and of the defendants. Without taking up *seriatim* the various requests to charge made by the learned counsel for the defendant which were

refused, we think no error was committed in any of such refusals. The subject-matter of most of them had already been covered by the charge of the learned trial judge, while others embodied or were based on facts assumed to be undisputed, but as to which there were disputes. None of the other exceptions in the case seem to us to call for any special notice or discussion.

The very elaborate brief of the learned counsel for defendants has received our careful attention and consideration, but we find ourselves unable to agree with him that the learned trial judge committed any error upon the trial, or that the appellants were prejudiced in any way. We are accordingly of the opinion that the judgment and order appealed from should be affirmed. Judgment and order denying motion for new trial affirmed, with costs.

RELIABLE STEAM-POWER CO. v. SOLIDARITY WATCH-CASE CO.

(City Court of Brooklyn, General Term. June 28, 1890.)

1. LANDLORD AND TENANT—CONSTRUCTION OF LEASE.

In a lease of the top floor of a building it was provided that the landlord should furnish steam-power every working day of the year, "excepting such time as may be necessary for repairs, * * * and the accumulated delays" thereof shall not exceed 12 working days each year, "except in case of accident to landlord's plant by explosion or otherwise, in which case the tenant may terminate this lease." The boilers and engine were in a separate building, and the lessee took power from the main shaft by its own counter-shaft. *Held*, that an injury caused to the landlord's machinery by a fire which originated in the demised premises was not "by explosion or otherwise," and did not authorize the termination of the lease.

2. SAME—TERMINATION OF LEASE.

The floor of the demised premises and the tenant's own belting and shafting were so injured as to require about three weeks for repairs, but the landlord could have been ready to furnish power within a few days. *Held* that, even though the destruction were held to have occurred "by explosion or otherwise," the tenant was not authorized to terminate the lease.

Appeal from trial term.

Action by the Reliable Steam-Power Company against the Solidarity Watch-Case Company for rent. The court directed a verdict for plaintiff, from which, and the judgment thereon, defendant appeals.

Argued before VAN WYCK and OSBORNE, JJ.

Chas. H. Machin, for appellant. *J. M. & H. N. Van Cott*, for respondent.

VAN WYCK, J. Plaintiff leased to defendant, for a fixed term and price, top floor of a building with steam-power. The engine and boilers which supplied the power were located in an adjoining building. A fire occurred in the demised premises, and a few days thereafter defendant notified plaintiff of its intention to move out, which was done. To this action for rent, for a period subsequent to the complete repair of premises, defendant's defense is that it vacated premises and terminated the lease, as it had a right to do. The court directed a verdict for plaintiff, and from the judgment entered thereupon this appeal was taken. The parties to this lease, recognizing that there were two species of property let, which were liable to such injuries from particular causes as would render them useless, contracted with reference thereto. There is always a chance of destruction of buildings from fire, and steam plants from explosion. The ninth paragraph of the lease is the usual fire clause, but there is no contention that there was a total destruction of the building therefrom; therefore this gave defendant no right to terminate the lease. This brings us to the consideration of the first paragraph of this instrument, which gave defendant, under certain circumstances, the right to terminate the lease, which reads as follows: "The landlord agrees to furnish said steam-power, live steam, and water for all work days, viz., every day in the year excepting Sundays and legal holidays, for ten hours daily, except on Saturdays, when they shall be nine hours, between the usual hours of morn-

ing and afternoon; excepting, also, such time as may be necessary for repairs and alterations in landlord's plant; and the landlord agrees that the accumulated delays for repairs on engines, boilers, or machinery shall not exceed twelve of the work days in each year, except in case of accident to landlord's plant by explosion or otherwise, in which case the tenant may terminate this lease; but it is hereby agreed that the landlord shall not be held liable for any loss to tenant caused by such accident."

Such steam-power plant consisted of engine and boilers placed in another building, and the shafting and belting which communicated the power to this top floor, and also 1,600 feet of two-inch pipe, which conveyed the steam from the boiler through the building. From the main shaft defendant received or took power by means of its own counter-shaft and belts. This top floor and defendant's own shafting and belts were so injured by fire as to render it impossible for defendant to use them till such damages were repaired, the building by plaintiff, and this shafting and belting by defendant, which required about three weeks. Defendant could have been in no condition to take power or steam for that time. We must not forget that some of the belting and shafting that were injured did not form a part of plaintiff's plant. The injury to plaintiff's plant was of a trifling character, viz., the damage to several belts by water or fire, which could have been replaced in a day, if needed, and were actually replaced within three days; and the damage to 20 feet of two-inch pipe out of 1,600 feet, which could have been replaced immediately, and would have been ready for use as soon as defendant would have needed it if defendant had not vacated the premises. Defendant was not, and could not have been, delayed in carrying on its business by injury to plaintiff's steam plant. The delay was caused solely by the injury to the building itself. So far as power and steam were concerned, the plaintiff stood ready to supply them to defendant as soon as it needed them, or was ready to receive them. What do the words "accident by explosion," used in connection with a steam boiler or engine mean? "Explosion" is defined by Webster to be "a bursting or sudden expansion of any elastic fluid with force and a loud report." It is manifest the parties to the lease had in mind the inherent danger of steam-boilers to explosion from the expansion of the steam. There is not the slightest evidence to show that any such explosion injured the plant referred to in this paragraph. The defendant's counsel insisted that any accident to the plant by explosion gave it the right to terminate the lease. We cannot agree with this construction of that clause, which means and says that, if the landlord shall fail to supply power or steam for every work day of the year except 12 days necessary for repairs to plant, the lease shall remain in force, but the landlord shall be liable to tenant for such failure unless the time shall be necessarily prolonged beyond 12 days to make repairs of injuries caused by an accident from explosion, always thought of in the use of steam, in which case the landlord shall have more than the 12 days to make such repairs without liability to tenant, though in that case the tenant shall have the option of electing the lease ended. Defendant failed to establish, in our opinion, the right to end this lease for injuries to the plant—*First*, because the injuries were not caused by an explosion, within the intent of the lease; and, *secondly*, even if the injuries were caused by an explosion, the defendant has not shown that plaintiff failed for more than 12 work days to give defendant the power and steam required and needed. We think the judgment and order ought to be affirmed, with costs.

DUEB v. TWELFTH ST. REFORMED CHURCH.

(City Court of Brooklyn, General Term. June 28, 1890.)

1. LIMITATION OF ACTIONS—RUNNING OF STATUTE.

Code Civil Proc. N. Y. § 410, provides that, "where a right exists, but a demand is necessary, * * * to maintain an action, the time within which the action must

be commenced must be computed from the time when the right to make the demand is complete." *Held*, that where money was deposited to be applied towards the discharge of a church debt, but "to be returned, if demanded, in case there is not sufficient amount subscribed by January 1, 1880," limitation against an action to recover the same because sufficient was not subscribed, began to run on that date, although demand was not then made.

B. SAME—DEPOSIT OF MONEY.

Such payment did not come within the exception of subdivision 2 of that section, which provides that, "where there is a deposit of money not to be repaid at a fixed time, but only upon a special demand, * * * the time must be computed from the demand."

Appeal from trial term.

Action by Susan Duer against the Twelfth Street Reformed Church of Brooklyn. A verdict was directed for the defendant, from which, and from the judgment thereon, the plaintiff appeals.

Argued before VAN WYCK and OSBORNE, JJ.

A. L. Martin, for appellant. *Woodward & Buckley*, for respondent.

VAN WYCK, J. The plaintiff sues to recover \$75.15, with interest, received by defendant under the following agreement: "Received from Mrs. Duer, for juvenile concert, \$75.15 towards permanent debt of \$19,000 of Twelfth-Street Reformed Church. The amount of this subscription to be returned, if demanded, * * * in case there is not sufficient amount subscribed by January 1st, 1880." The answer denies the allegation of the complaint that there was not a sufficient amount subscribed by January 1, 1880, to pay the debt, and there is no evidence to prove this allegation. This would be sufficient to defeat the plaintiff's claim; but, as the verdict in favor of the defendant was directed on the ground that the action was barred by statute of limitations, we will now consider that. Such an action as this must be brought within six years. Code Civil Proc. § 282. The real question is whether the statute commences to run when the right to make the demand matures, or when the demand actually is made. If the former, then this cause of action was outlawed at the time this action was brought; if the latter, then it was not. The right to make the demand of the defendant in this case ripened on January 1, 1880, if at all, for the condition of the subscriptions on that day was to determine the existence or non-existence of such right by the express terms of the contract. As soon as there was a failure on January 1, 1880, to receive sufficient subscriptions to pay the church debt, plaintiff's right to recover her subscription back was complete, though, to maintain her action, a demand was necessary. Code Civil Proc. § 410, provides: "Where a right exists, but a demand is necessary, * * * to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete." The plaintiff insists that this case comes within the exception provided for in subdivision 2 of this section, which is that, "where there is a deposit of money not to be repaid at a fixed time, but only upon a special demand, * * * the time must be computed from the demand." This payment of a subscription to a church was not a deposit within the meaning of this exception. The most common illustration of the cases covered by this exception are bank accounts, and most of the cases concerning this exception relate to them. Plaintiff did not deposit this money with the church to be taken care of for her, but paid her subscription to the church. *Corkings v. State*, 99 N. Y. 491, see 495, 2 N. E. Rep. 454, and 8 N. E. Rep. 660; *Dickinson v. Mayor, etc.*, 92 N. Y. 584. The judgment and order appealed from should be affirmed, with costs.

SCHICK v. BROOKLYN CITY R. Co.*(City Court of Brooklyn, General Term. June 28, 1890.)***APPEAL—REVIEW—WEIGHT OF EVIDENCE.**

A verdict for plaintiff for personal injuries, rendered on the testimony of herself and one other witness, as against that of seven opposing witnesses, will not be disturbed as against the weight of evidence, when the testimony for defendant is contradictory, and shows circumstances tending to support plaintiff's theory of the accident.

Appeal from trial term.

Action by Bettie Schick, an infant, against the Brooklyn City Railroad Company. Verdict and judgment for plaintiff, from which defendant appeals.

Argued before VAN WYOK and OSBORNE, JJ.

Moore & Wallace, for appellant. *B. F. Straus*, for respondent.

VAN WYOK, J. The only question raised on this appeal is that the verdict for plaintiff is against the weight of evidence. Plaintiff rested her case as to how the accident occurred upon the testimony of herself and Lena Bloch, her companion on the car. Their testimony was to the effect that the conductor was signaled to stop, and that he blew his whistle, and the car came to about a standstill, and, as she was about to step off, he blew his whistle, and the car started and threw her off. The defendant produced seven witnesses for the purpose of throwing light on this accident, and contradicting the story of the plaintiff and her companion, and now insists that their testimony demonstrated that the verdict is against the weight of evidence, and should not be allowed to stand. The largest number of witnesses will not necessarily create fair preponderance of evidence over that of a smaller number. A fair preponderance in this connection means evidence of such character and weight as will carry conviction to the minds of the jurors of the existence of the facts sought to be proven. This requires of us a careful examination of the testimony in this case. We have read it all critically, and find in the testimony of defendant's witnesses circumstances that tend to corroborate the testimony for plaintiff, and to weaken the statements of defendant's witnesses, as well as contradictions of the statements of plaintiff's witnesses. The conductor's employment is some evidence of his bias, besides his story is in conflict in some respects with that of other witnesses for the defendant, and has some of the earmarks of probability. He says, immediately after he was signaled to stop the car, he blew his whistle for that purpose, and that instantly before it stopped plaintiff made a running jump from the body of the same while it was in motion, and while both of her hands were held by her companion, (witness Bloch.) Vogt says she fell backwards. Hirschberg says he is not certain the car was in motion. Saul Pass says he was engrossed with his newspaper, and did not see her leave the car, though he saw her on the ground. Schmidt says the same. Behring says she made a step down, and fell. We think the jurors, who had all the advantages of seeing and hearing these witnesses, were the best judges of the truth of the story told by plaintiff and Lena Bloch, or of the story presented by the defendant. Defendant's counsel did not move for a nonsuit, or ask for the direction of a verdict in its favor. This would seem to indicate that he at that time thought it was a proper case to submit to the jury. *Ross v. Colby*, 8 Hun, 546; *Barrett v. Railroad Co.*, 45 N. Y. 628, 632. We do not find that preponderance of evidence which calls upon us to disapprove of the verdict of the jury. The judgment and order appealed from must be affirmed, with costs.

LATHERS v. HUNT.

(Common Pleas of New York City and County, General Term. July 18, 1890.)

1. CHATTEL MORTGAGES—MORTGAGOR'S POSSESSION—SATISFACTION.

The fact that a landlord, who holds a chattel mortgage on household furniture belonging to his tenant as security for rent, takes possession of the furniture on its abandonment by the tenant, and cares for it, does not amount to an appropriation of the property in satisfaction of the mortgage debt.

2. LANDLORD AND TENANT—RENT—CONVERSION OF TENANT'S PROPERTY—EVIDENCE.

In an action for the rent, where the tenant sets up as a defense a conversion of the mortgaged property, it is error to exclude the landlord's testimony that he never used the property or allowed others to use it, and that he had never reaped any advantage from its possession.

3. SAME—MEASURE OF DAMAGES.

Even if the landlord had converted the property to his own use, he would only be chargeable with its value at the time of the appropriation, in the absence of any evidence that he took it in full satisfaction of his debt; and the exclusion of testimony as to the value of the property is error.

Appeal from the eleventh district court.

Action for rent by Richard Lathers against Jacob H. Hunt. Defendant had a judgment for costs, and plaintiff appeals. For former report, see 9 N. Y. Supp. 494.

Argued before ALLEN and BOOKSTAYER, JJ.

Joseph Walmsley, for appellant. L. B. Bunnell, for respondent.

BOOKSTAYER, J. The action was brought by the plaintiff to recover the sum of \$150 due from the defendant for the rent of a certain flat in East Ninety-Third street. The answer practically admitted the rent due, but set up that the defendant, in order to secure its payment, executed to plaintiff a chattel mortgage on certain furniture and carpets then in the flat in question; that the plaintiff afterwards took possession of the same, and used it, and had derived great benefit from such use, while the defendant had suffered damage by reason thereof; and sought to offset or counter-claim the damage against the rent. It also set up as a separate defense that the plaintiff had exercised his right to foreclose the chattel mortgage by assuming and exercising the right of ownership since about the month of October, 1887, and had thereby discharged the defendant from all obligation for the rent in question.

Appellant contends that certain letters written by Richard Lathers, Jr., were improperly admitted in evidence under the well-settled rule that the declaration of a man cannot be given in evidence to prove that he is the agent of another; but, while they were not competent for that purpose, we think they were properly admitted as a part of the *res gestæ*, all of them having been written in relation to the matters in controversy, and his agency having been sufficiently proven by other evidence. He, and he alone, let the flat to the defendant; he collected the rent, and gave receipts therefor. When the rent fell in arrear he required security, rejected certain stocks offered, and selected the furniture, etc., to be included in the chattel mortgage; had that drawn up in his own name, although there was no other debt than for rent due either the plaintiff or the younger Lathers, and the latter must be held to have acted for the plaintiff in that matter. So, too, when the defendant was about to give up the flat, he was consulted about letting Mrs. Bryan, an inmate of defendant's family, have the same for the remainder of defendant's term, and afterwards let the same to her for a new term.

But, when this case was before this court on a former appeal, (9 N. Y. Supp. 494,) we held that there was no conversion of the mortgaged property when the defendant moved out of the flat leaving it in possession of Mrs. Bryan, to whom he gave the express permission to use it while she occupied the premises in his place, or afterwards, when the plaintiff let the flat to her for a new

term; and on the present trial that view is confirmed by the oral testimony given on plaintiff's behalf and the lease introduced in evidence, which clearly shows it was of the flat alone, and that the property in question simply remained as defendant had left it. After Mrs. Bryan left the flat in July, 1888, and abandoned the property, the plaintiff took possession of the flat, and put the property in other and unoccupied apartments in the same or adjoining house, and sent the carpets to be cleaned. He had a right, and it was his duty, to care for the property so abandoned, and his taking such possession under the circumstances did not satisfy the debt, or amount to an appropriation of the property towards that purpose, as pointed out in the opinions delivered on the former appeal; and, if we were warranted in reversing the judgment then for these reasons, defendant's case is certainly no stronger on this appeal, and the judgment must be reversed again.

Under the opinions then delivered by the court, and the issues raised by the pleadings, it was essential that the defendant show a conversion of the mortgaged property on the part of the plaintiff, or an appropriation of it to the full or partial payment of his claim. It was just as material and important for the plaintiff to present any evidence which would tend to disprove either of these facts, yet, when he undertook to show that he had never converted or appropriated it, that he had never used it himself or allowed others to use it, that he had never let it together or with other furniture, and had never reaped any advantage from its possession, the court below, on defendant's objection, refused to permit him to do so, although we think such testimony went to the very gist of the defense interposed, and it was error to exclude it. It is in vain that the respondent seeks to have us draw inferences from isolated facts, after excluding such evidence.

We also held on the former appeal that, if there had been a conversion or an appropriation of the property, that would have entitled the respondents to a credit upon the debt to the extent of the value of the property so converted; yet on this trial the court below excluded all testimony of such value either at the time the mortgage was given or at an subsequent time. This, we think, was clearly error, for the plaintiff is only chargeable with value of the property at the time of the appropriation, unless, indeed, he took it in full satisfaction of his debt, of which there is no proof in the return in this case. The judgment should therefore be reversed, and a new trial ordered, with costs of this appeal to the appellant to abide the event.

SPRINGER v. BIEN *et al.*

(*Common Pleas of New York City and County, General Term. June 2, 1890.*)

1. JUDGMENT—*RES ADJUDICATA*—IMMATERIAL ISSUES.

In an action involving the sole issue whether defendant had wrongfully used plaintiff's trade-mark, and should be enjoined from further using it, a finding of fact that defendant had been employed to sell plaintiff's goods on a certain commission is immaterial, and therefore not *res adjudicata* as against defendant on the question as to his contract with plaintiffs.

2. PLEADING—REPLY—NEW MATTER IN ANSWER.

Code Civil Proc. N. Y. § 514, providing that plaintiff must reply where the answer contains a counter-claim, does not require a reply to an answer averring new matter, but not containing a counter-claim.

3. ASSUMPSIT—SERVICES UNDER VOID CONTRACT—STATUTE OF FRAUDS.

The fact that a contract is void under the statute of frauds will not preclude a recovery for services actually rendered in pursuance thereof.

Appeal from equity term.

Action by John H. Springer against Julius Bien and another. From an interlocutory judgment in favor of plaintiff the defendants appeal.

Argued before DALY and BOOKSTAYER, JJ.

Franklin Bien, for appellants. Palmer, Boothby & Glidersleeve, for respondent.

BOOKSTAVER, J. This is an action in equity brought by the plaintiff against the defendants, constituting the firm of Julius Bien & Co., for an accounting as to moneys received by them since May 4, 1889, upon orders for theatrical engraving procured by the plaintiff for them prior to that time, under a contract by which they agreed to pay the plaintiff 10 per cent. on all moneys received by them on orders for such engraving brought by the plaintiff to them, which 10 per cent. was to be paid as such moneys were received by the defendants from such orders. All the material allegations in the complaint, except the terms of the agreement and the allegation that there was anything due the plaintiff, were either admitted by the answer or upon the trial of the action; and the findings of fact in respect to that agreement, made by the learned chief justice, were fully supported by the evidence in the case. Indeed, we do not understand the appellants to seriously challenge any of them upon this appeal. But the defendant claims that a judgment in an action in the supreme court between the same parties and others is a bar to the plaintiff's claim here, and is *res adjudicata* as against the plaintiff upon the question as to what his agreement with the defendants was. That action was commenced in the supreme court by the defendants in this, as plaintiffs, against the plaintiff in this action and others as defendants, to restrain them from the use of a certain name and trade-mark, and from doing business under that name, or collecting moneys thereunder, and for an accounting for the moneys theretofore collected under that name, and for no other relief; and the judgment in that action was for that relief, and that only. The allegation in the complaint in the action in the supreme court, in regard to what the compensation to the plaintiff in this action should be, was substantially as alleged by the plaintiff in his complaint in this action; and the plaintiff's answer in the supreme court action admitted that allegation. There was therefore no issue of fact to be tried upon that question in that action; and the terms of the agreement in respect to compensation were only alleged in the complaint in the supreme court action as one of the links in the chain upon which the right to an injunction was founded. Notwithstanding this, the plaintiffs in the supreme court action procured from the judge who tried it the following finding of fact: "*Eleventh.* That these plaintiffs, and the said James Mitchell as well as these plaintiffs, agreed to employ and did employ the said John H. Springer, for which he was to receive ten per cent. as aforesaid, which said commission should be paid to him as long as he remained in the employ of the defendants and the said James Mitchell prior to December 11, 1888, and with these plaintiffs since that time." The eighth finding of fact in that action contains a similar finding. Obviously, this finding was not a material matter within the issue which was expressly litigated and determined in the supreme court action, nor was it comprehended or involved in that action, as no judgment could have been rendered in favor of the defendant in that action for his claim in this. The only question to be determined in that action was whether the defendants in it had wrongfully used the name and trade-mark then in controversy, and whether they should be enjoined from the further use of them. *Campbell v. Consalus*, 25 N. Y. 613, was an action brought to foreclose a mortgage. The defense set up payment. On the trial the plaintiffs claimed that, prior to the commencement of that action, an action had been begun by the defendant therein against the plaintiff's assignor, to cancel the mortgage, on the ground that it had been paid, and that in such action the referee to whom it was referred found that the mortgage had not been paid, and that there was due thereon the sum of \$2,754.88, and that the complaint in that action had been dismissed, with costs. The referee in the action to foreclose the mortgage held that the prior judgment was binding to the extent that it found that the mortgage had been paid, but that the finding of the referee in the prior action, that there was due on the mortgage the sum above men-

tioned, being an immaterial finding, and not embraced within the issues, was no evidence whatever of the amount due, and was not *res adjudicata* upon that point. The referee's report was confirmed, and on appeal affirmed by the general term and the court of appeals. The court of appeals held that inasmuch as the finding of the referee in the prior action as to the amount due was an immaterial finding, and upon a matter not raised in the pleadings, it was not *res adjudicata* between the parties; that the pleadings in that action "did not directly or necessarily require the referee to find or report how much was due on the mortgage. * * * But the evidence and inquiry as to the amount due was merely incidental or collateral to the issue whether anything was due. And it would appear from the case before cited that the principle of *res adjudicata* does not apply to matters raised only incidentally or collaterally." See, also, *People v. Johnson*, 38 N. Y. 63. Hence the learned judge who tried the case committed no error in finding as he did in respect to the findings of fact and of law presented to him bearing upon that subject.

Appellants also contend that, inasmuch as in the forty-first section of the answer they alleged the agreement in the complaint stated, by its terms, was not to be performed within one year from the making thereof, and that there was no note or memorandum in writing of the agreement, and inasmuch as there was no reply to this allegation, that, therefore, the defense was admitted, and this action should not be maintained by reason thereof. The first answer to this contention is that section 514 of the Code only requires replies to answers where a counter-claim is set up. This was not a counter-claim, but a defense requiring no answer. New matter in an answer, not stating a counter-claim, is deemed controverted, and may be traversed or avoided in any way. *Arthur v. Insurance Co.*, 78 N. Y. 462.

But, even if this was not so, from the time of the passage of the statute of frauds to the present day, no case can be found which adjudicates that a party may not recover for work actually done or services rendered under a contract obnoxious to such statute, and this action is to recover for money earned, and not for future or prospective damages arising from a breach of contract.

None of the exceptions to the admission or exclusion of evidence were argued on this appeal, either orally or in the briefs of counsel, and they therefore do not require any examination. The defendants in their answer set up a counter-claim. On the trial no evidence was given in regard to it, nor indeed had the time arrived to give such evidence. But the plaintiff, at the close of the case, moved to dismiss the issue made by the answer as far as the counter-claim was concerned. The court very properly denied the motion. Manifestly, through some inadvertence, the learned judge who tried the case signed the fourth conclusion of law presented by the plaintiff, as follows: "The plaintiff is entitled to have judgment against the defendants dismissing the counter-claim set forth in the answer and the supplemental answer herein;" and the judgment contains the following: "And it is further adjudged that the counter-claim set forth in the answer and the supplemental answer of the defendant herein be, and the same is hereby, dismissed." This clause should be stricken from the judgment, so as to allow the defendants to litigate their counter-claim upon the accounting, if so advised. As thus modified, the judgment should be affirmed, but, under the circumstances, without costs of this appeal to either party as against the other.

MYERS v. DEAN.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

CONTRACTS—VALIDITY—PUBLIC POLICY.

The law requires that leases of New York city property shall be made at public auction to the highest bidder, but it is usual before the auction to obtain privately

what is considered a reasonable offer, which can be accepted if no higher bid is made. Plaintiff assisted defendant in negotiating with the city comptroller as to such an offer, and alleged that defendant agreed to pay him a commission, in case the bid was accepted. There was no bargaining as to keeping away other bidders. *Held*, the contract was not void as against public policy.

Appeal from special term.

Action by Walter Myers against Robert J. Dean. Verdict for plaintiff. A motion for a new trial was denied, and defendant appealed.

Handy & Hatch, for appellant. *P. L. Eckerson*, for respondent.

BOOKSTAVEN, J. This action is brought to recover broker's commissions in negotiating a lease of the property bounded by West, Reade, Washington, and Duane streets, in this city. The comptroller had charge of the property to rent on behalf of the city. The laws require that all leases of this kind shall be at public auction to the highest bidder. Before exposing such leases for sale, however, it has been usual, and we think quite necessary, for the officer having the matter in charge to obtain what he thinks a reasonable offer which the party desiring the property will make as an upset bid for the same; otherwise it might frequently happen that the property would either realize less than its value or have to be withdrawn from the sale. According to plaintiff's testimony, the comptroller wished the plaintiff to bring parties to him, and to procure offers for the property in question. Notices were posted on the property stating it was to lease. Plaintiff endeavored to get various persons to make offers, some of whom did, but their propositions were refused by the comptroller because he thought them too low. Plaintiff saw the defendant, talked to him about the property, showed him a diagram of it, told him how much the comptroller asked, informed the comptroller that he had a customer in Mr. Dean before the latter saw him. Previous to that time, as plaintiff testified, the defendant had agreed to pay him his commission if he would assist in obtaining the property. It was known to both the city would pay none. Plaintiff negotiated with the comptroller about the price, and had, as he testified, several interviews with him about the matter. On the 2d of November, 1888, plaintiff and defendant met by appointment at the comptroller's office, talked over the terms, and finally the defendant agreed to take the property on a lease for 10 years at an annual rental of \$31,000, provided no one bid higher at the auction sale. Whereupon the proposal was reduced to writing, and it contained a clause that the defendant would pay brokerage. The public sale afterwards took place, and the plaintiff became the purchaser. Defendant denied that he ever agreed to pay brokerage, or that plaintiff rendered any services in the matter, or was entitled to any commissions, and claimed that the clause as to brokerage was only inserted in the proposal to save the city from any claim for it. At the close of the plaintiff's case defendant moved for a dismissal of the complaint, on the ground that defendant's promise to pay brokerage contained in the written paper was void and *nudum pactum*. So it would have been had it stood alone, but, coupled with the testimony, we think there was sufficient consideration established, provided the jury believed plaintiff's evidence. He also moved to dismiss the complaint on the ground that no contract or employment had been proved, but we think the testimony was sufficient to warrant the submission of that question to the jury. It was sent to the jury, and they found a verdict for the plaintiff for \$3,063.33. The evidence is conflicting, and we cannot say that the preponderance in defendant's favor is so great as to warrant us in setting it aside, even if defendant had made that one of the grounds for so doing in his motion for a new trial. No exception was taken to the judge's charge as originally made. At its close plaintiff's counsel asked the court to charge "that, if the jury believe that Mr. Dean stated to Mr. Myers before the lease was obtained that if he obtained the lease on his offer he would pay the commission, then the plaintiff is entitled to recover," which it did, and de-

fendant took an exception. The charge must be read as a whole, and the portion excepted to does not mean, as plaintiff contends, that if Mr. Dean at any time stated to the plaintiff he would pay him a commission as a gratuity if he obtained the lease. But we think it meant that, in consideration of plaintiff's services, he would pay the commission, and in this light it was not error.

The exception to the admission of expert evidence as to brokerage was not well taken. It was admissible under the allegations of the complaint, and was relevant to the issues.

The question as to the legal effect of the written proposal was properly excluded. It called for a conclusion of law, and not for any fact.

Nor was the contract void as against public policy. There is nothing in the evidence from which an inference can be drawn that the plaintiff undertook to keep others away from the sale, or from bidding or purchasing at the same, or that he in fact did so. The whole agreement, if made, was completed when the written proposal was submitted to the comptroller, provided no one bid higher at the auction sale, and there was no bargaining between the parties looking to keeping any one away from that sale. The judgment should therefore be affirmed, with costs.

BAUMANN *et al.* v. GILMOUR.

(*Common Pleas of New York City and County, General Term. June 2, 1880.*)

NEGLIGENCE—EVIDENCE.

In an action for injuries to plaintiffs' team sustained by a collision between it and defendant's, evidence that defendant's driver, having drawn out of a railway track to allow the passage of a car, attempted to return immediately thereafter, though the space was then occupied by plaintiffs' light wagon, and that in making the attempt defendant's heavy truck came in collision with it, is sufficient to sustain a finding that defendant was negligent.

Appeal from fourth district court.

Action by Leo Baumann and another against John G. Gilmour for injuries to plaintiffs' horse and wagon in a collision with defendant's team. There was a judgment in plaintiff's favor, and defendant appeals.

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

Gruber, Bard & Landon, for appellant. *Geo. Hahn*, for respondents.

PER CURIAM. The action was brought to recover damages for injuries received by plaintiffs' horse and wagon, caused, as it is claimed, by the negligence of defendant's servants. Appellant contends that no negligence on the part of the defendant or his servants was shown, and that negligence in such a case will not be inferred from the mere happening of an accident. The latter proposition is true, but the record in this case shows such a state of facts as warranted the trial judge in finding that the collision occurred through the negligence of defendant's servants in the absence of any explanation of them; and when this explanation was attempted it showed that the defendant's servants, having drawn out of the railway track to allow a car to pass, immediately afterwards attempted to return to the track right after the car, as he claims he had a right to do, although the space was then occupied by plaintiffs' light wagon, and in making this attempt defendant's heavy truck came in collision with it. We think there was sufficient evidence to warrant the justice in giving the judgment he did, and that it should be affirmed.

WACHTERSHAUSER v. SMITH.

*(Common Pleas of New York City and County, General Term. June 2, 1890.)***EVIDENCE—PAROL TO EXPLAIN WRITING.**

In an action for the breach of a written contract of employment for a "season," in which the duration of the season is not specified, parol evidence is admissible to define the term.

Appeal from fifth district court.

Action by Otto Wachtershauser against Sydney Smith for breach of contract of employment. Judgment for plaintiff. Defendant appeals.

Argued before LARREMORE, C. J., and BOOKSTAYER, J.

E. R. Volmer, for appellant. *H. C. Kudlich*, for respondent.

LARREMORE, C. J. This is an action for an alleged breach of contract of employment. The answer interposed a general denial, with an allegation that the defendant was discharged for cause. The rate of recovery was based upon the following letter:

"JULY 19, 1889.

"*Mr. Otto Wachtershauser*—DEAR SIR: Your letter received. I can give you work for the season, commencing on the 12th of August, and, if possible, will give you steady work, but cannot promise it. If you are in N. Y., stop in and see me.

Yours, truly, SYDNEY E. SMITH."

In pursuance of the letter above mentioned, plaintiff went into the defendant's employ on August 12, 1889. The middle of the third week he was discharged, as defendant alleges, on account of his imperfect work, and for incompetency, receiving his wages for the time that he worked. The plaintiff claims that the word "season" meant employment until December 15, 1889, and sues for damages for breach of the contract, from August 28 to December 15, 1889, at the rate of \$13 per week. The defendant testified that there is no period of time known as a "season" in the trade, and was corroborated by two of his workmen, who had been in his employ for several years. It will be seen that the letter upon which this action is predicated specifies no time going to show the duration of the term "season" therein mentioned. In such a case parol evidence is admissible for the definition of such term. The court below believed plaintiff's testimony upon this point, and, although the defendant's witnesses gave a contrary interpretation, the court had a right to accept plaintiff's definition.

It appears, however, according to defendant's theory, that plaintiff was discharged for incompetency, and, as that was a disputed question of fact in the case, the finding of the court cannot be reviewed on this appeal. It also appeared that the plaintiff had been in the defendant's employ for over a year previous to the contract last mentioned, and that he had given him a recommendation when such employment terminated. There are no important questions of law arising in this case. The court below is the judge of the credibility of witnesses, and of all questions of fact. The judgment appealed from should be affirmed, with costs.

LEWIS *et al.* v. FLACK.*(Common Pleas of New York City and County, General Term. June 2, 1890.)***SALE—RIGHTS OF SELLER—ACTION FOR POSSESSION.**

Evidence of the false representations by which the purchaser obtained the property is admissible in an action to recover its possession by the seller against the sheriff, who levied on it in the hands of the purchaser.

Appeal from eleventh district court.

Action by Charles Lewis and others against James A. Flack, sheriff, to recover possession of personal property fraudulently obtained from plaintiffs by

the vendee, and levied on by defendant as sheriff. Judgment for defendant. Plaintiffs appeal.

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.
Nathan Lewis, for appellants. *David Tim*, for respondent.

PER CURIAM. This action was brought to recover the possession of certain property fraudulently obtained from plaintiffs by the vendee, and levied on by the defendant as sheriff. The sheriff was not a purchaser for value, and, where a sale of goods has been induced by false and fraudulent representations on the part of the vendee, the vendor may reclaim and retake them from the possession of any one but a purchaser in good faith for value; and evidence of the false and fraudulent representations inducing the sale are admissible in an action brought against the sheriff to the same extent that it would be against the original vendee. *Guckenheimer v. Angevine*, 81 N. Y. 394; *Stevens v. Brennan*, 79 N. Y. 254; *Hathorne v. Hodges*, 28 N. Y. 486. It was therefore error to exclude evidence of the representations made by the vendee at the time of the purchase, the falsity of these representations, and the fact that the representations were relied on in making the sale, and generally evidence tending to show the fraudulent intent of the vendee in making the purchase. Besides, the defendant did not show that he detained the goods under any process of court, and the jury were erroneously directed to find a verdict for the defendant. The judgment must therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event.

GALLAGHER v. REILLY.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

LANDLORD AND TENANT—ACTIONS FOR RENT.

Where, after final order awarding the possession of the premises to the landlord, the tenant from month to month voluntarily surrenders them before the issuance of a warrant for his removal, the tenancy is terminated by such surrender, and the landlord cannot recover rent for the ensuing month, under Code Civil Proc. N. Y. § 2253, providing that the warrant cancels the agreement, and annuls the relation of landlord and tenant.

Appeal from ninth district court.

Action for rent by Patrick Gallagher against Charles Reilly. Judgment for defendant. Plaintiff appeals. Code Civil Proc. N. Y. § 2253, provides that the issuing of a warrant for the removal of a tenant cancels the agreement for the use of the premises, and annuls the relation of landlord and tenant, except that it does not prevent the landlord from recovering rent due at the time the precept was issued, or for the use and occupation till the time the warrant was issued.

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.
E. T. Rice, for appellant. *J. Vincent*, for respondent.

LARREMORE, C. J. This was an action to recover for one month's rent of house No. 81 East One Hundred and Sixteenth street. According to plaintiff's testimony it was an oral hiring for 18 months from October, 1888. A written lease was prepared, but was not shown to defendant until he demanded it, when he objected to the proposed lease, and it was not executed. Subsequently a dispute arose between the plaintiff and defendant as to the amount then due. The action might have been maintained for the rent, but the plaintiff caused a precept to be issued and served upon defendant, requiring him "forthwith to remove from the premises, or show cause before the court below, May 21, 1889, why possession of said premises should not be delivered to the plaintiff." An answer was filed to the petition, and the cause was set down for trial. The defendant afterwards withdrew his answer, and there-

upon final order was made, awarding to petitioner possession of the property in question. The defendant, without waiting for the issuance of a warrant, moved from the premises May 27th, and sent the keys of the house to the plaintiff.

The court below held the plaintiff could not recover rent for the month of June; and, under all the circumstances of the case, I think such adjudication was correct. The hiring of the premises, under the authority of *Prial v. Entwistle*, 10 Daly, 398, was from month to month. *Thomas v. Nelson*, 69 N. Y. 121. After the trial order of the justice awarding possession of the premises to the plaintiff in the summary proceeding, it was the defendant's duty and right to surrender the premises, and not wait until dispossessed by warrant. *McAdam, Landl. & Ten.* (2d Ed.) 653; *People v. Kelsey*, 14 Abb. Pr. 378. Such final order, which was, in effect, a judgment, may be satisfied with compliance with its requirements on the part of the tenant as well as by the issuing of a warrant, and cancels the agreement between the parties. Section 2253 of the Code should not be restricted in its application. The lease may be canceled by the agreement of the parties, or by surrender of the premises, when required to do so by order of the court. I think it a fair interpretation of the statute that, when it becomes necessary to issue a warrant for the removal of a tenant, then the issuance of such warrant cancels the agreement. If, while the warrant was unexecuted, the tenant had remained in possession, a different state of facts would have been presented. *Powers v. Carpenter*, 15 Wkly. Dig. 155; *Boehm v. Rich*, 18 Daly, 62. As the defendant surrendered the premises under the final order, the landlord thus secured the precise remedy which he sought when he procured and served the precept. In such a case the issuance of a warrant was unnecessary and useless, for the plaintiff had obtained all that he sought in the summary proceedings. It appears that the tenant has already left. The landlord was entitled to full possession of his premises. To issue a warrant in such a case, as before stated, would be useless and a nullity, inasmuch as it would be the enforcement of an order which had already been complied with. The judgment of the court below should be affirmed, with costs.

LEWIS *et al.* v. IBA.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

PRACTICE IN CIVIL CASES—DISMISSAL.

Where the testimony warrants a finding in favor of one of several plaintiffs, a motion to dismiss the entire case is properly denied.

Appeal from fourth district court.

Action by Samuel Lewis and others against Casper Iba for work done. Judgment for plaintiffs. Defendant appeals.

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.
H. C. Botty, for appellant. M. H. Gottlieb, for respondents.

PER CURIAM. We have carefully read the testimony in this case, and find that there was sufficient evidence to justify the justice in rendering a verdict in favor of both plaintiffs, as there is proof that they were jointly interested in the work done, and the receipt given by Lewis was sufficiently explained. Even if it were not so, there certainly was sufficient testimony to warrant the justice in finding in favor of the plaintiff Lewis, and defendant's motion to dismiss was therefore properly denied, as it was a motion to dismiss the case entirely, and not as to the plaintiff Procha alone. The judgment should therefore be affirmed, with costs.

EDEL v. McCOONE.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

JUDGMENT—OPENING AND VACATING.

Under Laws N. Y. 1882, c. 410, § 1267, (Consolidation Act,) providing that any justice may upon motion set aside any default made in any action tried before him, a plaintiff who has offered proof of personal service of summons upon defendant, and obtained a judgment by default in a justice's court, cannot object to the vacation of the judgment by the justice, on proof that personal service was not had, on the ground that the justice had never acquired jurisdiction of the action.

Appeal from tenth district court.

Action by Charles Edel against Alexander C. McCone. Judgment was rendered dismissing the complaint, and plaintiff appeals.

Argued before LARREMORE, O. J., and ALLEN and BOOKSTAYER, JJ.
J. F. Meyer, for appellant. *W. F. Browne*, for respondent.

PER CURIAM. This action was commenced by the issuing of a summons November 27, 1889, and, the defendant not being served, an *alias* was issued, and on the 18th of December, 1889, returned with proof of personal service. Defendant did not appear, and plaintiff took judgment by default for \$52.50. On the 11th of January, 1890, the justice of that court, on the application of defendant, and on his affidavit setting forth that the summons had not been served upon him, granted an order to show cause why the judgment taken on the 18th of December should not be vacated and set aside. The only ground upon which the motion to vacate the judgment was made was that no summons, or copy of a summons, had ever been served upon the defendant. The motion was heard by the justice on the 7th of February, 1890, plaintiff's counsel not putting in any affidavit, and not controverting defendant's claim of non-personal service of the summons, but opposing the motion on the ground that the court had no jurisdiction to vacate and set aside the judgment, as it had been entered by default and the court had never acquired jurisdiction. The justice granted the motion, vacated the judgment, and set the cause down for trial on February 14, 1890, on which day both parties appeared by their counsel. Plaintiff's counsel refused to proceed with the trial, on the ground that the court had no power to open the judgment for the reason above set forth. Thereupon the justice, upon motion of defendant's counsel, dismissed the case, with seven dollars costs. Hence this appeal. By section 1267 of the consolidation act (Laws 1882, c. 410) it is provided that any justice may, upon a motion made before him, set aside any default made in any action tried before or by him. Appellant's counsel contends that this only applies to cases where he has actually acquired jurisdiction, and in this case he had not obtained such jurisdiction by reason of the non-service of the summons. But we think he is estopped from making this claim, because the justice only acted on the proof of the personal service of the summons upon defendant offered by plaintiff, and that the inquest taken upon such proof was a trial within the meaning of that section, and therefore the court had the power to open that default, and the defendant was not driven to the necessity of an appeal, although he had that remedy, nor to an action in equity to get rid of the judgment. Appellant also claims that, a transcript of the judgment having been filed, it was no longer a judgment of the district court. But the court of appeals has held that the filing of a transcript does not make it a judgment of this court for any other purpose than for its enforcement; that it remains a judgment of the district court. The judgment of dismissal should therefore be affirmed, with costs.

BOPP v. ATKINS.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

EVIDENCE—PAROL TO AFFECT WRITING.

In an action to recover the value of certain carpets, gas fixtures, etc., alleged to have been conveyed to plaintiff with a house, but which were not referred to in the written contract of sale, evidence of conversations had before the signing of the contract concerning such articles is inadmissible.

Appeal from eleventh district court.

Action by Jacob Bopp against James I. Atkins. Judgment was given for plaintiff, and defendant appeals.

Argued before LARREMORE, C. J., and BOOKSTAVEN, J.

C. B. Smith, for appellant. A. Lamont, for respondent.

BOOKSTAVEN, J. Action to recover the value of certain chattels alleged by the plaintiff to have been conveyed by the defendant to him with a house and lot in West Forty-Fourth street. The contract of sale was in writing, and at the time of its execution something was said about certain articles, as carpets, gas fixtures, etc.; but when the contract was drawn up it entirely omitted any reference to these articles. Nevertheless, on the trial, plaintiff was allowed to give evidence as to the conversation before the signing of the contract, and judgment was rendered in plaintiff's favor for their value. This we think was error. The rule was elementary. When the parties deliberately put their agreement in writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagements, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing, and all oral testimony of particular conversations should be rejected. 1 Greenl. Ev. §§ 275, 276. From the evidence admitted it seems clear that the carpets, etc., were intended to go with the house; but they were not included in the contract, and the plaintiff has mistaken his remedy, which should have been an action to reform the contract. The judgment should therefore be reversed, with costs.

KELLY et al. v. WEISS.

(Common Pleas of New York City and County, General Term. July 12, 1890.)

APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

A judgment will not be disturbed on appeal when the verdict on which it is based is justified by the evidence.

Appeal from eleventh district court.

Action by Thomas P. Kelly and others against Leopold Weiss, to recover \$99.50 for storage of a brougham and a T cart under an agreement at a specified price. There was a verdict in plaintiff's favor, and from a judgment thereon defendant appeals.

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

Horwitz & Hirschfeld, for appellant. J. Cochrane, for respondents.

PER CURIAM. No question of law is presented on this appeal. The justice, from the testimony, was justified in finding the verdict he did, and the judgment should therefore be affirmed, with costs to the respondents.

LEACOCK v. STRIKER.

*(Common Pleas of New York City and County, General Term. July 18, 1890.)***MASTER AND SERVANT—DISCHARGE—QUANTUM MERUIT.**

An engineer, employed by the month, who has been discharged for negligence after working nine days, and who has refused a tender of half a month's wages for his services, cannot recover for the services rendered on a *quantum meruit*.

Appeal from eleventh district court.

Action by Thomas Leacock against Elsworth L. Striker for an alleged unlawful discharge from defendant's employment. The court dismissed plaintiff's complaint, and he appeals.

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

Reynolds & Harrison, for appellant. *Bliss & Schey*, (*John J. Lenehan*, of counsel,) for respondent.

PER CURIAM. The plaintiff, who was employed as an engineer, having been discharged, brought this action to recover, as damages, his wages for a month. The defense was a justification of the discharge, on the ground of plaintiff's negligence and carelessness as engineer, and a counter-claim for damages arising from such negligence and carelessness. After hearing the testimony offered, the justice dismissed plaintiff's complaint, and did not allow any part of defendant's counter-claim. Hence plaintiff's appeal. We have carefully examined the return, and the only question raised by it seems to be one of fact, and we think the evidence of negligence, although conflicting, quite sufficient to sustain the justice's finding in that respect. But appellant contends that, even if this were so, inasmuch as he had worked for nine days during the month in which he was discharged he should have had a judgment for such services on a *quantum meruit*. But the return shows that, when discharged, he was tendered a half month's wages for those days, which he refused. The judgment should therefore be affirmed, with costs.

DIRRINGER v. MOYNIHAN.

*(Common Pleas of New York City and County, General Term. July 18, 1890.)***1. MASTER AND SERVANT—CONTRACT OF HIRING.**

In an action for wages for work done on defendant's building, it appeared that plaintiff was told to go to work by a subcontractor, and made no contract with any one else. Defendant gave plaintiff some money, but merely as a charity; he having paid the principal contractor in full. *Held*, that there was not sufficient evidence that defendant employed plaintiff to support a verdict for the latter.

2. STATUTE OF FRAUDS.

A promise by defendant to see that the workmen of the subcontractor were paid was a promise to pay the debt of another, and, not being in writing, was void.

Appeal from fourth district court; STICKLER, Judge.

Action by Jacob Dirringer against Daniel Moynihan for wages alleged to have been earned by plaintiff while working as brick-layer on defendant's building. Judgment was given for plaintiff, and defendant appeals.

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

John M. Tierney, for appellant. *Samuel Mullen*, for respondent.

PER CURIAM. We have carefully examined the evidence offered on the trial, and are convinced that, for some reason not clearly apparent, the jury were misled in rendering any judgment in plaintiff's favor, for there is no proof that he was ever employed by the defendant. The utmost that can be claimed on the evidence is that plaintiff was originally employed by a Mr. Smith, whom the defendant had engaged to look after the work, and see that it was done according to contract, or by one Spauman, who had contracted

either with Minto, the principal contractor, to do the mason work on a building then being erected by the defendant, or by Minto himself. It is contradicted that Smith had no right or authority to employ any one. His duty was simply to see that the work was done according to the contract between Minto and the defendant. It is also clear that neither Minto nor Smith originally employed the plaintiff. This was done by Spauman alone. The latter told plaintiff that Minto was the contractor; that he was working for the owner, the defendant, by day work; no price was at any time agreed upon by any one; that plaintiff simply went to work under Spauman's representations, and made no contract with any one else. He expressly testifies that he "never had any conversation with Minto, he never employed me;" consequently the only employment could have been by Spauman. But he was a subcontractor of Minto, and the latter had been fully paid by the defendant when he abandoned the work. Besides, no lien had been filed against the building by the plaintiff. The fact that defendant gave plaintiff two dollars as a matter of charity cannot bind him to pay wages for which he had never contracted. As a matter of fact, Spauman ceased work when Minto abandoned the contract. If defendant at any time promised that he would see that Minto or Spauman would pay his workmen, it was without consideration, and a mere promise to pay the debt of another, and, not being in writing, was void. We therefore think the judgment should be reversed, with costs to appellant, under *Curley v. Tomlinson*, 5 Daly, 283.

GROSS v. JANCOSK.

(Common Pleas of New York City and County, General Term. June, 1890.)

1. SALES UNDER POWER IN MORTGAGE—SECRET AGREEMENT.

At a sale of property under a power contained in a mortgage, defendant became the purchaser. His bid of \$325 was the highest offered, no one objected to the price at which the property was sold, and it did not appear that there was any "padding." The property was actually worth more than defendant's bid. *Held*, that he could not object to the regularity of the sale because of a secret agreement between him and the mortgagee by which he was to get the property for \$325, no matter what any one else bid.

2. SAME—RESALE.

Defendant having refused to complete his purchase, and told the mortgagee to sell the property to some one else, was informed that he would be liable for any loss on a resale. The property was then readvertised once, and sold without further notice to defendant. *Held*, that the verdict of the jury that defendant had sufficient notice of the resale was conclusive, no fraud or bias being shown.

Appeal from eighth district court.

Action by Charles Gross against John Jancosk. Judgment was given for plaintiff, and defendant appeals.

Argued before BOOKSTAVEN and ALLEN, JJ.

George W. McAdam, for appellant. John Mulholland, for respondent.

BOOKSTAVEN, J. This action was brought by the plaintiff, a vendor, against the defendant, a vendee, to recover damages on a resale of certain fixtures, etc., of a dining-room or restaurant, No. 197 Third avenue. The property was sold at auction under a power contained in a chattel mortgage, and at the sale the defendant, on the 5th of February, 1890, purchased the whole of it for the sum of \$325, after other bids up to \$320 had been made. He paid \$5 on account of the purchase, and agreed to pay the remainder on the same day at 4 P. M. When that hour arrived, defendant refused to complete the purchase, and told plaintiff's representative "to sell it to some one else," because his wife did not want him to take it. He was then told that, if the property was resold, it would be on his account, and he would be held liable for any loss on such resale. The property was then readvertised once without further notice to the defendant, and realized the sum of \$256.42 only. Against this the plaintiff

charged \$20 for a watchman for five days and nights, and \$2.40 for advertising and auctioneer's fees, and credited the defendant with the net proceeds, to-wit, \$208.58, and brought suit for the difference between the purchase price and the net amount realized; that is to say, for \$116.12. The trial court only allowed \$4 for watchman's fees, and the jury, after a charge by the court, rendered a verdict in the plaintiff's favor for \$74.98. The defendant does not dispute plaintiff's right to resell under the circumstances; but claims the first sale was not fairly conducted, the second was not made in good faith and with reasonable diligence, was not properly advertised, and defendant had no proper notice of the time and place of the resale.

As to the first objection, it appears from the evidence of the attorney for the mortgagee that the property was advertised by him to be sold at auction. There was a secret agreement between him and defendant that the latter should pay \$325 for the property, and that no one else should get it, no matter what they bid for it. So far as appears from the evidence, on the sale the sum of \$320 was bid for the property in good faith, and defendant's bid was the highest offered. His private understanding with the attorney therefore could not affect the general public, and the fact is, no bidder complained of the price at which it was sold to the defendant. Nor does it appear that the previous bid of \$320 was made by any one employed by the plaintiff or his attorney to inflate the price, and to induce the defendant to bid a higher price than he otherwise would have done, and in this respect it differs widely from *Fisher v. Hersey*, 17 Hun, 870. On the contrary, the evidence shows that the property was fairly worth \$400, and this, defendant's counsel admits, was about its real value. The rascality of the understanding which defendant claims was made with the mortgagee's attorney, by which he was to get the property at public sale for \$325, was equally shared by defendant himself. He should not be allowed to avail himself of his own wrong, in the absence of any deceit practiced on him.

As to the second objection, that the resale was not made in good faith and with reasonable diligence, we have carefully examined the testimony and the judge's charge on that point, and find the charge was fair and impartial on that question, and the jury's finding was fully sustained by the evidence. We may say that the charge was as strongly in defendant's favor as the circumstances warranted, and the finding of the jury in such case will not be disturbed. *Conklin v. Thompson*, 29 Barb. 218; *Corning v. Calvert*, 2 Hill, 56; *Maguire v. Woodside*, Id. 59; *Barber v. Arnoux*, 18 How. Pr. 285.

As to the third and fourth objections, that the property was not properly advertised, and the defendant had no notice of the resale, we think there is no law prescribing what notice shall be given to a defaulting purchaser, and it was fairly submitted to the jury whether the notice in fact given was a reasonable or proper notice, and their conclusion upon that question, as before shown, is binding on us in the absence of fraud, misrepresentation, bias, or prejudice, none of which do we perceive in this case. In the case of *Polles v. LeRoy*, 30 N. Y. 549, it was said: A vendor, if he elects to become such, is an agent for the vendee who refuses to complete his purchase, to sell fairly and for the best advantage. The only requisite to such sale, as a measure of the rights and injury of the party, is good faith; there is nothing in the case which I have found requiring more than this. In the same case it was held that, although the law regards the vendor as agent *quoad hoc* of the vendee, it is no part of his duty to notify the principal of the time and place of sale. In *Hunter v. Wetsell*, 84 N. Y. 549, it was held that the vendor might have abandoned the property, and sued for the full price of the goods sold, and that he might, although he was not bound to, resell at auction. In *Messmore v. Lead Co.*, 40 N. Y. 429, it was held that the vendor had a right to sell at the best price he could obtain, after his offer to deliver the goods, and the law did not require him to give any notice

of the time or place of sale. In *Porter v. Wormser*, 94 N. Y. 447, it was held that an agent authorized to sell property might, in the absence of restrictions, sell in any ordinary manner. In *Bigelow v. Legg*, 102 N. Y. 652, 6 N. E. Rep. 107, it was held that the measure of damage in such case is the difference between the contract price and the market value, and the price realized at auction may properly be taken into consideration in determining the market value. The fact that the property on the second sale was not sold in bulk, but in detail, was in defendant's favor. The fact that the license, etc., was not tendered to the defendant, is not material, in view of his positive refusal to take the property at any price. We therefore think, in any aspect in which this case may be viewed, the judgment of the court below must be affirmed, with the costs to respondent.

SCHNAUFFER v. CATTERBURY *et al.*

(Common Pleas of New York City and County, General Term. June 18, 1890.)

ATTACHMENT—REVIEW.

In an action aided by attachment, a judgment for plaintiff for the amount of the debt sued for, with interest and ordinary costs, not including marshal's fees, will not be reversed because the attachment was erroneously issued.

Appeal from tenth district court.

Action by Pauline H. Schnauffer against Louis Catterbury and others. Judgment was given for plaintiff, and defendants appeal.

Argued before BOOKSTAVEN and ALLEN, JJ.

Arthur C. Butts, for appellants.

BOOKSTAVEN, J. The action was commenced by summons dated the 28th day of December, 1889, and returnable January 6, 1890. There is proof that this was personally served. On an affidavit, undertaking, etc., the justice of that court, on the 28th of December, issued a warrant of attachment against the property of the defendants, which was executed on the same day by one of the marshals of the city of New York. On the return-day of the summons the defendants appeared, and, on the return of the marshal to the attachment proceedings, moved to set them aside on the ground that the affidavit was insufficient to warrant the issuing of the attachment or to give the court jurisdiction, and also on the ground that the return was false as to the value of the property seized. The motion was denied by the justice, the cause was tried, and at the close of testimony defendants moved to dismiss the complaint on the evidence, and also on the grounds stated in moving to dismiss the attachment. This was denied also, and a judgment rendered for the plaintiff. From that judgment this appeal was taken, and the appellants contend that on such appeal they have the right to review the attachment proceedings, and that the judgment should be reversed if the justice committed any error in regard to them. This precise question came up in *Rosenthal v. Grouse*, 7 Civil Proc. R. 135, and after mature deliberation was decided adversely to appellants' contention; this court holding that the warrant of attachment was a provisional remedy merely, not involving the merits of the action, or the validity of the process by which the defendant was brought into court, and that it could not be said that the judgment was erroneous, though the justice may have erred in upholding the attachment. In the course of that decision, *Lang v. Marks*, 3 Civil Proc. R. 287, was disapproved of, and it was distinctly shown that, since the adoption of the Code of Civil Procedure, the jurisdiction of the district courts no longer depends on the validity of attachment proceedings, replevin proceedings, etc., but upon the regularity in the summons, its service, etc. The same conclusion has been arrived at by the general term of the supreme court, third department, in *McNeary v. Chase*, 80 Hun, 491, and by the county court of Erie county in

Irr v. Schroeder, 6 Civil Proc. R. 258. It is true a contrary opinion was announced by the superior court of Buffalo in *Fritze v. Pultz*, 2 Civil Proc. R. 142, but that case was reversed on other grounds, as well as on account of the irregularity in its issuing of the attachment, and the court there assumed that, because the justice was in error in that respect, there must be a remedy by appeal; while this court held in *Rosenthal v. Grouse*, *supra*, that in such case there was no such remedy, but a *casus omisus*, just as there had been in section 3191 of the Code until amended, and we feel bound by that decision. Had the marshal's fees on the attachment been taxed and included in the judgment, this case might possibly have been distinguished from *Rosenthal v. Grouse*, but as the judgment rendered, as far as appears from the return, was for the amount of the debt, with interest and ordinary costs only, not including marshal's fees, and was in all other respects justified by the evidence, we think it should be affirmed, with costs.

GOLDBERG v. WOLFF.

(Common Pleas of New York City and County, General Term. June 18, 1890.)

1. TROVER AND CONVERSION.

In an action for the alleged conversion of money left with defendant to be sent to a third party, the testimony of plaintiff that he received letters from such third party, saying that she had not received the money, is not sufficient to support a verdict for plaintiff.

2. EVIDENCE—HEARSAY.

Such letters are hearsay evidence, and not admissible against defendant.

Appeal from fourth district court.

Action by Samuel Goldberg against William Wolff, for the alleged conversion of money left with defendant to be sent to plaintiff's sister. The only evidence of a conversion was the testimony of plaintiff that he had received a letter from the sister saying that she had not received the money. Judgment was given for plaintiff, and defendant appeals.

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

Abraham H. Sarahson, for appellant. R. Greenhol, for respondent.

PER CURIAM. We regret that we are compelled to reverse this judgment; but, without the contents of the letters which were admitted in evidence under defendant's objection, there is no sufficient proof of the conversion of the money deposited with the defendant. Those letters were not even offered in evidence, their contents only being given. But, even if the letters themselves had been offered, they would not have been evidence against the defendant, not having been written by any party to the action touching the matter in controversy. They were clearly hearsay evidence of a third party not under oath. The judgment should therefore be reversed, and a new trial ordered, with costs of the appeal to the appellant to abide the event of the action.

MITCHELL v. COCHRAN *et ux.*

(Supreme Court, General Term, Third Department. July 7, 1890.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

In an action by a surviving partner to foreclose a mortgage, plaintiff testified, with reference to an alleged payment of money in satisfaction of the mortgage, that the money was paid by defendant to the deceased partner, to be handed to him (plaintiff) for the purpose of buying goods for defendant; that the decedent gave him the money, and that he used it for the purpose indicated. *Held*, that such testimony related indirectly to a transaction between decedent and defendant, and that the testimony of defendant concerning such transaction was therefore not prohibited by Code Civil Proc. N. Y. § 829.

Appeal from judgment on report of referee.

Action by Patrick Mitchell, as sole surviving partner of the late firm of P. & J. Mitchell, against Robert J. Cochran and Clara, his wife, to foreclose a mortgage given by defendants to the firm for \$260. The execution of the mortgage and bond accompanying it was not contested, but the answer alleged that it was given without consideration, and also payment. The referee found that there was no consideration for either bond or mortgage, and plaintiff appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

L. L. Boyce, for appellant. *R. P. Antbal*, for respondents.

LANDON, J. The principal question is as to the admissibility of the testimony of the defendant under section 829, Code Civil Proc. The witnesses Hanley and Peck testified on behalf of the defendants to the effect that John Mitchell, one of the mortgagees and partners, of whom plaintiff is the survivor, and the defendant Robert Cochran had some conversation in October or November, 1876, about a mortgage, and that he saw Cochran pay John \$60, and John then said he would send up a satisfaction in a few days; that that made them all square. The plaintiff, the surviving partner, then testified in his own behalf that in October, 1876, the defendant asked him to go to Amsterdam, and get some coal and iron for him, and that he would give him the money for the purpose. Speaking with reference to a few days later, the plaintiff continued thus: "He [the defendant] gave John \$60 to hand to me, to go to Amsterdam and get coal and iron, and pay for it. I was not at home. When I came home John gave me the \$60, and I went the next week and got the coal and iron." The defendant Cochran, in his own behalf, the plaintiff's objection under section 829, Code Civil Proc., being overruled, then testified with respect to the transaction between him and John Mitchell, the deceased partner, as follows: "I came up to the bar and said to John Mitchell, 'Here is \$60, balance of that \$70 I borrowed of you, and this makes us all square.' He said it did. I spoke to him about the mortgage. I told him I wanted that taken care of, and he said: 'I will send you a satisfaction in a few days.' That is the only \$60 I paid to John Mitchell in October, 1876. Nothing was said about Pat [the plaintiff] taking that \$60 and going to Amsterdam to get coal and iron. He went after coal and iron in 1874. I did not in 1876, nor at any other time, give John Mitchell \$60, and request him to hand it to Pat to go to Amsterdam and get coal and iron." The plaintiff's several motions to strike out the parts of this testimony relating to the personal transaction with John Mitchell were denied, and plaintiff duly excepted.

It is obvious that the plaintiff testified to what John told him the defendant handed him the \$60 for. He testified to the interview between John and himself, but not directly to the interview between John and the defendant. If the defendant had chosen to object to the testimony, we perceive no ground upon which the referee could have admitted it. But the defendant was not obliged to object. If the plaintiff chose to give testimony which by

clear inference showed that the defendant gave John \$60 for coal and iron, and not to satisfy the mortgage, then the plaintiff indirectly testified concerning the transaction between John and the defendant, and thus permitted the defendant to testify concerning the same. The plaintiff's testimony had no materiality except as it touched the transaction between John and the defendant, and the inference from it, if accepted by the referee, was fatal to the version of the transaction given by Hanley and Peck. It detailed a transaction between the deceased and the plaintiff which had its origin and character in the transaction between the deceased and the defendant. The testimony of plaintiff unfolded by indirection the latter transaction, and hence the defendant could directly testify respecting it. *Clift v. Moses*, 112 N. Y. 426, 20 N. E. Rep. 392.

The case is not without difficulty upon the facts. We are inclined to think that, when the mortgage was given, the defendant did owe the firm \$60, and the mortgage was made for \$260, in anticipation of further advances to the defendant, or to protect the defendant from other creditors. The evidence is quite satisfactory that the defendant paid the \$60 to John Mitchell, and that the latter admitted satisfaction, and promised to give the proper evidence of it, but never did. It is reasonably clear that the plaintiff has confounded transactions prior to the mortgage and distinct from it with the transactions affecting the mortgage. That the defendant at one time offered to pay the plaintiff \$160 to settle the mortgage is not disputed, but this probably was for the sake of peace, and not as a tender. We think the finding for the defendant accords with the justice of the case. Judgment affirmed, with costs. All concur.

MC COMB v. BARCELONA APARTMENT ASS'N *et al.*

(*Supreme Court, General Term, First Department. April 13, 1890.*)

1. CORPORATIONS—EXECUTION OF MORTGAGE—ASSENT OF STOCKHOLDERS.

Under Laws N. Y. 1878, c. 163, providing that an association incorporated under Act Feb. 17, 1848, and its amendments, shall as a condition precedent to the giving of a mortgage to secure a debt contracted by it in the course of its business, have the assent of two-thirds of the owners of the capital stock, persons who have made no payments on their subscriptions, but are officers of the association, and persons who have made substantial payments either in cash or work, are stockholders for the purpose of giving their assent, though no certificates have been issued.

2. SAME—ASSENT NOT NECESSARY.

It was part of the arrangement under which land was conveyed to an incorporated association that it should give two mortgages to secure future advances for improvements thereon, and the mortgages and the deed were executed and delivered contemporaneously. *Held*, that these mortgages were not within the act of 1878, and did not require the assent of stockholders.

3. SAME—FORECLOSURE—JUDGMENT.

In an action to foreclose the mortgages merely, it is error to include in the judgment a sum sufficient to satisfy advances in excess of the amount of the mortgages.

Appeal from judgment on report of referee.

Action by James B. McComb against the Barcelona Apartment Association and others. Judgment for plaintiff, and defendants appeal.

Argued before BRADY, BARTLETT, and DANIELS, JJ.

William G. Choate and George H. Adams, for appellants. *Thomas H. Hubbard*, for respondent.

DANIELS, J. The principal object of this action was the foreclosure of two mortgages bearing date on the 14th of January, 1884, and executed in the name of the Barcelona Apartment Association. This association was incorporated under the act of 1848, (February 17th,) authorizing the formation of corporations for manufacturing and other purposes, and the amendments afterwards made to that act. The certificate or articles of association was

made and filed in December, 1881. Its capital stock was the sum of \$240,000, divided into 16 shares, of the par value of \$15,000 each. The object of the incorporation was declared to be "the purchasing, leasing, acquiring, maintaining, and improving real estate for residences and apartment houses, to be leased and conducted by the corporation, and occupied by its stockholders and others." The property devoted to this object was situated between Fifty-Eighth and Fifty-Ninth streets, and Sixth and Seventh avenues, in the city of New York. Before the execution of these mortgages the land had been obtained for this object by Jose F. de Navarro, and the title to it taken in the name of his wife; and it was afterwards conveyed to James Clyne. The apartment house was in process of construction, and had progressed towards its completion, at the time when these mortgages were given. In its erection the business had been managed and conducted by Navarro for his own benefit, and that of the association. He had appropriated and expended large sums of money for this object prior to the month of June, 1883, and it had then become necessary, for the progress and completion of the building, to obtain the aid and assistance of some other person or persons. In May, 1883, he entered into negotiations with the plaintiff to provide such additional financial assistance as at that time had become necessary for the success of the enterprise. As a means of securing that end, a construction company had been organized, called the Central Park Building Company, Limited, with a nominal capital of \$800,000. At the request of Navarro, and upon the representation that one-half the stock of the company would be taken by himself, and others acting with him, the plaintiff was induced to subscribe for \$200,000 of the stock under an agreement made by Navarro that he would return the money, with interest, and assume all liabilities for the balance remaining unpaid, 90 days after the completion of this and seven other buildings, if the plaintiff elected to transfer his interest in the company, and gave notice of such election within 60 days after the completion of the buildings; and, upon such transfer, Navarro further agreed that he would give a substantial guaranty for the faithful performance of the engagement.

After this agreement was made, the plaintiff subscribed for another portion of the stock, amounting to the sum of \$100,000, and Theodore Adams, at his instance and for him, also subscribed for a like amount. The amounts subscribed in this manner, together with the first subscription made by the plaintiff, were paid by him. But, for the other half of the stock of the company, payments were not in fact made. The money in this manner paid by the plaintiff was principally used in defraying the expense of the construction of this and the seven other similar apartment buildings; but it proved insufficient to secure the completion of this or the other buildings. The plaintiff thereupon, taking the position that the financial condition of the enterprise had been misrepresented to him, declined to make further or additional advances than those which he had already made for this object; and on the 1st of December, 1883, an agreement was made and entered into between himself and Navarro for the arrangement of their disagreements, and for the advancement of other moneys by the plaintiff, to secure the success of this enterprise. This agreement provided for the return of the payments made for the stock of the Central Park Building Company within 4 months after the completion of the buildings, in case the plaintiff elected to surrender the stock, and receive the money he had paid, with interest; and, within 60 days after such completion, he gave notice of such election. It then proceeded to provide for the advancement of other moneys to pay for the progress of the work, and the completion of the buildings. These advancements were to be made, as it was first stated in the agreement, upon the basis that the entire eight buildings, with the cost of the land, should not exceed the sum of \$4,500,000. But this was afterwards, and on the same day, by another agreement, increased to the sum of \$5,000,000. It was then agreed that the parties would

encourage the mortgaging of the property of the company to the full amount of \$2,800,000; and, to provide means in the mean time for the prosecution of the work on the buildings, the plaintiff agreed with Navarro to obtain and provide money upon the commercial paper of the company at lawful interest, and 5 per cent. commissions per annum, to the extent to which it should be necessary to pay the contractors for their work, according to the terms and provisions of their contracts, and to carry the buildings on to completion. It was further agreed that James Clyne, in whom the title to the land was vested, should make to the plaintiff a mortgage for the sum of \$100,000, with interest at 6 per cent., due May 1, 1886, on the land occupied by the building of the Barcelona Association, to be used in obtaining an additional loan from the insurance company, which at that time already held a large mortgage upon the property; and, in case the mortgage should not be taken by such company or other parties on the terms mentioned, it should be held by the plaintiff, "as security for the advances to be made or procured by him, in the same manner as the other securities hereinafter specified." It was also agreed that Clyne should make a further mortgage on the same property, for \$50,000, at the same rate of interest, payable to the plaintiff at the same time, "to be held by him as security for the repayment of such moneys as he may advance; such last-mentioned mortgages to be subject to previous mortgages for two millions eight hundred thousand dollars in the aggregate." The agreement then further covenanted that the apartment association itself should make such additional or collateral mortgages as might be necessary effectually to mortgage the buildings and improvements upon the land mortgaged by Clyne, and should authorize and assent to all the preceding mortgages, as that was required by its by-laws, and the statute under which it was organized, and the agreement stipulated for like mortgages upon each one of the other seven parcels of land.

Pursuant to this agreement and under the directions of Navarro, who acted throughout as well for the apartment association as for the Central Park Building Company and himself, Clyne executed and delivered these two mortgages, as well as similar mortgages upon the other seven parcels of land. They were acknowledged on the 29th of December, 1883, and payable at the times specified in the agreement, and were made to secure bonds executed for the like object. And it was further agreed, in the agreement already mentioned, that Clyne should execute and deliver to the plaintiff, for the company, a conveyance in fee of its property, subject to all the mortgages and a preceding lease, dated in March, 1883, given by Clyne to the apartment association for the period of 99 years. This agreement was afterwards changed in several respects by another, made on the 14th of January, 1884, between the Barcelona Apartment Association, by Navarro, its president, and Lespinasse, its secretary, and by the Central Park Building Company, by the same person as president, and James Clyne, and J. F. Navarro, and the plaintiff, individually. By this agreement it was further agreed that Clyne should convey the land directly to the association, and that the association itself, with the written assent of the owners of at least two-thirds of its capital stock, should execute and deliver two other mortgages upon the property, to secure other bonds in the like amounts as those already executed by Clyne, to take the place of the bonds and mortgages executed by him, and that those bonds and mortgages should be delivered to be held in escrow, and afterwards canceled when it should turn out that the other bonds and mortgages mentioned in this agreement of the 14th of January were held to be valid, effectual, and available, according to their intent. To carry this object into effect, Clyne and his wife executed a deed, dated on the 14th of January, 1884, to the apartment association, conveying the title to the land to the association, subject to his preceding mortgages, and consents were secured from individuals claiming to be the owners of 11 out of its 16 shares of capital stock to the execution and de-

livery of these two final mortgages. Their consent was verified by the affidavit of the secretary, and filed in the office of the clerk of the county; and the mortgages were executed and delivered as provided for in this agreement, and in the first agreement, made on the 1st of December, 1883.

These mortgages were dated on the 14th of January, 1884, and acknowledged the next day, which was the date of the acknowledgment of the deed from Clyne to the association; and in this manner the association itself became the owner of the property, and the lease previously received by it was probably thereby extinguished, for the legal rule is entirely well settled, where the owner of a lesser or inferior estate receives a conveyance of the legal title itself, that the lesser estate is merged and extinguished by the acceptance of such superior title. This rule is subject to the qualification, in equity, that the continued existence of the lesser estate will be maintained where that is the object and design, at the time, of its owner. But in this instance no evidence appears to have been given of any intention on the part of the apartment association to preserve and maintain the continued existence of this lease; and, in the absence of such an intention, the legal rule would apply, by which the lesser estate becomes extinguished. *Hill v. Pitney*, 63 Barb. 200; *James v. Morey*, 2 Cow. 246; *Lynch v. Pfeiffer*, 110 N. Y. 84, 17 N. E. Rep. 402. But, whether the lease was extinguished or not, the apartment association accordingly was, by this conveyance of the legal title, placed in the situation where it had the ability to mortgage the entire fee of the property, subject to the preceding incumbrances existing in favor of other parties upon it; and, to attain that end, these two mortgages in suit were executed and delivered.

But the right of the plaintiff to enforce the payment of these mortgages for the advancement of moneys afterwards made by him on their security has been contested on the part of the apartment association, and also by shareholders who had subscribed and paid for shares entitling them to apartments in this building. This has proceeded, in a large degree, upon the objection that chapter 163 of the Laws of 1878, providing for the manner in which the property of corporations created under the act of 1848 and its amendments should be permitted to mortgage its property, had not been complied with, for want of the assent of two-thirds of the owners of its capital stock. But this objection does not appear to be well founded, although, by a finding of fact made by the referee, he has found that Navarro, who subscribed the assent for two shares, Clyne for one share, and Lespinasse for another, had paid no part of their subscription for these four shares. No certificates for these or other shares were issued by the association; and the simple subscription of the articles probably would not, of itself, be sufficient to create these persons shareholders in this association. It is not essential that the certificates themselves should be issued for the subscriber to become a stockholder in the association; but something more than a mere subscription, as the fact has been found in this matter by the referee, is necessary for that purpose. But further findings of the referee have established the additional facts that Navarro was the president, Lespinasse the secretary, and Clyne a trustee, of the Barcelona Apartment Association. They consequently were, by the action of the association, accepted as shareholders in it, and were entitled to be considered as such for the purposes of this assent. In *Burr v. Wilcox*, 22 N. Y. 551, the controlling fact was different from this case; for there the price of the shares was fully paid. But in *Wheeler v. Millar*, 90 N. Y. 353, the subscriber was in fact accepted as a stockholder, and had been elected as a trustee and secretary of the corporation, and engaged actively in the management of its affairs, and appeared upon the books of the corporation as a stockholder. This case does not substantially differ in these material respects from the facts upon which this last decision was made, rendering the three parties voting for this assent the owners of the shares, within the rule maintained by this authority. The other persons assenting appear to have purchased their

shares still more effectually; for substantial payments were made upon the purchase price, which was deemed sufficient, in the first case just cited, to render the subscriber a stockholder. And whether this was done by the payment of the money directly, or by work performed by them for this or other associations, is not an important circumstance, as long as the fact is that an actual consideration was parted with by the other persons for the shares claimed, and acted upon by them in giving the assents. The assents obtained in this manner represented 11 out of the 16 shares into which the stock or property of the association was divided. That was two-thirds of the shareholders, if not in number certainly in amount, and gave the legal sanction and authority of the association to the execution and delivery of these mortgages.

But if the persons giving their assent, as these shareholders did, were not in fact the owners of the shares represented by them and voted upon, still the mortgages appear to be legally supported; for it was a part of the arrangement or consideration upon which the association received the title to the land, under the deeds executed and delivered by Clyne and his wife, that these mortgages should in this manner be given. And the acts by which the agreement was carried into effect were contemporaneously performed; for, at the same time the deeds were executed and delivered, these mortgages were also executed and delivered to the plaintiff as a fulfillment of the consideration or agreement on which the deeds were made. The mortgages were not, therefore, to secure a debt contracted by the association in the course of its business, which is the class of cases provided for by the statute; but they were given, in effect, to secure the payment of a part of the purchase price of the property. And where the security is, in this manner, contemporaneously given, it has not been, either by express language or fair implication, included within the act of 1878; and such was intimated to be the construction which should be given to the act in *Sugar Co. v. Whittin*, 69 N. Y. 328, 336, 337. And this was, in substance, approved in *Coman v. Lakey*, 80 N. Y. 345. The referee was accordingly right in holding that the mortgages were not invalid because of any failure to comply with the requirements of this act.

Their enforcement has been further resisted under that part of the agreement of December, 1883, permitting the plaintiff to charge a commission upon the moneys to be advanced, amounting to 5 per cent. per annum. But it was not the intention, neither was it the language, of either of the agreements, that this charge could be made for moneys loaned by the plaintiff himself. What the commission was to pay for has been expressed in the agreement; and it was only to be charged "in case it shall be necessary for said McComb to furnish credit as security in order to raise money on said paper." Then "a commission of 5 per cent., in addition to interest, shall be allowed by said company therefor." This, as well as the preceding part of the agreement, indicates the understanding of the parties to have been that the commissions were to be paid only in case it became necessary for the plaintiff to furnish additional credit or security in order to raise the money on the paper of the association, or otherwise; and that, under the authorities, might well be stipulated for without rendering the indebtedness afterwards created under the agreement unlawful on account of usury. A similar point to this was examined and advanced in *Matthews v. Coe*, 70 N. Y. 239. And there being no reason to suppose, as there certainly is not, in this case, under the findings of the referee, that the commissions were designed as a mere cloak or cover for usury, the agreement for their contingent payment cannot be permitted to have this effect. In *Van Tassell v. Wood*, 12 Hun, 388, it was supposed that an agreement of this nature would be usurious. But this view was not followed, but, on the contrary, disapproved, in 76 N. Y. 614, reversing the preceding decision. No more of the evidence has been brought before the court upon this appeal than such as is included in the findings of the referee; and neither that evidence, nor these findings, support the inference that these stipulations

were made to reserve to the plaintiff a greater amount than the lawful rate of interest.

Mortgages in all respects similar to these two mortgages were placed upon the other seven apartment lots and buildings; and the proof upon the trial is found by the referee to have established the fact that between the 1st of December, 1883, and the 29th of May, 1884, the plaintiff advanced the sum of \$1,643,162.18, exclusive of any interest charged, and that the interest upon the moneys borrowed by him, and advanced, to promote the success of this enterprise, was the sum of \$94,816.83. And, of the moneys procured and advanced by him in this manner, it has been further found that there was used and applied to the construction of the Barcelona Apartment building the sum of \$207,399.24. These advances were made for more than the amount of the two mortgages executed by the association upon their security; and as the association had, before the commencement of the suit, failed to pay the debt as it was agreed to be paid, it was in default in the observance of the condition of the bonds and mortgages, and the plaintiff was authorized to institute the action which he did for the foreclosure of these mortgages, and the sale of the mortgaged premises; for no stipulation or condition in either agreement deprived him of the right to collect his advances made for this object in this manner. It was not necessary, neither does it appear that the referee has included within his decision any moneys or indebtedness as secured by the mortgages beyond that incurred by the advancement of these moneys from and after the 1st of December, 1883; and by the clear effect of the agreements, to which the mortgages were subordinated, and the assents given for their execution by the association, they were entitled to be held as security for these advancements. They were, in this respect, within the language of the assent of the shareholders sanctioning the execution and delivery of the mortgages. The money was supplied and used for the benefit of the association, certainly to the extent to which the mortgages were given for its security.

The referee has, however, in the judgment entered upon his decision, provided for the raising of so much money, beyond what will be necessary to satisfy these mortgages, as the plaintiff advanced for the use and benefit of the Barcelona Association. After receiving the title to the land from Clyne by the deed delivered to the association, and after these mortgages were in this manner executed and delivered by it to the plaintiff, the association declined to continue to hold the title which had been conveyed to it, and by resolution directed a reconveyance of the property to be made to Clyne; and such reconveyance was afterwards executed and delivered. But this action of the association could have no effect upon the execution and delivery of the mortgages, which had then become legal securities in the hands of the plaintiff; for he was permitted, without interference on the part of the association, to raise the money and make the advances which he did, up to the amount of the two mortgages, for the benefit of the association. It could not, as it did, through the action of the construction company and of Navarro, who acted throughout as the officer and agent of the association, receive these benefits in this manner, and afterwards deny the validity of the securities upon whose faith the advances were made. But, by the decision of the referee, he not only authorized and directed a judgment for the foreclosure and sale of the property included in the mortgage for the payment of the advances made by the plaintiff, together with the interest upon them, up to the full amount of the mortgages; but he directed the collection and payment to him, in like manner, of the additional sum required to satisfy the full amount advanced for the Barcelona Association. This was done under the effect given to a still further mortgage executed and delivered by the association to the Mercantile Trust Company, of the city of New York, to secure mortgage bonds of \$1,000 each. These bonds, it was held, the plaintiff had become entitled to for the residue of his advance over and above those secured by his mort-

gages; and upon that fact, although the bonds had not been delivered to him, but had been mostly withheld from him, under the authority of the apartment association, the referee, by his decision, and the judgment entered upon it, directed this residue to be raised and paid to the plaintiff. And the cases of *Insurance Co. v. Van Rensselaer*, 4 Paige, 85; and *Trust Co. v. Seymour*, 9 Paige, 538, have been brought to the attention of the court as authorities sustaining this part of the judgment. But they fail to do so; for it was no part of the plaintiff's cause of action, as that was presented by his complaint, either to state or enforce this obligation. But the action was brought for the foreclosure of these mortgages, or, in case they should be held to be invalid, then for the foreclosure of the mortgages previously given by Clyne, and delivered in escrow for the plaintiff, to secure the same advances. That is, substantially, all that was within the issues presented by the pleadings in this action; and the referee was authorized to go no further than to decide and dispose of those issues.

Some other objections have been raised to maintain the appeal, but they are, in effect, disposed of by what has already been said, and need no further attention for the disposition of the case. So much of the judgment as included the excess of the advances made by the plaintiff for the Barcelona Association, over and above the amount, with interest, secured by his mortgages, was unauthorized, and should be reversed. But, with this modification, the judgment seems to have the support of the facts which have been found by the referee, and it should be affirmed, without costs of the appeal. All concur.

McCORMEY v. CORDOVA APARTMENT ASS'N et al. SAME v. LISBON APARTMENT ASS'N et al. SAME v. MADRID APARTMENT ASS'N et al.

(*Supreme Court, General Term, First Department. April 18, 1890.*)

Appeals from judgments on report of referee.

Argued before BRADY, P. J., and BARTLETT and DANIELS, JJ.

William G. Choate and George H. Adams, for appellants. Thomas H. Hubbard, for respondent.

DANIELS, J. These cases depend upon the disposition which should be directed to be made in the action in favor of the same plaintiff against the Barcelona Apartment Association. The mortgages are, for the same reasons as have been given in that case, entitled to be maintained. But the judgment directed in favor of the plaintiff should be in like manner modified, by excluding the residue of the moneys advanced by the plaintiff over and above those secured by the bonds and mortgages executed and delivered to him; and, as so modified, the judgment should be affirmed, without costs of the appeal to either party. All concur.

MCBRIDE et al. v. LANGAN et al.

(*Supreme Court, Special Term, New York County. April 14, 1890.*)

ARREST—IN CIVIL ACTIONS—FRAUD.

A complaint in an action for the price of goods sold, which alleges that defendants were guilty of fraud in contracting the debt, and that they have disposed of their property with intent to defraud their creditors, is sufficient, when supported by proper proof, to support a warrant of arrest.

At chambers. Action by Harry McBride and Charles F. Droste, partners, doing business as produce commission merchants, under the firm name of McBride & Co., against Patrick T. Langan, George E. de le Ree, and Joseph P. Langan, partners under the firm name of P. T. Langan & Co., for the price of goods sold and delivered by plaintiffs to defendants. Plaintiffs alleged that defendants fraudulently contracted the debt for the goods purchased by them, and filed an affidavit specifying the alleged fraudulent acts, and alleging "that in the month of May, 1887, the defendants formed their copartnership for the purpose of carrying on business as produce commission merchants

with a capital of \$17,176.71. It appears from the schedules signed, verified, and filed by the defendants in the office of the clerk of the court of common pleas in November, 1888, that their liabilities were \$22,623.91 larger upon the day of their assignment than the actual value of their assets, thereby showing a loss in the said business since its formation, on May 1, 1887, of \$39,800.62. That deponent is familiar with the nature of the business conducted by the defendants, and avers that, in view of the good trade, the general experience of merchants in the same line, and a rising market, which facts existed during said copartnership, it was not within the range of possibilities for the defendants to have lost within so short a space of time so enormous a sum of money, in view of the fact, as it appears from their books, that they did a yearly business of only about \$100,000. * * * That on or about October 2, 1888, the defendants caused two actions to be commenced against them in the supreme court held in this county,—one by Catharine Langan, wife of the defendant Patrick T. Langan, for the sum of nine thousand dollars, upon two promissory notes payable to her upon demand, one for the sum of \$1,000 and the other for the sum of \$8,000, purporting to have been signed by the defendants on May 1, 1888; and the other action, Josephine de le Ree, wife of the defendant George E. de le Ree, for the sum of six thousand dollars, likewise upon two promissory notes payable to her on demand, one for the sum of \$1,000 and the other for the sum of \$5,000, also purporting to have been signed by the defendants on May 1, 1888,—all of said notes bearing that date, and sworn to in the complaint in said actions by the said Catharine Langan and Josephine de le Ree as having been executed and delivered on that day. That, although the said two judgments were entered after the said assignment, it was the intention of the defendants, as deponent is informed by the defendant De le Ree, and verily believes, to have the said judgments entered and execution issued thereon before the assignment, so as to establish a first lien, when the defendant De le Ree protested against such a course. Deponent further says that the said defendant De le Ree has since caused the said judgment in favor of his wife to be canceled, and has admitted to the plaintiffs and to others that the said promissory notes were written out by him and signed by the said firm on or about October 1, 1888, and were executed and delivered without any value therefor, but with the fraudulent intention of having the said two actions commenced thereon, and the amounts thereof collected for the benefit of the defendant by execution. That the said Josephine de le Ree and Catharine Langan have presented their said claims to the assignee duly verified, and, while the said Josephine de le Ree has withdrawn hers, the said Catharine Langan demands a distributive share of the assets in proportion to the amount of her alleged claim or judgment. That the said defendant De le Ree has further admitted to the plaintiffs and to others that the financial affairs of said firm of P. T. Langan & Co. were in such a condition in October last as not to necessitate an assignment for the benefit of creditors; that they were solvent, and could have met all of their firm obligations. Deponent further says that at the meeting of the creditors of said insolvent firm hereinbefore referred to the defendants offered to pay the creditors twenty-five per cent. in cash, and twenty-five per cent. in notes unsecured, which was declined. That the books kept by the defendants in their said business failed to show any entries of the alleged loans to the said firm by Robert Dorian, Catharine Langan, and Josephine de le Ree, or either of them, nor any payments by the defendants to them, or either of them. Wherefore deponent charges that the defendants were guilty of a fraud in contracting or incurring the said liability, and that since the making of the said purchase, or in contemplation of making the same, have removed or disposed of their property with intent to defraud their creditors."

An order for the arrest of P. T. Langan was granted, which he now moves to vacate. For decision on motion to amend complaint, see *post*, 554.

Francis W. Judge, Jr., for plaintiffs. *J. Woolsey Shepard*, for defendants.

BARRETT, J. This case differs from those where no averments of fraud were made in the complaint. The court there was without jurisdiction to grant the order of arrest. Here, however, averments of fraud are made, though imperfectly. The statement that the defendants were guilty of fraud in contracting the debt may not be issuable, but the statement that they have disposed of their property with intent to defraud their creditors is. It would, of course, be insufficient, standing alone and without proofs, to warrant an order of arrest. With proper proofs, however, *dehors* the complaint, it was sufficient to confer jurisdiction. It is even questionable whether the averment that the defendant was guilty of fraud may not be sufficient to confer jurisdiction, (*Valentine v. Richardt*, 6 N. Y. Supp. 197, 953,) and whether the remedy is not to make more definite, though my own opinion is that such a statement is not the statement of an issuable fact. As, however, there is a statement of an issuable fact as to the disposition of property, and as the case cited seems to hold that the general allegation in the language of the Code is sufficient, I feel bound to deny the motion to vacate, with costs.

MCBRIDE et al. v. LANGAN et al.

(*Supreme Court, Special Term, New York County. April 14, 1890.*)

ARREST—IN CIVIL ACTIONS—FRAUD—PLEADING.

Where the complaint in an action for goods sold alleges, in the language of Code Civil Proc. N. Y. § 549, subd. 4, providing for arrest in civil cases, that defendants were "guilty of a fraud in contracting or incurring the liability," it may be amended so as to state the facts constituting the fraud.

At chambers. Action by Harry McBride and Charles F. Droste, partners under the firm name of McBride & Co., against Patrick T. Langan and others, partners under firm name of P. T. Langan & Co. A motion having been made to dismiss the complaint, in that the averment that defendants "were guilty of a fraud in contracting or incurring the liability" did not state sufficient facts, plaintiff moves for leave to amend. For motion to vacate order of arrest, see *ante*, 552.

Francis W. Judge, Jr., for plaintiffs. *J. Woolsey Shepard*, for defendants.

BARRETT, J. As upon the other motion I have upheld the order of arrest, there can be no good reason for refusing the amendment. The observations as to jurisdiction made in disposing of the other motion apply to this. It is not a case where we are asked to insert an allegation of fraud in a complaint which is simply upon contract, but in a complaint which attempts to set up fraud, but does it insufficiently. The plaintiffs thought they might plead the language of the statute,¹ and certainly the case cited upon the motion looks as though they had some justification for their practice. I think, however, that in that case the court scarcely meant to go as far as the plaintiffs now contend, and that the observations of the court must be held to refer to the facts actually in the complaint; for clearly the complaint there showed fraud as matter of fact independent of the general averment in the language of the statute. The amendment here asked should be granted, but I cannot see any justification for the suggestion that it should be without terms. The plain-

¹ Code Civil Proc. N. Y. § 549, subd. 4, provides for arrest "in an action upon contract, express or implied, * * * where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability."

tiff should be required to pay the trial fee upon the trial which resulted in his withdrawal of a juror for the purpose of making this motion, and \$10 costs of this motion.

MAYOR, ETC., OF THE CITY OF NEW YORK v. NATIONAL BROADWAY BANK.

(Supreme Court, General Term, First Department. May 5, 1890.)

1. MUNICIPAL CORPORATIONS—DEPOSIT OF CITY FUNDS—POWERS OF CHAMBERLAIN.

Laws N. Y. 1866, c. 623, (an act to regulate the deposit by the chamberlain of New York city and county money,) provides that the banks in which the money is deposited shall proportionately pay the rent of the office of chamberlain and the salaries of his clerks and deputy, but says nothing as to the matter of interest. *Held*, that the chamberlain could stipulate for interest on deposits.

2. SAME—INTEREST.

From the passage of the act until November, 1871, defendant bank regularly paid to the chamberlain 4 per cent. on deposits. It thereafter continued to pay its proportion of the expenses of the chamberlain's office, but paid no interest, for the reason that the city comptroller denied the chamberlain's authority to collect it, and directed the bank to add it as a credit to the deposits. Defendant's counsel advised it not to make the payments or credits, but to send monthly statements to the comptroller and chamberlain of the interest due. A communication of the comptroller to defendant was referred by the directors of the latter to its president, who had become the chamberlain, who, in a letter to the comptroller, said the interest was the result of a contract between the chamberlain and the bank. No action was taken by the stockholders or directors denying the existence of an agreement to pay interest or defendant's liability. *Held*, that there was an agreement to pay interest, and that, as it was not illegal, defendant could not, after having the benefit of the deposits, question the chamberlain's authority to make the agreement.

3. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

The evidence consisted of a stipulated statement of facts, and it was stipulated that plaintiff gave *prima facie* evidence of these facts, and that defendant objected to parts thereof as incompetent and irrelevant, and that in case of defendant's taking an appeal the record should be so framed as to preserve all its rights of objection and exception. No objections were brought to the court's attention on the trial. Moreover, proof of defendant's liability was not dependent on the objectionable evidence. *Held*, that the judgment would not be reversed by reason of the admission of this evidence.

Appeal from circuit court, New York county.

Action by the mayor, etc., of the city of New York, against the National Broadway Bank of the city of New York. From a judgment for plaintiff defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Thomas Allison, for appellant. Simon Sterne and John H. Strahan, for respondent.

DANIELS, J. The action was brought to recover interest upon deposits of money belonging to the city and county of New York made with the defendant. These deposits commenced about the first of the year 1861, and interest was paid by the defendant upon the deposits to the chamberlain of the city of New York up to and including the time of the enactment of chapter 623 of the Laws of 1866.¹ The payments of interest preceding that date do not appear to have been either precise or regular, but they were paid to the chamberlain from time to time, and probably amounted to the rate of 4 per cent. upon the deposits. But no accounts were produced showing the amounts which had been paid and received, and the transactions prior to the enactment of this law were not clearly or certainly proved. But from the enactment of the law of 1866 to the last of November, 1871, the interest upon the deposits was regularly paid by the defendant to the chamberlain; and this in-

¹An act to regulate the deposit by the chamberlain of New York city and county money.

terest consisted of 4 per cent. upon the daily balances remaining on deposit to the credit of the city and county with the defendant. From the evidence in the case, consisting mainly of a stipulated state of facts, the inference is plainly supported that there was no objection or dissent on the part of the defendant during that period to the payment of this interest, but it was regularly paid at the expiration of each month, as it had accrued on the amount of the deposits; and from the fact of these payments it may be inferred, as it was at the trial, that an agreement had been entered into on the part of the bank with the chamberlain for the payment of this rate of interest. In *Esterly v. Cole*, 8 N. Y. 502, it was said in the course of the opinion that "an agreement for interest may be inferred from the course of dealing between the parties, as where interest has before been charged and allowed under the like circumstances." These deposits were continued from the last of November, 1871, to the 17th of June, 1873, but no interest was paid upon them during this interval, except that which accrued for the month of May, 1873, and that appears to have been paid because of the directions contained in section 85 of chapter 835 of the Laws of 1873, that so much interest should be reserved on the deposits. A sufficient amount to defray the defendant's proportion of the expenses of the chamberlain's office was paid from time to time during the interval already mentioned; and this, as well as the payment of the interest for the month of May, 1873, was credited to the defendant in the disposition of the action, against the interest which it was found had accrued on these daily balances, and then leaving a final balance amounting to the sum of \$186,684.18.

But the omission to pay the monthly amounts accruing on these balances for interest from the end of November, 1871, to the month of May, 1873, did not arise out of any denial on the part of the defendant that it had become bound to pay this interest on the daily balances of the deposits. There was no denial at that time, or in the subsequent dealings between the financial department of the city and the bank, of its having obligated itself by agreement to pay this interest. But the failure to pay the interest arose out of a disagreement between the comptroller of the city and the chamberlain, the former denying the right of the latter to collect the interest, and insisting that it could only be drawn on the warrant of himself and the mayor; and where that might be necessary, as it was as to the disposition of county moneys, that the warrant should also be signed by the clerk of the board of supervisors. And by a letter which the comptroller wrote to the bank on the 16th of December, 1871, the bank was forbidden to pay the interest accruing on the deposits otherwise than upon the authority of warrants signed in that manner; and it was requested, as the interest accrued at the end of each month, that it should be credited to the accounts of the city and county, and that information should be given to the comptroller of the amount of such credits. The chamberlain dissented from this denial of his authority to receive the accruing interest from the bank. But there was no disagreement as to the liability of the bank to pay, or the amount of the interest, but it related wholly to the authority by which it was to be drawn from the bank; and in consequence of this disagreement the bank omitted to pay out the interest, or to add it as a credit to the deposits, the chamberlain claiming that the interest should be proportionately applied to the city and the county money, and the bank was not disposed to attempt that apportionment, or to give the requested credits. Beyond this, further substantial evidence was given tending to support the averments that the defendant had agreed to pay this rate of interest upon the deposits of the city and county money; for, after the letter of the comptroller to the bank of the 16th of December, 1871, the president of the bank is stated to have waited personally upon him as to the subject-matter of that communication. And it is to be inferred from that circumstance, as well as other correspondence, that the president of the bank had an interview

with the comptroller concerning the disposition of this accruing interest. And from the letter of the president to the comptroller on the 30th of December, 1871, the further inference is justified that the president of the bank had submitted to the comptroller an opinion of the late Judge EDMUNDS concerning the dispute which had arisen between the comptroller and the chamberlain as to the manner in which the interest should be drawn from and paid by the bank; for by the letter the comptroller was requested to return the opinion which had been obtained from Judge EDMUNDS. This opinion reviewed the state of affairs arising out of the disagreement with considerable elaboration; and it is to be presumed from its contents that the entire subject, including the obligation of the bank to pay interest upon the daily deposits, had been presented to Judge EDMUNDS for his consideration and opinion; and that, as a part of the case presented to him, the obligation of the bank to pay this interest had, as a matter of fact, been conceded. If it had not been, there is no reason for supposing that the language employed in the opinion concerning the obligation of the bank would have been used by the counsel. That language carries with it a very decided implication that the counsel had been requested to advise the bank what it should do as to the interest which it was liable to pay, accruing on the deposits after the last of November, 1871. Indeed, if that had not been the design, but the bank was under no obligation to pay interest on these deposits, then there was no necessity whatever for consulting counsel upon the subject. That was not the consultation which had taken place, but it was to ascertain what the bank should do as to this interest, in view of the disagreement existing between the chamberlain and the comptroller; and in the opinion returned by him to the bank, which does not appear to have been dissented from on the part of the bank, he refers to the fact of the defendant having been selected as one of the depositories of the public moneys under this law of 1866; and then adds: "And a contract was made between him and the bank that interest should be paid on the monthly balances. That contract has been carried out now for several years by a computation of the interest earned every month, and the payment of it to the chamberlain, who, out of the amount thus received, has paid the expenses of his office, and the balance into the treasury. Now, however, the comptroller has given notice to the bank not to pay any more of that interest to the chamberlain, but to add it to the amount on deposit, and the chamberlain has given notice to the bank that it must not obey those orders of the comptroller, but must continue to pay over the interest to him as heretofore; and my opinion is asked by the bank what it shall do under the circumstances." And, after referring to the different sources from which the moneys deposited were from time to time obtained, it is further stated that "it is on moneys belonging to all three of these ownerships that interest is earned, and when paid over to the chamberlain, as has heretofore been done, the distribution of it among the parties by whose moneys it has been earned has devolved upon that officer." And by way of conclusion the suggestion is made, not that the bank could be exonerated from the obligation of paying interest upon the deposits, but "that those officers be seen, and some arrangements be effected by which the difficulties may be obviated; but, if that cannot be done, then I advise the bank (they first paying their proportionate share of the expenses of the chamberlain's office, for by accepting the deposits the bank has bound itself to do so) to refuse to comply with the comptroller's demands, and also refuse to pay the interest to the chamberlain, but at the end of the month to send to comptroller and to the chamberlain a statement of the amount of the interest then due, after deducting such expenses, with a notice that the bank will take immediate measures to obtain leave to pay the money into court for the benefit of whom it may concern." And these statements all concur in maintaining the continued liability of the bank to pay interest upon the deposits.

On the 3d of February, 1872, a further communication reiterating his previous requests was made by the comptroller to the bank; and it is stated in the stipulation that this was considered by the directors, whose only action taken thereon was to refer the same to the chamberlain. At that time the president of the bank had become the chamberlain, and it was to him that this subject had in this manner been referred by the directors. And on the 7th of February, apparently under this authority, he wrote a letter to the comptroller stating that the letter of the 3d had been received "in relation to the question of interest on the deposits of city and county funds, and I am as well aware as you can be of the necessity of having some definite rules established in regard to that interest. That interest is the result, not of any statutory direction or enactment, but is the product of bargains made by the chamberlain with banks which he may select as depositories of the funds in his hands, and all of it belongs to the owners of the principal of these funds, excepting only so much as he may by law be authorized to deduct for the expenses of his office." In writing this letter, he was acting as much under the authority of the directors of the bank as he was in his capacity of chamberlain; and what he in this manner stated in the communication to the comptroller was warranted by the fact that the directors had submitted the subject to him; and his statement accordingly was evidence against the bank that bargains had in fact been made by the chamberlain with the depository banks for the payment of this interest; and, as it appeared further by the stipulation that no action had been taken by the stockholders or the board of directors of the defendant, as to the interest on the daily balances between the 30th of November, 1871, and the 27th of May, 1878, the conclusion necessarily follows that no change in this state of the affairs had taken place on the part of the bank. It had in no manner denied the existence of an agreement to pay interest upon the balances, nor its liability to make such payments whenever the dispute between the chamberlain and the comptroller should be adjusted, and the payments could be made with the certainty that they were authorized, and would be allowed in satisfaction of the claim.

Evidence was given by Mr. Palmer, the president of the bank, concerning these transactions, but it did not definitely result in anything which was said to relieve the bank from the obligations imposed upon it by the agreement to pay interest. As to that obligation, if it was created at all, it was not by this witness, but probably by the cashier of the bank; and that it was in fact created was proved with a very satisfactory degree of clearness by the circumstances and correspondence already referred to; and the right to recover the accrued interest became vested in the city itself so far as it should be derived from the deposits of moneys belonging to the county. The act of 1866 did not direct the chamberlain to reserve, either for the city or the county, interest upon the deposits which he should make. Neither did it forbid such a reservation of interest, or the making of contracts with the banks by which they should become obligated to pay interest. But the omission of the act to direct interest to be reserved did not deprive the chamberlain of the authority, when that could be done, to stipulate for the reservation and payment of interest upon the balances remaining on deposit of the public moneys. Certainly before the passage of this act such an agreement could legally be made, for it was incidental to the deposit of the moneys and the enjoyment of the benefit of such deposits by the banks selected to receive them. And the act of 1866 in no respect attempted to abridge or divest the chamberlain of this authority. It did provide that the banks in which the deposits should be made should proportionately pay the rent of the office of the chamberlain, and the salaries to be fixed by him of his clerks and a deputy chamberlain. But no negative language was employed forbidding the chamberlain to reserve still more beneficial terms for the city for the use of its moneys remaining on deposit; and, as long as the act neither in language nor theory prohibited him from secur-

ing an obligation for the payment of interest upon the daily balances of the deposits, he was at liberty, when that could be done, to stipulate for the reservation and payment of that interest. The case in this respect is within what was said in *U. S. v. Tingley*, 5 Pet. 115, that "the United States, being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers." Id. 128. Without the act of 1866, the chamberlain was clearly authorized to secure the best terms he could for the benefit of the city and county from the depositories of their moneys; and, as that act in no manner forbade this to be afterwards accomplished, it is clear that it did not abrogate this preceding authority incidental to the city and county as bodies politic and corporate. And what was decided in *People v. Board*, 75 N. Y. 38, in no way draws in question this authority. There the right determined depended wholly upon the authority of the statute, and it was held to be alone obligatory upon the board of police representing the city. The legislation considered was held to limit the power allowed to be exercised, and the relator's rights were controlled by that authority instead of what had transpired between himself and the other officials of the city. The case has no application to this controversy; neither has that of the *Shepherd's Fold v. Mayor, etc.*, 96. N. Y. 137.

There was nothing illegal, or against the policy of the law, in the reservation of interest upon these deposits, and the bank has derived the benefit expected to be secured from the deposits under the agreement which was entered into. And, after deriving this benefit in this manner, the law will not permit it to resist this demand for interest by taking the ground that the chamberlain was not authorized to make the agreement which was entered into for its payment. *Woodruff v. Railway Co.*, 93 N. Y. 609, 619; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Raft Co. v. Roach*, 97 N. Y. 378; *Mayor, etc., v. Sonneborn*, 113 N. Y. 423, 21 N. E. Rep. 121.

The stipulation used upon the trial contained other correspondence passing between the chamberlain and the comptroller, and between the former and the mayor, which was not competent evidence upon the trial of this action. Neither was it pertinent to prove what had taken place with the other depository banks concerning the payment and collection of interest on the daily balances. But the admission of this evidence does not require the reversal of the judgment, for the liability of the defendant for the payment of the interest was so clearly made out as to leave it in no sense dependent upon any of the evidence which should have been omitted upon the trial. This evidence was embodied in the stipulation with the other which was pertinent and relevant to the controversy; and it was stipulated that the plaintiff gave *prima facie* evidence of the facts mentioned in the stipulation. But as to the parts of the stipulation which were not pertinent to the issues in this action, as well as to other portions which were, it is stated that the evidence was objected to under the foregoing stipulation as *res inter alios acta*, and exception taken. But it does not appear that either of these objections were brought to the attention of the court upon the trial, or that in the course of the trial any exception was made to the admissibility of so much of the stipulation as has in this manner been referred to. Both the objections and the exceptions have probably been inserted in the case under another stipulation dated on the 1st of June, 1887; for by that it appears that the matters contained in the stipulation of facts dated on the same day were, "upon the express understanding and agreement that, in case the defendant shall appeal or make any motion herein, then any case, minutes, or record of the trial, which may be used on such appeal or motion, shall state that plaintiffs offered evidence of the facts covered by said stipulation, and that defendant duly objected thereto, and duly excepted to the overruling of defendant's objection, and such

case, minutes, or records shall be made in substance and forms so as to save all rights of objection and exception to the defendant, and shall be so framed to preserve all such rights." And from that it is obvious that the objections and exceptions were not considered by any ruling of the court, but were inserted in this manner under the authority of the agreement made between the counsel. And it would be conspicuously unfair to allow the judgment to be disturbed because of the admission of these several matters when the attention of the court had not been called to any question involving the point, but they were inserted in the case only because of the stipulation entered into between the counsel for the parties. Many other authorities have been cited by the counsel in the elaborate briefs presented on behalf of each of the parties. But they do not require to be noticed, for the reason that those which have already been mentioned appear to be decisive of the appeal; and the same may be said as to subordinate objections which have not been referred to, for those which have been considered control the disposition of the action; and, as the judgment appears to be right, it should be affirmed. All concur.

PEOPLE *ex rel.* SAYRE v. MCCLAVE *et al.*, Police Commissioners.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

MUNICIPAL CORPORATIONS—DISMISSAL OF POLICEMAN.

Where it appears that a policeman was so intoxicated as to be unfit for duty, his dismissal from the police force will be sustained, though the evidence goes to show that his intoxication was produced by very moderate drinking; he having been rendered peculiarly susceptible to the effects of liquor by an injury which he had received.

***Certiorari* to police commissioners.**

Action by the people, on the relation of George W. Sayre, to review the action of John McClave and others, police commissioners of the city of New York, in dismissing the relator from the police force.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Louis J. Grant, for relator. William H. Clark, (Edward H. Hawks, Jr., and Charles A. O'Neil, of counsel,) for respondents.

DANIELS, J. The relator was tried upon the charge that he became so much intoxicated as to be unfit for duty when he was detailed for service at the twentieth election district of the eighth assembly district. The charge was not only proved to be true, but it was conceded to be so by the relator. The preceding evening he had been on duty at a meeting held at the Cooper Institute building. During that night, he slept but little, and took what he states to have been a "whisky sour" before trying to eat his breakfast, and another afterwards, which produced his intoxication. It was proved that he had previously been injured, which may have rendered him more susceptible than he otherwise would have been to the effects of spirituous stimulants. But, if that was his condition, it should have impressed him with the conviction that he could not safely make use of the stimulant which he took. It was a circumstance which, if it had been heeded by him, would have led him to abstain from what he had reason to know he could not indulge in the use of with safety to himself, and his position on the force. He voluntarily failed to avoid his danger, and, under the authority of the law, must suffer the consequence following that failure. *People v. French*, 110 N. Y. 494, 18 N. E. Rep. 133; *People v. Same*, 23 N. E. Rep. 1061.

It has been assumed by the relator's counsel that so wide a departure from the rule maintained by these cases took place in the decision of *People v. French*, 23 N. E. Rep. 1058, (decided by the same court in March last,) as to relieve him from this adverse action of the commissioners. But the difference in the cases was considered to arise out of materially distinguishing

facts, and not in the law. That still remains as it was pronounced in the first of these authorities, and it sustains the action of the commissioners.

As the relator had been a faithful officer of the police force, this action may be considered severe for a first substantial breach of discipline by him. But whether it should be or not was for the commissioners to judge, and this court is not permitted to interfere with that judgment. The order of the commissioners should therefore be affirmed.

VAN BRUNT, P. J. Although, in my opinion, the severe punishment inflicted upon the relator was entirely undeserved, and far exceeds any proper punishment for his offense, I do not see how we can interfere. He had been guilty of a breach of discipline, and the amount of punishment to be inflicted therefor was entirely discretionary with the commissioners.

BRADY, J., concurs.

PEOPLE *ex rel.* MANNING v. MCCLAVE *et al.*, Police Commissioners.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

1. MUNICIPAL CORPORATIONS—DISMISSAL OF POLICEMAN.

The board of police commissioners of the city of New York is the judge as to whether dismissal from the police force is the proper penalty for a violation by a policeman of the rules of the department.

2. SAME.

It is no excuse for such violation that the policeman made a mistake of judgment.

Certiorari to police commissioners.

Proceedings by the people *ex rel.* Thomas F. Manning against John McClave and others, constituting the board of police commissioners of the police department of the city of New York. Relator was dismissed from the police force on a charge of having failed to arrest a man charged with a criminal offense, and to report his absence from his post, as required by the rules of the department.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

L. J. Grant, for relator. William H. Clark, (Edward H. Hawke, Jr., Charles A. O'Neill, and J. J. Delany, of counsel,) for respondents.

VAN BRUNT, P. J. The admissions of the relator show that he violated the rules of the police department, and it is no excuse to say that such violation was a mere mistake of judgment. The board of police was the judge of the amount of punishment to be inflicted for such violation, with which this court cannot interfere. The proceedings should be affirmed, and the writ dismissed. All concur.

NOYES v. MORRIS *et al.*

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

1. FRAUDULENT CONVEYANCES—SUFFICIENCY OF EVIDENCE.

That a conveyance for an expressed valuable and adequate consideration was made two days before the grantor executed a general assignment for the benefit of creditors, that she on the same day conveyed other property to third persons, and that, several months before the assignment, she gave notes aggregating a large sum, constitutes no evidence of fraud on the part of the grantee.

2. SAME—DECLARATIONS OF GRANTOR.

In a suit to set aside a conveyance as fraudulent, evidence as to the acts and declarations of the grantor after the execution of the deed was properly excluded, as against the grantee, when there was no proof of a conspiracy between them, and no evidence that the grantor was still in possession at the time.

2. TRIAL—FINDINGS OF FACT.

The decision of the court in an equity cause which is tried without a jury, that upon the whole evidence plaintiff fails to make out a case, and its judgment dismissing the complaint, constitute substantially a finding of the facts.

Appeal from special term, Albany county.

Action by Levi S. Noyes against Abram V. Morris, Robert Felthousen, and others. Plaintiff appeals from a judgment dismissing his complaint.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

E. F. Bullard, for appellant. *M. L. Stover*, for respondents.

MAYHAM, J. Appeal from a judgment entered upon the dismissal of the plaintiff's complaint at the trial. The action was brought to set aside certain deeds of conveyance of real estate, made by Adam W. Kline and Bata A. Kline to Abram Morris, and by Morris to Robert Felthousen; also to set aside a general assignment by Bata Ann Kline to Julius Wasserman for the benefit of creditors. On the trial the plaintiff put in evidence a deed from Bata A. Kline and Adam W. Kline, her husband, to Abram V. Morris, dated December 8, 1883, conveying the premises described in the complaint, reciting a consideration of \$15,000, and subject to a mortgage of \$2,500. Plaintiff also read in evidence the record of a deed dated December 8, 1883, from Bata A. Kline and Adam W. Kline, her husband, to Thomas Liddle, conveying the factory property in Amsterdam, reciting a consideration of \$40,000, subject to a mortgage of \$25,000 to be deducted from consideration as expressed. Plaintiff also puts in evidence an assignment for the benefit of creditors, executed by Bata Ann Kline to Julius Wasserman, dated December 10, 1883, which directed the assignee to pay the debts of the assignor in classes as therein specified. The plaintiff also put in evidence three judgments against the defendant Bata A. Kline in favor of John Consalus, one entered July 24, 1883, for \$2,762.26, on which an execution had been issued, and returned unsatisfied January 24, 1884; also a judgment against B. A. Kline entered January 5, 1887, on four notes, dated, respectively, August 8, 1883, September 1, 1883, September 14, 1883, and October 25, 1883. Plaintiff also put in evidence a judgment for \$6,309.63, roll filed January 10, 1884, in favor of John Consalus against Bata A. Kline, being for the amount of four notes made by B. A. Kline, dated, respectively, September 8, 1883, September 11, 1883, September 20, 1883, and September 12, 1883. The plaintiff also put in evidence an assignment, executed by John Consalus to this plaintiff of each of the above-mentioned judgments, dated July 28, 1883. The plaintiff also read in evidence a deed from A. V. Morris to the defendant Felthousen, dated April 22, 1884, recorded May 17, 1886, conveying the premises described in the complaint, expressing a consideration of \$15,530. The plaintiff also put in evidence the testimony of Bata A. Kline taken before a referee in proceedings supplemental to execution, February 24, 1884. This evidence was objected to by the defendant, and received by the court against Mrs. Kline only. There was some evidence given by the plaintiff tending to show that the premises conveyed to Morris were worth at the time of the conveyance \$22,000 to \$23,000. The plaintiff upon this evidence rested his case. The defendant's counsel moved to dismiss the complaint upon the following grounds: *First*, that there was no evidence of fraud on the part of any one in the transaction; *second*, that the plaintiff had failed to prove any facts upon which fraud could be predicated; *third*, that plaintiff had failed to prove the cause of action set forth in the complaint; *fourth*, that there was not sufficient evidence on the question of fraud to authorize the submission of the question to the jury; *fifth*, that the plaintiff had no right to maintain the action; *sixth*, that under the statute of 1858 this action could only be maintained by the assignee. The court held that there was no evidence of fraud, and declined to rule that the *onus* was upon Felthousen to show that he purchased in good faith, and

that the fact that there was no change of possession throws the *onus* upon the grantee. The court held that there was no evidence in the case to show that he did not purchase in good faith, and declined to hold otherwise, and dismissed the complaint. There was no request to submit the question of fraud to the jury, but the plaintiff requested the court to rule and decide that, if Mrs. Kline intended to commit a fraud by giving the deed, the *onus* was upon Morris and Felthousen to show that they bought in good faith.

So far as we can see, there was no evidence offered in the case that could sustain the allegation of fraud, if we exclude the testimony of Bata A. Kline, taken before the referee on proceedings supplemental to execution. That evidence was excluded, except as against her, and was not before the court for consideration as against the grantees, and it is therefore insisted by the plaintiff that its exclusion was error. The rule seems well settled that the acts or declarations of a grantor after the grant, in the absence of proof of a conspiracy between the grantor and grantee or assignee, are not competent as against the grantee or assignee in possession, to invalidate the grant or assignment. In *Cuyler v. McCartney*, 40 N. Y. 226, the court of appeals, by WOODRUFF, J., uses this language: "I concur fully in the proposition that, after the execution and delivery of an assignment for the benefit of creditors, and the entry of the trustees upon the performance of the trust, * * * the assignor cannot, by his declarations or admissions out of court, invalidate the assignment. * * * On such evidence the assignees may legally say, as to us, the allegation is wholly unproved." Declarations of a vendor after sale and delivery of possession are not competent evidence against a vendee in an action wherein the sale is attached for fraud. *Burnham v. Brennan*, 74 N. Y. 597. See, also, *Jacobs v. Remsen*, 86 N. Y. 670. Declarations of parties at the time of a transaction are usually receivable as part of the *res gestæ*. But declarations of one of the parties at another time, and in the absence of the other, are not admissible. *Ogden v. Peters*, 15 Barb. 562. "All the cases agree that declarations made by the person under whom the party claims, after the declarant has parted with his rights, are utterly inadmissible to affect any one claiming under him." Phil. Ev. (1 Cow. & H. Notes,) note 194, subd. 3. This rule seems so universal as not to require further citations of authorities. It is elementary, and founded upon most obvious reason and propriety. To this rule there is an exception when the grantor remains in possession; after the grant, his declarations are sometimes competent to prove fraud. But before such declarations can be received for that purpose it must appear distinctly that the declarant is an occupier at the time. *Den v. Pickett*, 3 Dev. 6; Phil. Ev. (1 Cow. & H. Notes, 275.) This is not in conflict with *Loos v. Wilkinson*, 110 N. Y. 210, 18 N. E. Rep. 99. In this case plaintiff was permitted to prove declarations of the grantor while in possession, the possession being established beyond question, and that rule was sustained on appeal. But the court put their ruling expressly upon the ground that at the time of the declaration the grantors were in possession, and the deed was purposely kept from record. In the case at bar no such facts are proved. The allegations in the complaint that the grantor retained the possession of the premises after conveyance are denied in the answer, and the plaintiff offered no evidence upon that subject, except that of witness Flansburgh, who says: "They continued to occupy the same for several years, I think." This evidence does not come up to the rule as laid down in *Den v. Pickett*, *supra*. Nor is it sufficient to bring the case within the rule stated in *Loos v. Wilkinson*, above cited. If the above conclusions are correct, then the evidence fails to establish fraud, and the plaintiff could not legally recover.

This brings us to the consideration of the remaining question raised in this action: Had the judge in this class of cases a right to dismiss the complaint summarily upon the trial, or should he have formulated findings of facts and

conclusions of law, upon which a decree could have been entered? The action was purely an equitable action, and all the relief asked for was of an equitable nature or character. It was therefore an action triable by the court, and neither party was entitled to a trial by a jury. *MacNaughton v. Osgood*, 114 N. Y. 577, 21 N. E. Rep. 1044; Code Civil Proc. § 968. The questions of fact arising upon the issue might have been directed by the court to be tried by a jury, (Id. § 971,) but no issues were framed and no questions formulated for the jury; and, even if the issues had been framed and heard by a jury, the court would have been called upon to pass upon, and might have adopted, rejected, or modified, their verdict. In such case the action would have to be brought to a hearing before the court, and the decision made in writing in the same manner as if there had been no verdict of the jury on the issue. But the practice has been settled that where an equity case is tried by the court, with a jury impaneled for the purpose of passing upon such disputed facts as the court may submit to it, if on the whole evidence the judge determines that the plaintiff has failed to make a case, his decision dismissing the complaint is such a finding of facts, and determination of the law arising upon them, and the signing by the clerk was a substantial compliance with the provisions of section 1022 of the Code of Civil Procedure. In *Rousseau v. Bleau*, 8 N. Y. Supp. 824, the court, LANDON, J., in discussing this question, uses this language: "The signature of the clerk is the signature of the court. The judgment is equivalent to a finding of fact by the court that the testimony adduced by the plaintiff did not, taken in the aspect most favorable to him, establish the case alleged in his complaint. It is also a finding that the court did elect not to submit any question to the jury. The direction for judgment finds that on the merits the plaintiff is not entitled to recover. If the court had awarded affirmative relief, it would have been proper to have made out a decision setting forth the facts, from which the direction of judgment would follow as the necessary legal conclusion. But the necessity for settling forth findings of inconsequent facts, and then formally finding as a conclusion of law that they are inconsequent, is not so obvious. We think that the judgment signed by the clerk, in a case in which the result is a dismissal of the complaint upon the merits, a sufficient compliance with section 1022. The case of *MacNaughton v. Osgood* does not hold otherwise. There is no difficulty in reviewing upon appeal such a case." It will be seen that the proceedings of the trial court upon this point were not irregular, and that a valid judgment might be entered upon the decision of the trial judge dismissing the complaint, in an equity action. The judgment must be affirmed, with costs.

KING v. CITY OF BUFFALO.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

1. MUNICIPAL CORPORATIONS—OFFICERS.

Under an ordinance providing for the annual appointment of a gas inspector by the city council, an appointment to such office, "subject to the further orders of this council," is invalid.

2. SAME—RES ADJUDICATA.

Where H., claiming under such invalid appointment, sued the city for his salary for a certain year, plaintiff, who claimed the salary of such office for the same year, was not bound to come in and defend the action, and, not having been a party, he was not bound by the judgment in the action.

3. TRIAL—FINDINGS—EXCEPTIONS.

An exception to a finding that plaintiff was duly appointed does not raise the question as to whether there was a vacancy in the office at the time such appointment was made.

Appeal from circuit court, Erie county.

Action by Chauncey H. King against the city of Buffalo. Judgment was given for plaintiff, and defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER, J.
F. C. Laughlin, for appellant. *M. H. Peck*, for respondent.

DWIGHT, P. J. The plaintiff sues, as assignee of one Maycock, to recover a balance of salary alleged to be due to the latter as gas inspector for the defendant for the year of 1888. The common council assumed to appoint Maycock on the 15th of January. He took the oath of office, filed his official bond, and discharged the duties of the office throughout the year. The only question in the court below was whether his appointment was valid, and that depended upon the question whether there was a vacancy in the office at the time the appointment purported to be made. We suppose the latter question is not presented by this appeal, because there is no finding by the court, nor was there any request that the court should find, upon that question. The court did find that Maycock was duly appointed, and, it is true, the defendant excepted to that finding; but so he was unquestionably duly appointed unless the fact existed that there was another lawful incumbent already in the office; and there is no finding to that effect, nor any refusal so to find upon request. The authorities are to the effect that the mere exception to one finding of fact does not raise the question whether the proofs establish another distinct proposition of fact upon which the first-mentioned finding depends; that the court of review will not look into the evidence to see whether it establishes a proposition of fact which has not been passed upon by the trial court, either by a finding or a refusal to find. *Smith v. Insurance Co.*, 62 N. Y. 85, 87; *Thomson v. Bank*, 82 N. Y. 1; *Burnap v. Bank*, 96 N. Y. 125.

But, assuming that the question was raised by the proper exception, we think the finding below was correct. The other alleged incumbent of the office was one Healy, in respect to whom the minutes of the common council show that on the first Monday of January the following resolution was adopted: "Resolved, that Henry Healy be, and he is hereby, appointed to the office of gas inspector, subject to the further order of this council." Healy was notified of this action of the common council, and he took the oath of office, and presented his official bond to the mayor for approval, which was refused on the ground that his appointment was invalid. Healy then resorted to proceedings by *mandamus*, and, under the order of the special term, his bond was approved and filed. On the trial of that proceeding evidence was offered by the respondent therein to impeach the record of the common council, and to show that at the time of the alleged adoption of the resolution appointing Healy a quorum of the body was not present. The evidence was excluded, and the appointment of Healy was held to be valid. The same evidence offered by the plaintiff on the trial of this action was received, and, although there was no finding in respect to the appointment of Healy, the opinion delivered at the circuit indicated that the trial judge regarded that appointment as invalid by reason of the want of a quorum. Probably the mayor did not assume to go behind the record of the common council, but found the appointment invalid upon the face of the resolution, and such we think was the case.

Under the provisions of the charter of the city of Buffalo, (title 2, § 18,) the common council, in 1878, enacted an ordinance providing for the annual appointment by that body of a gas inspector, whose term of office should be one year from the date of his appointment, and that ordinance was in force at time of the pretended appointment of Healy. The resolution of the first Monday of January must, we think, be construed to have intended the appointment of Healy during the pleasure of the common council; and it received that construction at the hands of the same body when, on the 15th of January, they proceeded to reconsider and revoke that appointment, and to appoint Maycock "for the year 1888." It is conceded on all hands that the common council had no authority to appoint to the office in question for a term

less than one year; but it is argued that it was only the limitation of the term that was void, and, consequently, that the appointment of Healy was a valid appointment for the year. We are unable to concede the correctness of that proposition. If the resolution had been for the appointment of Healy for one month or for three months, no one, we presume, would contend that it would have constituted an appointment for a year. Why, then, when it purported to be an appointment during the pleasure of the common council? There was no attempt to repeal or amend the ordinance of 1878, and that enactment was the law which governed the appointment to the office in question. We think it was clearly violated in the attempted appointment of Healy, and that such appointment was wholly void.

In its answer in this action the defendant avers that Healy claims to have been duly appointed gas inspector for the year 1883, and to have qualified and discharged the duties of the office, and that, in the year 1884, he commenced an action to recover the salary, which was then, at the date of such answer, pending and undetermined; that the title to said office "has not in any manner been legally decided or determined, and that the defendant is unable to determine or decide to whom such salary should be legally paid;" and the defendant now contends that the plaintiff, being thus apprised of the pendency of that action, should have applied for leave to come in and defend that action, and, not having done so, he is concluded by the judgment therein, which the defendant, on the trial of this action, offered to show was in favor of Healy. There seems to be no ground for this contention. The plaintiff was not a party to the action of Healy. It was not a case in which there could be a recovery over by the defendant against the plaintiff, and, consequently, was not a case in which the latter would have been bound, even by a notice to come in and defend. It was open to the defendant to move to interplead the plaintiff, or to substitute him for the defendant in that action. Not having done so, the defendant took the risk of the final result of the action of the plaintiff. We think the findings of the court in this case were correct, and that the judgment must be affirmed.

LAWRENCE *et al.* v. CHURCH.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

1. APPEAL—REVIEW.

Where defendant demurs to a complaint on four different grounds, and the issues raised are separately determined, the demurrer being sustained as to some of the grounds, and overruled as to others, the failure of the defendant to take an appeal from that part of the judgment adverse to him precludes him from objecting thereto on appeal from the final judgment.

2. CONTRACTS—INTERPRETATION.

Where defendant agrees with the executors of an estate to pay all debts "allowed or legally established against the estate," he is bound for all claims properly presented, and verified and allowed by the executors in good faith.

3. SAME—EVIDENCE.

The agreement provided that defendant should have the benefit of the proceeds of certain notes and mortgage belonging to the estate, if any, after paying the expenses and commissions proper in collecting the mortgage, and settling and administering the estate. *Held*, in an action against defendant to recover an amount alleged to be due from him under the agreement after crediting to him the proceeds of the mortgage to which he was entitled, that a decree of the surrogate rendered after the commencement of the action was not admissible to show the costs of collecting the mortgage, and the expenses and commissions of plaintiffs in settling the estate.

Appeal from judgment on report of referee.

Action by Roxanna H. Lawrence as executrix, and George Sherman as executor, of the will of Judson W. Sherman, deceased, against Walter S. Church. Judgment was given for plaintiffs, and defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

F. A. Robbins, for appellant. *J. H. Stevens, Jr.*, for respondents.

DWIGHT, P. J. In September, 1882, an action was begun by the same plaintiffs against the same defendant on several promissory notes given by the latter to the plaintiff's testator in his life-time, amounting in the aggregate to upwards of \$12,000, with an allegation of certain payments from time to time to apply thereon. The answer pleaded the statute of limitations, denied the allegation of partial payments, and set up a counter-claim, to which the plaintiffs replied. On the 4th day of January, 1884, the action above mentioned being pending and at issue, as above, the parties thereto entered into a written agreement, of which the following is a copy, and of which a duplicate was signed by George and William Sherman, named therein:

"SUPREME COURT."

"Roxanna H. Lawrence as executrix, George Sherman as executor, of the last will and testament of Judson W. Sherman, dec'd, v. Walter S. Church."

"Stipulated, that Walter S. Church will pay all the debts allowed or legally established against the estate of said deceased, including the mortgage and liens on the real estate of said deceased at the time of the death of the said deceased. That said Walter S. Church, defendant as aforesaid, will pay to Roxanna Lawrence aforesaid the sum of three thousand dollars, in such manner as will be acceptable to her. That said Walter S. Church shall have the benefit of the Thomas J. Chew, Jr., notes and mortgage now belonging to the estate, or the proceeds thereof, if any, after paying the expenses and commissions such as are legal and proper in collecting said mortgage, and settling and administering upon the estate. The said Roxanna Lawrence to have the use during her natural life of the house and lot where she lives, according to the will. She to release to George and William Sherman her life-estate in the vacant lot, and said George and William to have the said house and lot subject to the life-estate of said Roxanna. When this is all done, this action to be discontinued, and the notes surrendered.

[Signed]

"W. S. CHURCH.

"ROXANNA H. LAWRENCE,

"Administratrix of J. W. Sherman's Estate.

"Witness: JAMES LOOKHART.

"Jan. 4th, 1884."

The will of Judson W. Sherman, mentioned in the agreement, gave to Roxanna H. Lawrence the sum of \$5,000, all the household furniture and property, and a life-estate in all his real estate in the town of Angelica,—including, presumably, the house and lot, and the vacant lot, mentioned in the agreement,—and gave all the rest and remainder of his property to George and William Sherman. There having been no performance, or offer of performance, of the foregoing agreement, on the part of the defendant, the plaintiffs in August, 1887, commenced this action, joining with them the plaintiff Mrs. Lawrence individually. The complaint alleged, in addition to the facts above stated; the further fact that the amount realized on the Chew notes and mortgage, which was alleged to be the sum of \$2,902.20, was less by several hundred dollars than the amount of the debts of the estate allowed and paid by them, and the costs and expenses of collecting said mortgage and of administration, and demanded judgment against the defendant for such deficiency, in addition to the \$3,000 stipulated to be paid to the plaintiff Lawrence. To this complaint the defendant demurred on four grounds, of which the first was that the complaint did not state facts sufficient to constitute a cause of action, and the last that there was a misjoinder of parties plaintiff. The issues of law thus joined were tried at special term, and it was held and found (1) that the complaint did state facts sufficient to constitute a cause of action; and (4) that there was a misjoinder of parties plaintiff by the joinder of Mrs. Lawrence, individually, as such party,—and accordingly the de-

murrer was overruled as to the first, and sustained as to the last, ground, and judgment was ordered for the defendant thereon, but with leave to the plaintiffs to amend, and an interlocutory judgment was entered accordingly. The plaintiffs thereupon amended by striking out the name of Mrs. Lawrence as a plaintiff individually; and the action continued and was tried upon a complaint the same in all other respects as that to which the demurrer was interposed. The answer of the defendant denied none of the facts alleged in the complaint, except for want of knowledge or information as to whether the moneys realized on the Chew notes and mortgage had been expended in payment of debts allowed or legally established against the estate, or for the expenses of administration, and as to whether any such debts had been so allowed or established, with certain exceptions specified. On the trial the plaintiffs made proof of debts of the estate allowed and paid by them to the amount of \$2,401.45. They were also permitted to introduce in evidence, against the defendant's objection and exception, the decree of the surrogate made in February, 1889, on the judicial settlement of the accounts of the plaintiffs as executors, which allowed the payments above mentioned, and also settled and allowed the costs and expenses of collecting the Chew notes and mortgage, and of the administration and settlement of the estate, including commissions to the plaintiffs, and expenses incurred after the commencement of this action, at the sum of \$950.24. From these figures the referee obtained a balance of \$449.49 as the deficiency in the amount realized on the Chew mortgage to pay the amount of debts and expenses paid by the plaintiffs in settling the estate; and for the amount of such deficiency, together with the \$3,000 stipulated to be paid to Mrs. Lawrence, with interest, judgment was ordered and entered for the plaintiffs.

We regard the main question in this case as determined by the judgment on the demurrer, viz., whether the plaintiffs had a cause of action against the defendant on the contract set out in the complaint, and admitted by the answer. The case was not one in which the defendant was precluded from appealing from the judgment because it was in his favor. Four distinct issues of law were raised by the demurrer, which were separately determined by the findings and judgment of the special term. It was adjudged that the complaint did state facts sufficient to constitute a cause of action in favor of the present plaintiffs. From that branch of the judgment the defendant was at liberty to appeal; and, not having done so, he is not at liberty again to raise the question in this action.

We are of opinion, also, that competent proof was made of the amount of debts allowed against the estate, and to the payment of which the avails of the Chew mortgage were applicable under the contract between the parties. The language of the contract in this respect is, "all the debts allowed or legally established against the estate of the deceased." This language does not seem to call for a judicial allowance of the claims before the plaintiffs would be authorized to pay them, unless they were such as the plaintiffs themselves refused to allow. All the claims paid in this case were presented and verified in due form. There is no charge or suggestion of bad faith on the part of the plaintiffs in allowing them, and we observe from the record that many of them were compromised at a figure much below the amount at which they were verified.

But there is another feature of the case, which presents much more difficulty. The effect of the report of the referee and the judgment is to charge the defendant, as against the amount realized on the Chew mortgage, with the sum of \$950.24 for the costs and expenses of the collection of that mortgage, and the expenses and commissions of the plaintiffs in settling and administering the estate. No evidence was given on this branch of the case except by the decree of the surrogate rendered on the 23d day of February, 1889, whereas this action was commenced on the 26th day of August, 1887.

Moreover, the amount so allowed embraced a considerable sum for costs and expenses incurred since the commencement of the action, including the costs of the demurrer, and a counsel fee of \$100 in this action itself. The admission of the decree in evidence was duly objected to by the defendant on the ground, among others, that it was granted since the commencement of the action; and that objection, we think, should have been sustained. Conceding that the decree would have been competent evidence against the defendant if it had been rendered before the commencement of the action, the plaintiffs were not entitled to recover the amounts ascertained and allowed by that decree after the action was commenced. So far as those sums became a charge against the defendant by virtue of the decree, the latter must be declared upon either by original or supplemental complaint. Code Civil Proc. § 544. Whether any and what part of these charges might have been established in this action by proof independent of the surrogate's decree, we do not feel called upon to consider. No such proof was given or offered in respect to any portion of the \$950.24 allowed by the surrogate for the expenses of the collection of the Chew mortgage, and of administration. We see no way of sustaining the judgment as to that portion of the recovery, and we think the judgment must be reversed, and a new trial granted, unless the plaintiffs see fit to reduce the judgment by the amount named. Judgment reversed, and a new trial granted before another referee, with costs to abide the event, unless the plaintiffs, within 10 days after service of a copy of the order herein, consent to deduct from the amount of the judgment as entered the sum of \$950.24, with interest thereon from the 23d day of February, 1889, without prejudice to a future action to recover the same, in which case the judgment as so modified is affirmed, without costs of this appeal to either party. All concur.

WEISMAN v. CITY OF BUFFALO.

(*Supreme Court, General Term, Fifth Department. June 20, 1890.*)

1. **MECHANICS' LIENS—RIGHTS OF LABORERS.**

By the terms of a contract to do work for defendant, the latter was entitled to retain 20 per cent. of the contract price for 90 days after the completion of the work. The contractor abandoned the work after being paid more than 80 per cent. of the value of the work already done. Plaintiff, an employee of the contractor, then filed his lien for work done. Thereafter the contractor's sureties, by agreement with defendant, completed the work for the balance of the contract price not already paid to the contractor. This was paid to them on the completion of the work, the value of which was more than the compensation paid. *Held*, that it was a mere right, and not a duty, for defendant to retain the 20 per cent. 90 days, and that, the contractor having received all he was entitled to, plaintiff had no remedy against defendant.

2. **SAME.**

The question whether the contractor had agreed with his sureties to complete the work for the balance of the contract price, over and above what defendant had retained from the work done by the contractor, was immaterial; there being no pretense that defendant knew of it, and it being undisputed that the price paid the sureties was not more than the work done by them.

Appeal from Erie county court.

Action by Anton Weisman against the city of Buffalo. From a judgment for defendant entered on the verdict of a jury directed by the court, plaintiff appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Giles E. Stillwell, for appellant. *Frank C. Laughlin*, for respondent.

DWIGHT, P. J. The plaintiff and his assignor of a portion of the claim sued upon were workmen in the employ of one Winter on a contract of the latter to do the work of a local improvement in the city of Buffalo. By the terms of the contract the defendant was entitled to retain 20 per centum of

the contract price until three months after the completion of the work. On the 7th of June, 1888, the contractor, having done work to the amount of \$1,275, and having been paid thereon the sum of \$1,120, abandoned the work, leaving in the hands of the defendant the sum of \$155, or less than 20 per centum of the value of the work done. On the 25th day of June the plaintiff and his assignor filed mechanics' liens, under the provisions of chapter 315 of the Laws of 1878, for the amount of their claims for work done before June 7th. Thereafter the defendant notified the sureties of the contractor to complete the work, and they did so under an agreement with the defendant that they should receive for the work required to be done by them the balance of the contract price not already paid to Winter; and upon their completion of the work, August 1, 1887, that balance was paid to them. The value of the work done by the sureties was more than the compensation so paid. The contention on the part of the plaintiff is that the liens of himself and his assignor, though filed after the abandonment of the work by their employer, Winter, and after payment to him of more than the full amount which he was entitled to receive up to that time, attached to the balance of \$155, retained under the contract; that the payment of the entire balance of the fund on the 1st of August to the parties completing the work, while it defeated the liens, excused the lienors from bringing an action to foreclose within the 90 days limited by the statute, or at any time thereafter, and that the defendant is liable for its wrongful act in paying out the balance of the fund; and we understand counsel to contend that the act was wrongful for two reasons: (1) Because it defeated the provisions of the statute which give the lienors 90 days after filing their liens in which to commence an action to foreclose them; and (2) because it was in direct violation of the defendant's contract to retain 20 per centum of the money earned for three months after the completion of the work. Neither of these positions is at all tenable. The provision of the contract referred to was not for the benefit of the contractor, still less for that of his employes, but for the benefit of the city, as security on the part of the contractor that the work done should remain or be kept in repair for the period named after its completion. It was a condition which the city might waive at its pleasure, and under which no other party could claim any rights.

The other ground of contention is equally unavailing. The lienors had no lien on any portion of the balance of the contract price, because no part of it ever became due to the contractor. By abandoning the work before its completion the contractor forfeited all right to the balance retained by the city. That balance was not to become due to the contractor until three months after the completion of the work under the contract with him. The contract with his sureties was a new contract, and could not inure to his benefit, nor to that of his lienors. *Haswell v. Goodchild*, 12 Wend. 373; *Hagan v. Society*, 14 Daly, 131, and the cases cited.

The question of fact whether Winter had agreed with his sureties to complete the work for \$200, the balance of the contract price over and above the amount retained by the city on the work done by the former, was immaterial. There was no pretense that the city or its officers had any notice of such an agreement, if it was made; and the evidence is undisputed that they contracted with the sureties in good faith, and that the price paid to them was not more than the actual value of the work done by them. The judgment of the county court was right, and must be affirmed. Judgment of the county court affirmed, with costs. All concur.

CADY v. SPRINGVILLE WATER-WORKS CO.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

EASEMENTS—CREATION.

Plaintiff for many years was the owner of a lot, appurtenant to which was the right to take water from a spring on another lot across a highway. Up to

1877 the spring was open, and plaintiff took water therefrom in pails. In that year it was inclosed by a reservoir, and a pump log laid therefrom along the street past plaintiff's premises to convey water to other premises. Thereafter plaintiff and the owner of the servient tenement executed their several conveyances to each other, both of which recited the existence of the easement appurtenant to plaintiff's tenement. The conveyance to plaintiff, in consideration of the release by plaintiff, his heirs and assigns, of all right and title in the spring, granted to plaintiff, his heirs and assigns, the right to take by a half-inch pipe, from the main pipe leading from the spring along the street, all the water necessary for the family use of plaintiff, his heirs, etc., holding and occupying the said lot. Plaintiff's conveyance recited that, in consideration of the rights and privileges conveyed to him, he released all right, title, and interest in the spring. *Held*, that the right conveyed to plaintiff constituted an easement in the tenement of the grantor, and ran with the land.

Appeal from special term, Erie county.

Action by Ebenezer S. Cady against the Springville Water-Works Company. From a judgment for plaintiff, defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER, J.

W. W. Ticknor, for appellant. *Thos. Penny*, for respondent.

DWIGHT, P. J. For many years before the date of the conveyance hereafter mentioned, the plaintiff was the owner of a lot on the south side of Main street, in the village of Springville, appurtenant to which was an easement in another lot on the same side of Main street, and separated from the plaintiff's only by a highway known as "Elk Street." The easement was the right to take water from a spring on the latter for the use of the former premises. Before 1877 or 1878 the spring was open, and the plaintiff exercised his easement by taking water therefrom in pails. About the date last mentioned the spring was inclosed by a reservoir, and a pump log was laid therefrom through Elk and Main streets, past the premises of the plaintiff, which conveyed water to several premises further down the street. In 1880 one Myers became the owner of the lot on which the spring was situated, and two years thereafter he and the plaintiff executed and delivered, concurrently, to each other, their several conveyances, which were duly acknowledged, and that from Myers to the plaintiff was duly recorded in the same year. Both conveyances recited the existence of the easement appurtenant to the plaintiff's tenement, and the acquisition of the servient tenement by Myers, and the conveyance by the latter proceeded: "Now, therefore, this indenture witnesseth that I, the said John P. Myers, in consideration of the release to me by the said Ebenezer S. Cady, his heirs and assigns, of all the right, title, and interest in and to said spring of water, have granted and conveyed, and by these presents do grant and convey, to the said Ebenezer S. Cady, his heirs and assigns, the right and privilege of taking and conveying, by a half-inch pipe, from the main pipe leading from the spring of water aforesaid along Main street, * * * all the water that may be necessary for the family use of the said Ebenezer S. Cady, or the heirs and assigns of the said Ebenezer S. Cady, holding and occupying the said lot, * * * to have and to hold the said right and privilege to the said Ebenezer S. Cady, his heirs and assigns, forever." The conveyance from the plaintiff to Myers, after reciting the same facts as the other, and that the water from the spring was being conveyed in pipes through the streets of the village, proceeded: "Now, therefore, in consideration of certain rights and privileges this day granted and conveyed to me by the said John P. Myers, I, the said Ebenezer S. Cady, have released, and do hereby release, to the said John P. Myers, all the right, title, and interest I have had and do have to the spring of water aforesaid." Thereupon, and in the same year, (1882,) the plaintiff proceeded to tap the main pipe in front of his lot, and inserted a half-inch iron pipe, through which he drew water from the spring until prevented by the acts of the defendant complained of. In June, 1887, Myers and wife conveyed the spring to the defendant, with the right to maintain a reservoir about the same, and

to lay pipes therefrom to the street. The defendant proceeded to take up the pump log, and lay mains of its own, and in so doing cut off the plaintiff's supply of water. The plaintiff's action was for a mandatory injunction requiring the defendant to restore the plaintiff's connection with the spring, either by its own mains or otherwise and for damages. The judgment appealed from sustains the plaintiff's action, and grants the relief mentioned. The only question argued is whether the right conveyed by the deed of Myers to the plaintiff constituted an easement in the tenement of the former, and so ran with the land, and bound the grantee of the spring. We think that question is to be answered in the affirmative. The necessary purport and effect of the two deeds, construed together, is to convey to the plaintiff, and his heirs and assigns, forever, the right to take water, for the benefit of their lot, from the spring on the lot of their grantor; and this constitutes an easement. The fact that by the terms of the deed the water is to be drawn from the main pipe leading from the spring does not change the nature of the privilege, but only the mode of its enjoyment; it necessarily implies the right to have the water flow through the main pipe from the spring. The half-inch pipe mentioned in the deed is the measure of the water which the plaintiff is entitled to draw, and the main pipe is the means by which it is to be drawn. The right to take the water in this manner is substituted by the deed for the right to enter upon the land of the grantor, and take water in pails or by other means available to the plaintiff under his easement as it previously existed. The defendant took its deed of the spring with notice by the record of the plaintiff's right, and subject thereto. It had no right to remove the pump log through which the plaintiff drew his water without replacing it by a main which would afford him the same facilities. The proof shows that the defendant has laid a main of its own, and it is only necessary that it should connect the plaintiff's half-inch pipe with the new main in order to restore the plaintiff to the enjoyment of his rights. The effect of the judgment of the special term is to require this to be done, and that judgment should be affirmed. Judgment appealed from affirmed, with costs.

TOTTEN v. NEW YORK, L. E. & W. R. Co.

(*Supreme Court, General Term, Fifth Department. June 30, 1890.*)

1. RAILROAD COMPANIES—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

In an action for damages, occasioned by a collision with defendant's train at a highway crossing, the court properly refused to charge that it was negligence in plaintiff to drive up to the crossing at a slow trot, and left it to the jury to say whether, under the circumstances, he was negligent.

2. TRIAL—OBJECTION TO EVIDENCE.

The objection to the question, "State whether there was any signal, either by the ringing of the bell or blowing of the whistle of that train, before it got to the crossing," that it was improper in form, and that there was no foundation laid for it, was not well taken, as form of question and order of proof is in the discretion of the court.

Appeal from circuit court, Steuben county.

Action by Andrew Totten against the New York, Lake Erie & Western Railroad Company, for the loss of a horse and the injury to a wagon occasioned by a collision with a train of the defendant at a highway crossing. From a judgment for plaintiff, defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

J. H. Stevens, for appellant. *W. W. Clark*, for respondent.

DWIGHT, P. J. We think the evidence in this case required the submission to the jury of the two questions of negligence on the part of the defendant, and of contributory negligence on the part of the plaintiff. The evidence on the subject of the omission of signals from the approaching train was, as

usual, contradictory, and manifestly required the submission of that question to the jury. The question whether the plaintiff observed all reasonable precautions to avoid the collision was one in respect to which different inferences might possibly be drawn from the evidence by different minds, and it was for that reason a question for the jury. The instructions given to the jury seem to us in all respects adequate and correct. The court properly declined to charge that the particular gait at which the plaintiff was driving as he approached the crossing, which was described as a slow trot, was of itself negligence on his part. The jury was instructed that they must take into consideration (among other things) "the way he came upon the track, and the pace at which he went down to it," and say whether, under the circumstances, there was any negligence on his part in those respects. The objection to the direct question put to several witnesses, "State whether there was any signal, either by the ringing of the bell or blowing of the whistle of that train, before it got to the crossing," was not well taken. The objection was that the question was improper in form, and that no foundation was laid for it, by which it seems to have been intended that it was not shown what observation of the subject the witness had made. But, at most, the objection related only to the form of the question and the order of proof, which were both in the discretion of the court. We find no exception in the case which can vitiate the verdict, and are of opinion that the judgment and order appealed from should be affirmed. Judgment and order appealed from affirmed. All concur.

WINDMULLER *et al.* v. LOVEJOY *et al.*

(Supreme Court, General Term, First Department. June 6, 1890.)

1. FRAUDULENT CONVEYANCES—EVIDENCE.

Defendant L., a stockholder in the R. Co., indorsed notes given by the company to plaintiffs. About the same time he transferred his interest in a certain firm to defendants F. and C., the consideration being an indebtedness of L. to the firm and shares of stock held by F. in the R. Co. But it appeared that L. continued to occupy the same position towards the firm that he had always done, and that the R. Co. was financially embarrassed to the knowledge of F. Judgments were also rendered against L. in favor of defendant B., it being alleged that they were based upon loans made to L., and that the stock of the latter in the R. Co. had been transferred to B. as collateral therefor. But L. testified that he had asked B. to buy the stock, and that he had offered to guaranty him against loss, and the stock was transferred to B.'s name. *Held*, that such conveyance and judgment, as well as a conveyance made to L.'s wife before the indorsement of the notes, were a part of a scheme to defraud creditors, and would be set aside.

2. SAME.

But a transfer of property by L. to defendant W. for a valuable consideration will be sustained, there being no evidence of any participation by W. in the fraudulent designs of L.

Appeal from special term.

Action by Louis Windmuller and another against Henry W. Lovejoy and others. Judgment was given for plaintiffs, and defendants appeal.

Argued before VAN BRUNT, P. J., and DANIELS and BRADY, JJ.

B. Estes, F. Seymour, and A. F. B. Chase, for appellants. *A. Blumenstiel*, for respondents.

VAN BRUNT, P. J. This action was brought by the plaintiffs as judgment creditors of the defendant Henry W. Lovejoy to reach certain property claimed to be the property of the judgment debtor, and fraudulently transferred for the purpose of defrauding his creditors. The transfers sought to be impeached were—*First*, a transfer by Henry W. Lovejoy of his seven twenty-fourths interest in the firm of Lovejoy, Son & Co., made on February 6, 1888, to the defendants Ferguson & Cregan; *second*, a transfer made in July, 1888, by said Lovejoy to defendant Wood of one twenty-fourth interest in the same

firm; *third*, a judgment and execution against said Lovejoy in favor of the defendant Bruce, and the sales thereunder; *fourth*, to reach a portion of a mortgage made by the defendant Susan C. Lovejoy, the wife of the judgment debtor; *fifth*, to reach certain real estate in Harrison, Hudson county, N. J., which was conveyed to said Susan C. Lovejoy, and to have the property declared to be the property of the judgment debtor, and applicable to the payment of the plaintiffs' judgment; and, *sixth*, to reach the judgment debtor's interest in his father's estate, and to have the same applied on the plaintiffs' judgment. The plaintiffs several claims upon which this action is founded originated in a sale of rubber to the Universal Rubber Company early in February, 1888, for which notes were given indorsed by Henry W. Lovejoy, dated in February and March, the first note maturing in July, 1888, and upon which judgments have been obtained and executions returned unsatisfied. The grounds upon which these transfers are sought to be set aside are that they were made by Lovejoy with intent to hinder, delay, and defraud his creditors. It might very well be true that some of these transactions, taken by themselves, might have been upheld under the principles laid down by the adjudicated cases. For example, the transfer of the Hoboken property by the executors of Henry Lovejoy, deceased, to the defendant Susan C. Lovejoy, for which the interest of her husband in his father's estate was charged \$13,900, the purchase price of the property. Such transfer having taken place prior to the time when Henry W. Lovejoy became indebted upon his indorsements for the rubber company, and the conveyance having been recorded promptly, standing alone would have exhibited no intention upon the part of Lovejoy to transfer this property to his wife in fraud of creditors. But when we find that he is pursuing a system of transfers so that he utterly strips himself of all his property except his stock in the rubber company, it may very well be held that this transfer was part and parcel of the scheme which he entered into at that time to secure his wife at the expense of his creditors. The transfer by Henry W. Lovejoy of his seven twenty-fourths interest in the firm of Lovejoy, Son & Co., made on the 6th of February, 1888, seems clearly to have been part and parcel of a plan which he had formed long before for the purpose of placing beyond the reach of his creditors whatever property he might have possessed. It is found by the court below, as the ground upon which the charge of fraud is to be sustained, that this transfer was substantially without consideration. It appears that it was made for the consideration of an indebtedness due from Lovejoy to his firm of \$14,000 or \$15,000, and 338 shares of Universal Rubber Company's stock held by Ferguson. It further appears that, after this transfer of all his interest in the firm, Henry W. Lovejoy occupied the same position towards the firm as he had previously done, namely, he transacted all its financial business; no change was made; he drew from the firm as previously; exercising all the rights of a partner after having parted with the whole of his interest. It would seem, under these circumstances, that the transfer was intended only to be a cover, there being no change in the relations of these parties to this business; and, although it may not be entirely clear what knowledge Ferguson had of the condition of the rubber company, yet still it is reasonably sure that he knew that the company was being pressed for money, and had good reason to suppose that, unless new capital was brought into the concern, it could not continue its business; and it was undoubtedly because of this fact, and because Lovejoy was so mixed up with the concerns of the rubber company, that it was determined that his interest in the firm of Lovejoy, Son & Co. should be transferred to his other partners in order that it might be protected from his creditors. It is sought to account for his presence as a member of the firm by the fact that he was entitled to one of the three twenty-fourths interest which his father's estate owned. But this he only held as executor, and in no way gave him the rights of a partner.

We further find that as far back as July, 1887, to secure the indebtedness of the rubber company to the friends of Lovejoy, viz., Mrs. Lovejoy, Ferguson, and Lovejoy, Son & Co., the property of the company was agreed to be mortgaged to the amount of over \$23,000, which mortgage was actually executed in October, 1887. It further appears that Ferguson was aware of the existence of this mortgage, because as a stockholder he assented to its execution, and this mortgage was not recorded; and, although some attempts to excuse the failure to record are made, yet the significant fact exists that it was not recorded until the impending failure of the rubber company,—a fact exceedingly significant, in view of the critical condition in which the company seems to have been placed during this period. It seems to be clear that Ferguson must have known of the embarrassed condition of the rubber company, and that in the disposition of this stock for the interest of Lovejoy he had good reason to believe that he was selling what was not of very great value for that which had for years been a continuous source of income. And this mortgage, given under the circumstances disclosed, kept from the record as it was, given virtually to secure indebtedness to stockholders of which they made gifts to Mrs. Lovejoy, indicated a plan upon the part of these people, as far as possible, to secure whatever property there was, of either Lovejoy or the rubber company, for the benefit of persons who could not legally acquire a preference in the property of the rubber company over its other creditors. This is another circumstance which characterizes the whole of these transactions.

Then we have the procuring of the judgment by the defendant Bruce. It is sought to sustain this upon the ground that the stock of the rubber company was transferred to him as collateral for loans made to Lovejoy. Now, the evidence is conclusive that there was no such loan. On the contrary, it was a purchase of the stock by Bruce at the suggestion of Lovejoy, and this idea of a loan came into existence when the rubber company got into difficulties, and the stock was proven valueless. Mr. Lovejoy testified that he solicited Bruce to buy this stock, and that he offered to guaranty him against loss, and the stock was transferred to Bruce's name,—evidence characterizing the transaction beyond question. If Bruce was loaning money to Lovejoy, and taking this stock as collateral for that loan, why should Lovejoy guaranty him against loss? His indebtedness to Bruce upon the loan was certainly a better security than his guaranty. The giving of a guaranty is only consistent with the idea of a purchase. Mr. Lovejoy might very well guaranty Bruce against loss in case he bought the stock, but such a transaction would be absolutely senseless in the case of a loan. And, furthermore, if Bruce did not think himself the owner of that stock, and intend to exercise the rights of an owner, why did he have it transferred to his own name? The pledge of the stock was just as good while it stood in the name of Lovejoy; and unless Bruce supposed himself to be the owner, intending to exercise the rights of an owner, and not simply those of a pledgee, it does not seem probable that he would have had it transferred to his own name. We think the evidence conclusively shows that this idea of a loan was an after-thought, and that the judgment obtained by Bruce against Lovejoy was upon an indebtedness which did not exist.

As to the transfer of the one twenty-fourth interest in the firm of Lovejoy, Son & Co., it may be that Henry W. Lovejoy and his partners, in the share which they took in that transfer, did it for the purpose of placing it beyond the reach of the creditors of Lovejoy. But there is no evidence whatever that the defendant Wood participated in that fraudulent intent. He was applied to for money. He asked for security, and it was stated that Lovejoy had an interest in the firm which he would sell. The price named was \$2,000, and Wood said he would buy it, if he could get the money. Representations were made by Ferguson & Cregan to Wood as to the value of this interest. In fact, they

guaranteed to Wood a profit of 10 per cent., and it was under these circumstances that Wood took the transfer of this share, paid \$500 in cash, and gave his note for \$1,500. What Lovejoy did with the money or with the note was none of Wood's business, nor was he at all interested therein. There was nothing to show, as far as the evidence discloses, any design upon the part of Wood to cheat, defraud, or delay the creditors of Lovejoy. In fact, he seems to have been actuated in this transaction with the desire to furnish Lovejoy the means of satisfying some of these demands. Simply because it is stated that Lovejoy paid his attorney with the money and securities received from Wood does not in any way affect Wood's title. There was no such inadequacy of consideration as impeached the transaction as far as he was concerned. It was undoubtedly a *bona fide* purchase on his part, though the sale may have been made upon the part of Lovejoy and his partners for the purpose of putting that interest out of the reach of Lovejoy's creditors. But Wood, not being a participant in this scheme, having paid his money and taken the transfer, simply because he did not attempt to intrude himself into business with which he had nothing to do, cannot be deprived of a purchase made by him in good faith. We think, therefore, upon the whole case, that the evidence discloses an evident intent upon the part of all these parties, except Wood, to put the property of Henry W. Lovejoy beyond the reach of his creditors, and that all these transactions, commencing with the gift to his wife, were in pursuance of a common scheme for the purpose of attaining a common end, and that, therefore, these transfers, this judgment, and this mortgage were fraudulent as against the creditors of Henry W. Lovejoy, and that the transfer to Wood would have been fraudulent if there had been anything to show that Wood had participated in any such design. We think, therefore, that, with the exception of that part of the judgment which impeaches Wood's title to the one twenty-fourth interest in the firm of Lovejoy, Son & Co., it should be affirmed, and as to that part of the judgment it should be reversed, and a new trial ordered, with costs to the appellant Wood to abide the event. All concur.

LAROCQUE v. HARVEY.

(Supreme Court, General Term, Third Department. July 7, 1890.)

1. JUSTICES OF THE PEACE—JURISDICTION.

Under Code Civil Proc. N. Y. § 2861, providing that a justice of the peace has only the civil jurisdiction given him by statute, a justice has no jurisdiction of the person of defendant in an action brought in violation of Code Civil Proc. N. Y. § 2869, providing that an action must be brought before a justice of a town or city wherein one of the parties resides, or a justice of an adjoining town or city in the same county.

2. APPEAL FROM INFERIOR COURTS—PRACTICE.

On appeal from the judgment of a justice in such case, affidavits of defendant, showing the residence of the parties, are competent, under Code Civil Proc. § 3057, providing that, upon appeal, errors in fact not affecting the merits of the action, and not within the knowledge of the justice, may be determined upon affidavits.

Appeal from Franklin county court.

Action by Joseph Larocque against Willis C. Harvey. A judgment of a justice of the peace in favor of plaintiff was affirmed by the county court, and defendant appeals. The defendant did not appear before the justice upon the return-day of the summons. The justice of the peace resided, and had his office, in the town of Malone, and the summons was returnable there. Both the plaintiff and the defendants were at the time residents of the town of Waverly, in Franklin county. The town of Waverly does not adjoin the town of Malone. These facts appear upon the affidavit of the defendant, served in connection with his notice of appeal, and are not disputed.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

J. W. Webb, for appellant. Kellas & Munstall, for respondent.

LANDON, J. The justice of the peace had no jurisdiction of the person of the defendant. *Houghtaling v. Groesbeck*, 51 N. Y. 673. Section 2869, Code Civil Proc., provides: "An action must be brought before a justice of a town or city wherein one of the parties resides, or a justice of an adjoining town or city in the same county." There are certain exceptions, not material here. A justice of the peace has the civil jurisdiction given him by statute, and no other. Section 2861. Upon appeal, errors in fact not affecting the merits, and not within the knowledge of the justice, may be determined upon affidavits. Section 3057. The affidavit of defendant, showing the residence of the parties, was therefore competent, and properly received. *Griffin v. Norton*, 5 N. Y. St. Rep. 812; *Vallen v. McGuire*, 2 N. Y. Supp. 381. The plaintiff cites section 3064. That section is applicable to a defendant in default who seeks to open it. In such case, he appeals to the discretion and favor of the court. Here the defendant asks no favor. He denies the jurisdiction of the justice. If the facts deprived the justice of jurisdiction, it was the defendant's right to show them. In *Hoffman v. Barton*, 14 N. Y. St. Rep. 506, cited by plaintiff, it does not appear that such facts were shown. The fact that the defendant did not appear in response to a summons which the justice had no jurisdiction to issue, was no waiver of his right to his subsequent objection to an unauthorized judgment. Judgment reversed, with costs. All concur.

BURKE et al. v. JACKSON.

(Supreme Court, General Term, Third Department. July 7, 1890.)

1. EVIDENCE—DECLARATIONS—DESCRIPTION IN MORTGAGE.

Where a deed of a lot fails to give its dimensions, describing it simply by its boundaries, a purchase-money mortgage executed by the grantee at the same time, which describes the lot as being 50 feet wide on a specified street, does not constitute such a declaration of the nature and extent of the grantee's claim as will render the mortgage admissible in evidence in ejectment by the grantee's heirs against an adjoining lot-owner, who is a stranger to both the deed and the mortgage.

2. DEED—DESCRIPTION—PURCHASE-MONEY MORTGAGE.

Neither is the mortgage admissible under the doctrine that a deed and a purchase-money mortgage are to be construed as one instrument, as this doctrine does not mean that the mortgage, as against a third person, can increase or diminish the amount of land conveyed by the deed.

MAYHAM, J., dissenting.

Appeal from circuit court, Montgomery county.

Ejectment by Sarah Jane Burke and Mary Frances Burke against William H. Jackson. There was a verdict for plaintiff; and from the judgment thereon, and an order denying a new trial on the judge's minutes, defendant appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

P. J. Lewis, for appellant. Z. S. Westbrook, for respondents.

LEARNED, P. J. This is an action of ejectment to recover a strip of land about 1 foot wide and about 96 feet long. The question is how wide the lot of plaintiffs really is. The plaintiffs claim under a deed from French to their ancestor which describes the lot as bounded "northerly by Grove street, easterly by Daniel Leffert's lot, southerly by Waterman Sweet's lot, and westerly by a lane," giving no other description, and no dimensions. Burke, the grantee, the same day gave a mortgage to French, described as a purchase-money mortgage, describing the land mortgaged as bounded "northerly by Grove street, easterly by Daniel Leffert's lot, southerly by Waterman Sweet's lot, and westerly by a lot of the party of the second part," (viz., French,) and further stating that the lot thereby conveyed was "fifty-one feet wide on Grove street." This mortgage the plaintiff gave in evidence on the trial, against

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defendant's objection, in order to sustain plaintiffs' claim that their lot was 51 feet wide on Grove street. The defendant's lot lies on the easterly side of plaintiffs' lot. The plaintiffs claim that this mortgage, executed by their ancestor to French, is competent (1) as being part of the transaction with the deed; (2) as a declaration by a party in possession as to the extent and claim of his possession.

It does not appear that defendant derived title either from French or from Burke. Therefore the transaction between them was not binding on him. The giving back of a purchase-money mortgage by Burke could not increase the title which he had received from French, especially as against a stranger. The deed bounded the land easterly by Leffert's, westerly by a lane. The mortgage described the western boundary differently, yet it might mean the same thing. The doctrine that a deed and the purchase-money mortgage are to be construed together as one act does not apply. That doctrine only indicates the simultaneous character of the transactions, showing that no outside rights can come between. But the doctrine does not mean that the mortgage can in any way increase or diminish, as against a third party, the amount of land conveyed by the deed. A mortgagor may be very willing to mortgage land twice as large as that described in the deed to him. But the mortgagee, on foreclosure, would get no more than the deed had conveyed.

Declarations of former owners have been admitted to show the nature of their claim, or to show its extent, or to show where boundaries were; but it does not seem to us that this mortgage comes within the rule. At the best, this is only an assertion by Burke that the description in a deed to him embraced 51 feet. How that can be evidence against the defendant, we do not see. Burke might as well have said that the lot mortgaged was 100 feet on Grove street, which would have taken all of defendant's lot, and would have been an easy way of getting title to another's property. We have examined the cases cited by the plaintiffs to sustain the admission of the mortgage. They seem to us clearly distinguishable from the present case. The doctrine here asserted is that one, by executing a mortgage on another's land to a third party, can acquire title thereto, or at least can show, as against such owner, a possession thereof. If authority is needed to the contrary, it may be found in *Armstrong v. Du Bois*, 90 N. Y. 95, at 104. Judgment reversed, new trial granted; costs to abide event.

LONDON, J., concurs. MAYHAM, J., dissents.

MACAULEY v. SMITH *et al.*

(Supreme Court, General Term, Fifth Department. June 30, 1890.)

ATTACHMENT—PROPERTY SUBJECT TO—EQUITABLE INTEREST.

The owner of land, in consideration of and for the purpose of securing a loan, agreed to execute to defendants H., S., and T. a warranty deed, and said defendants, in consideration of the deed, agreed to advance the money. It was further agreed that the deeds should be security for the loan for a term not exceeding a year, and on repayment of the loan within a year the premises should be reconveyed; but, in case the loan should not be repaid within a year, then the deed was to become a deed absolute, and said defendants were to be owners in fee-simple absolute. Pursuant thereto a deed with the usual covenants of warranty was executed and recorded. The agreement was not recorded. The loan was not repaid within the year, and the owner of the real estate surrendered possession to said defendants, who afterwards sold and conveyed it to a fourth defendant. Thereafter plaintiff commenced an action by publication against said owner as a non-resident, and at the same time levied an attachment on said real estate. Judgment was entered by default. Code Civil Proc. N. Y. § 707, provides that, where a non-resident defendant has not been served within the state with the summons, a judgment by default can be enforced only against property on which an attachment has been levied at the time when the judgment is entered. *Held*, in an action to have the deeds declared mortgages,

and the real estate adjudged subject to the judgment, that after the expiration of the year the original owner had at most an equitable interest, which was not subject to attachment.

Appeal from special term, Monroe county.

Action by Antoinette Macauley against Robert H. Smith and others. From a judgment for defendants plaintiff appeals. Code Civil Proc. § 707, provides that, "where a defendant who has not appeared is a non-resident of the state, or a foreign corporation, and the summons was served without the state or by publication, pursuant to an order obtained for that purpose, * * * the judgment can be enforced only against the property which has been levied upon by virtue of the warrant of attachment at the time when the judgment is entered."

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

J. Van Voorhis, for appellant. *R. Tracy*, for respondents.

DWIGHT, P. J. The judgment dismissed the complaint on the merits. The action was in the nature of a creditors' bill to have certain conveyances of real estate by warranty deeds declared to be mortgages, and to have the real estate adjudged to be subject to the lien of a certain judgment recovered by the plaintiff against the grantor in such deeds, and of an execution issued thereon. The action in which the judgment was entered was for the recovery of money only, and was commenced in August, 1879, by publication of a summons against the defendant therein as a non-resident, and an attachment was at the same time issued against her property, which was in form levied upon the real estate in question. Judgment by default was entered in that action in July, 1883, and an execution issued thereon to the sheriff of the county where the property was situated, which has never been returned. The facts bearing upon the *status* of the title to the property in question at the time of the commencement of the plaintiff's action, and the issue of the attachment therein, was as follows: On and prior to the 6th day of July, 1871, Lucilla Tracy was the owner and in possession of that property, consisting of two parcels of real estate on Alexander street in the city of Rochester, known as the "Tracy Seminary Property," upon one of which parcels there were two mortgages, of \$5,000 and \$2,000 respectively. On the 5th day of July, 1871, she entered into an agreement in writing with the defendants Robert H. Smith and Calvin Tracy and one Slocum Howland, since deceased, (who is represented in this action by the defendants William and Emily Howland, as his executors,) whereby, in consideration of and for the purpose of securing a loan of \$8,240, she agreed to execute and deliver to them a good and sufficient warranty deed of both parcels of land above mentioned; and the agreement proceeds as follows: "And the said Howland, Smith, and Tracy, in consideration of, and before the execution and delivery of, said deed, hereby agreed to advance the said sum of \$8,240 [in a manner specified] to the said Lucilla Tracy. It is also hereby agreed by and between the parties hereto that the said deed is to be and is a security for said loan for a term not exceeding one year from the date of said deed, which is to be hereafter executed; and that, upon the repayment of said sum of \$8,240, with interest, within or at the expiration of said one year, by the said Lucilla Tracy, her heirs, executors, administrators, or assigns, the said Howland, Smith, and Tracy, their and each of their heirs, executors, administrators, or assigns, are to reconvey said premises so conveyed to said Lucilla Tracy, her heirs, executors, administrators, and assigns, free from all incumbrances or liens thereon, except such as exist and are liens or incumbrances upon said premises at the time of the conveyance thereof as aforesaid by the said Lucilla Tracy. And in case the said sum of \$8,240 shall not be repaid during or at the expiration of one year as aforesaid, then it is understood and agreed that the said deed so as aforesaid to be executed by the said Lucilla Tracy is to become and be a deed absolute, and the said Howland,

Smith, and Tracy, or their heirs or assigns, are to become and be the owners thereof in fee-simple absolute." Accordingly, on the following day Miss Tracy executed and delivered to the other parties to the agreement deeds of the two parcels of land, containing the usual covenants of warranty, which were on the same day duly recorded in the clerk's office of Monroe county, in and by one of which deeds the grantees, as part consideration of the conveyance, assumed the payment of the two mortgages above mentioned. The loan was not repaid, and in December, 1872, the grantor quit and surrendered possession of the premises to the grantees, who remained in possession thereof, by tenants or otherwise, until the 1st of January, 1875, when they sold and conveyed the same to the defendant the New York Baptist Union, for ministerial education, which has ever since been in possession of the premises, claiming title thereto. The agreement of July 5, 1871, was never recorded, and the defendant the Baptist Union, etc., had no notice thereof at the time of its purchase of the property.

It is conceded, on the part of the plaintiff, that her judgment against the grantor in the deeds above mentioned is of no force or effect for the purposes of this action, unless as a judgment *in rem* by virtue of a levy of the attachment upon the property in question. Code Civil Proc. § 707. It is also in effect conceded that mere equitable assets or interests in property, real or personal, are not subject to the levy of an attachment; but the contention on the part of the plaintiff is that the interest of the defendant in that judgment in the property against which the attachment was directed was the legal title, and not an equitable interest merely; that the conveyances to the defendants Howland, Smith, and Tracy, interpreted in the light of the instrument of defeasance executed between the same parties, were mortgages merely, and did not pass the legal title to the property, but that the legal title, notwithstanding such deeds, remained in the grantor, and was subject to the levy and lien of the attachment issued in the plaintiff's action. This contention, we think, cannot be sustained. The agreement of defeasance which preceded the execution of the deeds, while it provided that the deeds were to be security for the loan, also prescribed the mode and condition of defeasance, viz., by a reconveyance by the grantees upon payment of the loan, with interest, within one year. The deeds were to be and were absolute in form and absolute in effect, subject only to the right of the grantor to have a reconveyance upon repayment of the loan within the time prescribed. There was no undertaking or agreement on the part of the grantor to repay the loan, and no indebtedness was created by the agreement which could have been collected by the grantees in any form of action. The option to repay the moneys and take a reconveyance of the property was a privilege of the grantor, and there was no corresponding option to be exercised by the grantees; they could not tender a reconveyance of the property and demand the repayment of their money.

We do not propose to extend the discussion to any inquiry as to what, if any, rights or remedy the grantor possessed under this agreement, after the expiration of the time within which she might demand a reconveyance; whether, for example, she might after that time have maintained an action to declare the deeds to be mortgages, and for the right to redeem. It seems to us very clear upon the case above stated that, whatever her rights or her remedy, they were of an equitable character, and could be established only by a resort to equity, and that until they were so established she had no legal title or interest in or to the property conveyed which was subject to the levy or lien of an attachment. In *Thurber v. Blanck*, 50 N. Y. 80, 87, it was held that, whenever debts and choses in action are so situated as to require the exercise of the equitable powers of the court to bring them within the reach of legal process, they must be treated as equitable assets only, and are not subject to attachment. See, also, *Anthony v. Wood*, 96 N. Y. 180. And in this respect we suppose there is no distinction between real and personal property rights and

interests; that where the interest of the debtor in either class of property can be established only by resort to equity it is to be treated, in respect to the application of legal process, as an equitable interest only, and is not subject to the lien of an attachment. Upon the ground so far discussed, we think the complaint in this action was properly dismissed, and that the judgment must be affirmed. Judgment appealed from affirmed, with costs. All concur.

HALL v. ABELLS.

(Supreme Court, General Term, Fourth Department. July 1, 1890.)

1. BURDEN OF PROOF—PAYMENT.

Where, in an action upon a contract for building a house, plaintiff shows performance, and defendant thereupon testifies that he has paid the amount due, the burden of proving that something is still due is on plaintiff.

2. POWERS OF REFEREE—AMENDMENT.

A referee has power to allow amendment of pleadings.

Appeal from judgment on report of referee.

Action by Napoleon Hall against W. Irving Abells. Plaintiff appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Homer Weston, for appellant. Jay B. Kline, for respondent.

MARTIN, J. We are of the opinion that the referee erred in finding that there was due from the plaintiff to the defendant the sum of \$87.50 on the agreement between them in relation to the house known as "No. 1 Putnam street." The proof was that the plaintiff agreed to build a house for \$1,500; that it was to be sold, and the parties were to divide equally any amount exceeding that sum, which should be realized from such sale. It was sold for \$1,800. It is true, the plaintiff received \$1,875, but \$75 was for building a kitchen costing that sum, and not included in the agreement. The defendant was paid on this agreement \$100; thus leaving his due only \$50, instead of \$87.50, the amount awarded by the referee. It is claimed by the appellant that the referee also erred in holding that the burden was upon the plaintiff to show that something was due him under the contract for building the house on East Fayette street. The appellant's contention is that, having proved that he built the house, for which he was to receive \$800, he was entitled to recover that sum, unless the defendant proved payment; and that the burden of establishing that defense was upon him. That payment is an affirmative defense, and the person averring it has the burden of establishing it by proof, is a rule that must be regarded as well settled. When, therefore, the plaintiff had proved his claim, the burden of establishing payment was upon the defendant. We think this burden was borne by him. He testified that the plaintiff's claim had been settled and paid. The plaintiff testified that he did not know whether there was in fact anything owing him on that contract or not. It was upon this state of the evidence that the referee held that the burden was upon the plaintiff to show that there was something owing thereon; and, as he failed, he could recover nothing. What the referee in fact held was that the burden of overcoming the proof of payment given by the defendant was upon the plaintiff, and, not having sustained it, he could not recover. We find no error in this. We think the findings of the referee are well sustained by the evidence, except that relating to the amount due the defendant under the contract as to house No. 1 Putnam street, which we have already considered. That the referee had power to allow the defendant to amend his answer we have no doubt, nor do we think there was any abuse of his discretion in allowing such amendment. We have examined the other exceptions in the case, but have found none that seem to require special discussion, or that would justify an interference with the judgment. We think the judgment should be modified by deducting therefrom the sum of \$37.50, and in-

terest thereon from the date of the entry thereof, and, as modified, affirmed without costs to either party. Judgment modified, and, as modified, affirmed without costs to either party. All concur.

BUTTON v. LUSK.

(*Supreme Court, General Term, Fourth Department. July 1, 1890.*)

1. JUSTICES OF THE PEACE—PLEADING—REPLEVIN.

Under Code Civil Proc. § 2940, which provides that pleadings in justices' courts shall be sufficient if they enable a person of common understanding to know what is intended, a complaint in replevin which alleges ownership of, and right of possession to, the property in plaintiff, and that defendant wrongfully detains it under an execution against a third person, is not defective because of its failure to allege that the taking was wrongful, as the facts averred clearly show this to have been the fact.

2. PLEADING—AMENDMENT—NEW CAUSE OF ACTION.

Even if a wrongful taking should have been more fully alleged, the county court, on appeal from the justice, has power to allow an amendment to that effect, as such amendment will not introduce a new cause of action.

Appeal from Onondaga county court.

Replevin by Nora Button against William Lusk. The action was originally commenced in justice's court, and taken by appeal to the county court, where plaintiff's complaint was dismissed on the ground that it did not state a cause of action. Plaintiff appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Charles F. Ayling, for appellant. *J. R. Shea*, for respondent.

MARTIN, J. We think the appeal in this case should prevail. The action was replevin. The facts, as set forth in the plaintiff's affidavit, were treated as alleged in the complaint. These allegations were, in substance, that plaintiff owned, and was entitled to the possession of, the property in question; that the defendant wrongfully detained it; and that the alleged cause of detention was that defendant levied upon and took it away under an execution against the property of a third person. The court below held that the complaint did not state facts sufficient to constitute a cause of action, refused to permit the plaintiff to amend, and dismissed the plaintiff's complaint with costs. This action was commenced in the justice's court. A pleading in that court is not required to be in any particular form, but it must be so expressed as to enable a person of common understanding to know what is intended. Code Civil Proc. § 2940. We think the complaint in this action was sufficient, under the liberal rule applicable to cases in that court. A person of common understanding, upon reading the complaint, would know that it was intended by the plaintiff to aver that she owned, and was entitled to the possession of, the property, and that the defendant wrongfully took and detained it under an execution against another person. This was all that was necessary. The effect of these allegations was to charge that both the taking and detention were wrongful. While the complaint did not in terms allege that the taking of the property was wrongful, it alleged facts which clearly showed a wrongful taking. We think it was sufficient.

But if it were to be held that a wrongful taking, or a demand and refusal, should have been more fully alleged, then we think the court erred in deciding it had no power to allow an amendment to that effect. Practically, the only limitation upon the power of the court to allow the plaintiff to amend the complaint was that a new cause of action could not be introduced. This action was to recover a chattel. The plaintiff had alleged ownership, right of immediate possession, and that it was wrongfully taken and detained by defendant under an execution issued against the property of another. The plaintiff simply asked to allege more fully that the taking and detention were wrongful. We think the court had power to allow the amendment asked for.

This conclusion seems to be sustained by the authorities. *Cramer v. Loojoy*, 41 Hun, 581; *Argersinger v. Levor*, 7 N. Y. Supp. 923; *Hatch v. Bank*, 78 N. Y. 487; *Reeder v. Sayre*, 70 N. Y. 180, 190; *Insurance Co. v. Nelson*, 78 N. Y. 137, 149; *Harris v. Tumbidge*, 83 N. Y. 93, 97; *Price v. Brown*, 98 N. Y. 388; *Benson v. McNames*, 12 N. Y. St. Rep. 503; *Avery v. Railroad Co.*, 106 N. Y. 143, 12 N. E. Rep. 619; *Davis v. Railroad Co.*, 110 N. Y. 646, 17 N. E. Rep. 738. In the case last cited, it is said: "It is a fair test, to determine whether a new cause of action is alleged in the amended complaint, that a recovery had upon the original complaint would have been a bar to any recovery under the amended complaint." If we apply that rule to the proposed amendment in this case, it would seem to leave no doubt as to the power of the court to allow the amendment sought. It is manifest that, if the plaintiff had recovered a judgment in the county court for the possession of the property in question, the judgment would have been a bar to any recovery under the proposed amended complaint. We are of the opinion that the court erred in dismissing the plaintiff's complaint, and that for such error the judgment should be reversed. Judgment reversed on the exceptions, and a new trial ordered in the Onondaga county court, with costs to abide the event. All concur.

In re SCHMITT.

(Supreme Court, General Term, Third Department. July 7, 1890.)

1. INSURANCE—MUTUAL BENEFIT ASSOCIATIONS.

Laws N. Y. 1889, c. 520, § 3, provides, with reference to the preliminary organization of fraternal beneficiary societies, that when, among other things, a sworn statement has been filed that at least 200 persons have made application in writing for membership in such an association, the superintendent of insurance shall issue a license, etc. The section further provides that when the license has been filed, and when at least 200 persons have subscribed in writing to be beneficiary members, etc., such persons shall be constituted a body politic and corporate, etc. *Held*, that it was necessary, in order to become a body corporate under the law, not only for the prescribed 200 persons to make application for membership before the issuance of the preliminary license, but they must subscribe in writing to be beneficiary members after the issuance of the license.

2. SAME—MANDAMUS TO SUPERINTENDENT OF INSURANCE.

The act provides that the application for membership in such an association shall be made in good faith, and that, when the superintendent of insurance shall have certified that they have complied with the provisions of the act, the proposed corporators shall be constituted a body politic, etc. *Held* that, the superintendent having refused to issue such a certificate on the ground that the membership of the proposed association was not entered into in good faith, *mandamus* would not issue to compel him to issue such certificate; his duties in the premises being judicial in their nature.

3. SAME.

On application for *mandamus* to compel the issuance of such certificate, allegations in the affidavits of the superintendent that the provisions of the said act have not been complied with will be taken as true, where the relator proceeds to argument without controverting them.

Appeal from special term.

In the matter of the application of August W. Schmitt and the Order of the International Fraternal Alliance for a peremptory writ of *mandamus* to compel Robert A. Maxwell, as superintendent of insurance, to issue a final certificate entitling the Order of the International Fraternal Alliance to become a body politic and corporate. From an order denying the writ the applicants appeal.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

James C. de la Mare, for appellants. *Charles F. Tabor*, Atty. Gen., for respondent.

LONDON, J. The order of the special term should be affirmed—

1. Because the superintendent, in his opposing affidavits, denies that the relator has complied with the provisions of section 3, c. 520, Laws 1889, and the relator, by proceeding to argument without controverting the opposing affidavit, admits its allegations. *People v. Supervisors*, 78 N. Y. 173; *People v. Fairman*, 12 Abb. N. C. 252; *People v. Cromwell*, 102 N. Y. 477, 7 N. E. Rep. 413. The relator contends that the denial is apparent, rather than real, and that facts stated show that the relator has complied with the provisions of the section cited. Chapter 520, Laws 1889, is entitled "An act in relation to fraternal beneficiary societies, orders, or associations." Section 1 provides that any number of persons, not less than nine, may associate together upon the mutual assessment plan, and form an association for the relief of its members, as therein afterwards prescribed, and not otherwise. Section 2 provides a plan for preliminary organization. The associates shall file in the office of the superintendent of the insurance department a declaration, signed and acknowledged by each of them, which shall express their intention to form the association, its name, method of business, official title of officers, etc. Section 3 provides that, with the filing of the declaration, there shall be filed the sworn statement of three of the corporators that at least 200 persons eligible to membership under the proposed laws of said association have in good faith made application in writing for membership. This declaration and sworn statement must then be referred to the attorney general, who, if he find the same conformable to the act, shall so certify; and then the superintendent shall record the declaration and certificate, and deliver to the association a certified copy of all of the papers, and also a license to carry on the work of the society as proposed. It is conceded that thus far the provisions of the act were complied with, and that the superintendent of the insurance department issued the license to the society. Section 3 further provides: "Upon such certified copy and license or certificate being filed in the office of the superintendent of insurance, and when at least two hundred persons have subscribed in writing to be beneficiary members therein, the total beneficiary amount to be not less than four hundred thousand dollars, and have paid in one full assessment in cash, amounting to at least one per cent. thereof, and the superintendent of the insurance department shall have certified that it has complied with the provisions of this act, and is authorized to transact business, the said corporators, and those that may hereafter become associated with them, or their successors, shall be constituted a body politic and corporate," etc. It will be seen that, in order to obtain the preliminary license, at least 200 persons must first make application for membership, and that after the preliminary license is issued at least 200 persons must subscribe in writing to be beneficiary members therein. In the first instance, 200 persons must apply for membership; and, when the license "to carry on the work" is issued, they, or an equal number, must actually become members. The issue presented by the superintendent of insurance is that, after he issued his license, the applicants for membership took no further steps to become members, but relied upon their previous application as a sufficient compliance with the act. The papers presented by the relator confirm this position.

2. The affidavit of the superintendent of insurance further shows that he caused an investigation to be made, and thereby ascertained that the persons who are alleged to have made application for membership are nearly all members of a similar association in the state of Maryland, and that the proceedings taken in this state were with the view to transfer the membership from the Maryland association to the New York association, and that the money paid for that purpose was not paid by the members themselves, but by the Maryland association; that such payment has the appearance of a loan; and that the transactions, which he gives at considerable length, lead him to conclude that the actual membership has not, in good faith, been entered into,

nor has the payment required been made in good faith; and hence he makes the denials set forth in his affidavit. We may accept these denials as his findings of fact. In discharging the responsible duty of determining whether the proposed association had in all respects complied with the provisions of the act, the superintendent of the insurance department has a judicial duty to perform. *People v. Chapin*, 104 N. Y. 369, 11 N. E. Rep. 383; *People v. Barnes*, 114 N. Y. 317, 20 N. E. Rep. 609, and 21 N. E. Rep. 739; *People v. Common Council*, 78 N. Y. 33. In such a case, *mandamus* will not lie. *Id.* It is plain that the superintendent was confronted with a grave question of fact, not only judicial in its nature, but one requiring the special facilities and qualifications which that officer is presumed to command and possess. Unless he determined it in favor of the society, no occasion for the ministerial duty of issuing the final certificate exists. Order affirmed, with costs.

MAYHAM, J., concurs. LEARNED, P. J., takes no part.

HEAVEY v. HUDSON RIVER WATER-POWER & PAPER CO.

(Supreme Court, General Term, Third Department. July 7, 1890.)

1. MASTER AND SERVANT—RISKS OF EMPLOYMENT.

Plaintiff was employed by defendant to keep in motion a heavy iron pipe suspended above some open vats containing hot liquors. Plaintiff performed his work by pushing against the pipe with a pole, and was stationed upon some pipes laid upon the top of the vats, and along their sides. *Held*, that it could not be said, as a matter of law, that plaintiff assumed the risk of falling into the vats.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Plaintiff fell into one of the vats through his pole slipping off the pipe as he was pushing against it. He had been given instructions with regard to the performance of his work; but he had not been told that his pole, the end of which had become soft and spongy through use, was unsafe. He was 15 years old, and without previous experience. *Held*, that the question as to whether defendant should have given further instructions was for the jury, and that it could not be said, as a matter of law, that plaintiff was contributorily negligent in using the pole.

Appeal from circuit court, Saratoga county.

Action by John Heavey against the Hudson River Water-Power & Paper Company. The action was to recover for injuries sustained by the plaintiff, an employe of defendant, by falling into a vat of hot liquor while he was engaged in his employment. The plaintiff charges that the defendant neglected to assign him to a safe place of labor, and to furnish him with proper appliances, and that he sustained his injuries in consequence of this neglect of defendant. On the 31st day of March, 1885, the plaintiff, then 15 years of age, was engaged in defendant's paper pulp manufactory. His duty was to guide, by pushing with a wooden pole, which he held in his hands, an iron pipe eight feet long and seven inches in diameter, which, moving horizontally upon a joint over a series of vats, discharged hot liquor into them, successively, as the plaintiff pushed it, so that its orifice of discharge rested above whichever vat he needed to supply with the liquor. This iron pipe, movable horizontally upon its hinge, was very heavy. It was about two feet above the level of the top of the vats. Its discharging end curved downwards. The plaintiff pushed it from vat to vat by placing the end of his wooden pole against a flat flange or band upon the end of the pipe, resting that end of the pole upon a hook or iron loop or rest which was attached to the end of the pipe, and then pushing upon the pole with the whole weight of his body. While pushing this pipe, he had to stand upon other iron pipes which lay upon the top of the vats, near one side of them. There were nine vats, standing side by side, in the pit-room. The center vat received the liquor from the pipes which lay upon the top of the adjacent vats. From the center vat the liquor was distributed through two pipes—one on the right, and the other on the left—to the vats upon either side. There were four vats on

each side of the center vats. These vats were each twelve feet by eight, and six feet deep. The movable pipe in question was the terminal part of the pipe leading from the central vat. The vats were uncovered, except by the pipes leading to the central vat. While the plaintiff was standing upon these pipes, pushing the movable pipe, his pole slipped from the flange, or end of the movable pipe, causing him to lose his balance, and fall forward into the vat over which he stood. He was soon extricated, but sustained serious injury. The end of the pole placed against the movable pipe had become soft or spongy by use and saturated in the liquors. Upon the trial, its slipping was attributed to that cause. While it does not clearly appear from the evidence, it is probable that the end of the pole rested in the iron hook or loop, and for some reason the force employed in pushing the pole raised it upward out of its rest, and thus it slipped. The top of the vats was about a foot above the floor. The plaintiff had been engaged in this employment six weeks. He had had no previous experience. He was doing his work as he had been instructed by the foreman to do it. Before the plaintiff was employed, a rope had been used to pull the movable pipe from vat to vat. Why this method was abandoned, does not appear. The vats had also been more effectually covered. The trial court granted a nonsuit because the plaintiff assumed the known or apparent risks of the business, and he must have known better than any one else that the end of his stick had become soft and spongy, and therefore he knew better than any one else that it was less fit for use. Plaintiff appeals.

Argued before LEARNED, P. J., and LANDON, and MAYHAM, JJ.
T. F. Hamilton, for appellant. *L. B. Pike*, for respondent.

LANDON, J. The plaintiff assumed all the risks incident to his employment, except those which the reasonable care of the defendant could, and therefore should, have protected him against. Grant that the pole was in good condition, and that the plaintiff's liability to lose his balance, or slip and fall, was as common to any other place as to this; and thus far the plaintiff assumed the risk. That he should slip and fall was, independently of the place into which he should fall, too ordinary and common an experience with such a youth to be a matter of concern to his master or himself. But if, when he should fall, he must inevitably fall into a deep vat containing scalding liquor, then the situation is different. If, by reasonable care, the master could protect him from falling into the vat, as by guard-rails or covers, or other appliances not materially obstructive to the business, then the omission of some such protection would be the fault of the master. The plaintiff did not assume the risks which his master should have protected him from, unless he can be properly charged with negligence in accepting the place of labor which his master assigned him. If the defendant should claim that the plaintiff was negligent in the respect last stated, all he could ask, upon the evidence, would be to have the jury pass upon the question. We think, under the circumstances presented, that it was a question of fact whether the plaintiff's risk of falling into the vat, in case he should fall at all, was not one for which the defendant was responsible; and therefore, if the nonsuit was granted because it was clear, as a matter of law, that the plaintiff assumed it, it was error.

The learned trial judge, in effect, held that, because the plaintiff knew that the end of his pole had become soft and spongy, he therefore knew that it had become unfit for use, and his further use of it was negligence which contributed to his injury. This proposition assumes that the facts admit of but one inference, and that against the plaintiff. We think that fair men might, with entire fairness, make a different inference. The testimony tends to show that the plaintiff faithfully followed his instructions. He was 15 years old, without previous experience; was given his place of labor, this

pole, and certain instructions as to its use. He knew, of course, that the end of the pole was becoming soft and spongy. But he might or might not suspect that it was becoming unsafe. We have no right to assume that he knew. No one had told him, and his experience had not instructed him. Why should he expect it to slip, or fear it? The jury would not exact from this lad any more thought or care than he was able to give, nor any more knowledge than he had. We think it was for the jury, and not for the court, to determine whether the plaintiff was negligent in this respect.

If the jury should conclude that the plaintiff ought to have been instructed with respect to the proper treatment of his pole in case the end became soft, it would follow that the failure to instruct him was an omission of duty on the part of the defendant. A servant may ordinarily be expected to know when his tools need repair. But, in the absence of experience and instruction, a lad cannot be expected to know intuitively, or as fully as his experienced master; and it is reasonable that he should be warned against such deterioration of them as endangers his safety, especially when it is of such a nature as requires instruction to arrest his attention or excite his apprehension. Every case must be governed by its own circumstances. In this case the question whether the defendant ought to have given the plaintiff further instructions seems to be involved, and to bear directly upon the question of the plaintiff's negligence, and also upon the question of the defendant's negligence. It is a question for the jury. Judgment reversed; new trial granted; costs to abide the event.

LEARNED, P. J., and MAYHAM, J., concur.

PEOPLE *ex rel.* BALLOU v. WENDELL, County Judge.

(Supreme Court, General Term, Third Department. July 7, 1890.)

1. **MANDAMUS—SOLDIER'S RIGHT TO OFFICE.**

Under 1 Rev. St. N. Y. (8th Ed.) p. 407, § 1, which provides that honorably discharged Union soldiers and sailors shall be preferred for appointment in every public department, such a soldier is not entitled to a writ of *mandamus* to compel a judge to appoint him to the office of crier of the court, to which, in spite of his application, a civilian was appointed, even though he be qualified for the place, and was the only soldier who applied.

2. **SAME—POWER TO APPOINT.**

The judge had power, in his discretion, to appoint from the whole body of electors, and, having exercised that power and discretion, his duty was performed; and, since *mandamus* lies only to compel action by inferior officers and tribunals, there was nothing upon which the writ could take effect.

3. **SAME—PARTIES.**

The person appointed, being in possession of the office, could not be ousted without a hearing; and that he was not a party to the proceeding was fatal to the application.

Appeal from circuit court, Montgomery county.

Application by Cyrus N. Ballou for a writ of *mandamus* to John D. Wendell, county judge of Montgomery county. Relator appeals from an order refusing to submit to the jury any of the issues of fact joined by the alternative writ, and from an order dismissing the proceeding with costs. The relator, an honorably discharged soldier of the Union army, and otherwise eligible to appointment, in January, 1889, applied to the defendant, as county judge of Montgomery county, to be appointed crier of the courts of record for said county. The judge appointed one Folmsbee, a civilian, to the office, whereupon the relator obtained a writ of alternative *mandamus*. The defendant made return to the writ, denying the capacity of the relator to discharge the duties of the office, and alleging that Folmsbee had the better qualifications, and therefore the defendant appointed him, and taking issue upon other allegations of the writ. These issues were brought to trial before the

circuit court and a jury. At the close of the testimony, upon motion of the defendant, the court dismissed the proceedings with costs, refusing to submit the case to the jury. From the order reciting this disposition of the case the relator appeals. 1 Rev. St. N. Y. (8th Ed.) p. 407, §§ 1, 2, are as follows: "Section 1. In every public department, and upon all public works, of the state of New York, and of the cities, towns, and villages thereof, and also in non-competitive examinations under the civil service laws, rules, or regulations of the same, wherever they apply, honorably discharged Union soldiers and sailors shall be preferred for appointment and employment. Age, loss of limb, or other physical impairment which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the business capacity necessary to discharge the duties of the position involved. Sec. 2. All officials or other persons having power of appointment to, or employment in, the public service, as set forth in the first section of this act, are charged with a faithful compliance with its terms, both in letter and spirit; and a failure therein shall be a misdemeanor."

Argued before LEARNED, P. J., and MAYHAM and LANDON, JJ.

Sayles, Searl & Sayles, for appellant. *W. B. Dunlap*, for respondent.

LANDON, J. Since the trial court refused to submit the case to the jury, and dismissed the proceeding, we may assume upon this appeal that every controverted question of fact might have been found in the relator's favor by the jury, if the case had been submitted to them. The case, then, is, that there was a vacancy in the office of crier of the courts of record for Montgomery county; that the relator was an elector of the county, and an honorably discharged soldier of the Union army, and was the only soldier who was an applicant for the office, and that he possessed qualifications sufficient to perform the duties of the office; that one Folmsbee was also an applicant for the office, and that the county judge, after a consideration of the matter, appointed Folmsbee instead of the relator; that the county judge, in making the appointment, considered that Folmsbee would make the better officer. The question, then, is, would the relator, assuming these facts to be found in his favor, be entitled to a writ of peremptory *mandamus* requiring the county judge to appoint him? We think not. The statute does not give him the office, nor command that he, alone of all the honorably discharged Union soldiers, shall be appointed. It says that such soldiers shall be preferred, other necessary qualifications existing. It points out no method by which one soldier shall have a preference to the appointment over all other soldiers. It simply prefers soldiers to civilians. Even if the appointment of Folmsbee should be vacated, and the county judge were peremptorily commanded to appoint a soldier, he would have the whole body of eligible soldiers from whom to select. It follows that the relator has no clear legal right to the appointment, to the exclusion of all other soldiers, and hence lacks the clear right essential to a *mandamus*.

Again, *mandamus* issues to compel inferior tribunals and officers to act. Assuming that it was the duty of the county judge to appoint a crier, he could make that appointment from the whole body of eligible electors. All that *mandamus* could do would be to compel him to act, and make the appointment. In so far as he had discretion in exercising the right of selection, *mandamus* could in no wise control that discretion. The county judge had the duty to select, the power and duty to appoint. He has discharged that duty, and has no further duty now to perform. Whatever may have been his obligation to give the soldiers a preference, his power to discharge that obligation ended when he made the appointment. *People v. Trustees*, 7 N. Y. Supp. 125; *People v. Village of Little Falls*, 8 N. Y. Supp. 512, 960; *People v. Barden*, Id. 960; *People v. Summers*, 9 N. Y. Supp. 700. The relator's grievance is not that the county judge refused to act, but that he erred in

his action, and appointed a civilian instead of a soldier. Whether there is any method to review his decision and action, we are not called upon to decide. It is enough now to say that *mandamus* is not an appropriate method to review it.

Besides, Folmsbee was appointed to the office, and presumably is in possession of it. He is not a party to this proceeding, and cannot be turned out without his day in court, in the proper action. The relator cannot be inducted into office unless a vacancy can be legally made for him to fill. It cannot be made in this proceeding.

The learned counsel for the relator cites *In re Wortman*, 2 N. Y. Supp. 824, as an authority for *mandamus*. *Mandamus* was refused in that case. In *Sullivan v. Gilroy*, 8 N. Y. Supp. 401, the soldier had procured his preference to employment, and then was arbitrarily deprived of it. *Mandamus* was issued to compel his restoration to his rightful place. The difference between depriving a person of what is already rightfully his own, and compelling the bestowment upon him of what he never had, is suggested in the case, and is very plain. That difference exists between that case and this.

It is manifestly difficult to enforce, in cases like the one before us, the compulsory preference which the act seems to prescribe. Practically, the act embodies an inconsistency in principle. It seeks to give a preference to one class of citizens, as a class, without impairing that equality of civil rights which the soldier struggled to establish, and also without changing the wise maxims of government by which justice is administered. We cannot put the relator in without turning Folmsbee out, and, so far as we know, Folmsbee has a right to stay in. We cannot put the relator in without changing the rules governing *mandamus*, and the legislature has not authorized any change. There are many soldiers, and the relator is only one; and the act does not provide for merging in him the rights of every other soldier, and of every other person, eligible to appointment. The order and judgment thereon should be affirmed, with costs. All concur.

PEOPLE v. SNAITH *et al.*

(Supreme Court, General Term, Third Department. July 7, 1890.)

1. ARREST IN CIVIL ACTION—CONSPIRACY—AFFIDAVITS.

Under Code Civil Proc. N. Y. § 557, which prescribes that in cases in which arrests are authorized in civil actions the cause of action must be made to appear by affidavit, it is not sufficient that the acts are charged upon information and belief; and where the cause alleged is conspiracy to defraud the state the affidavits must state facts which show that the conspiracy is provable.

2. SAME.

Where the cause of action alleged is conspiracy, it is not sufficient to justify an arrest that it appears from affidavits that one or more of the defendants did defraud the state, when it is not shown to be provable that they did so in pursuance of a conspiracy.

Appeal from special term, Oneida county.

Action by the people of the state of New York against John Snaith, Charles B. Andrews, and Timothy J. Sullivan. Defendants appeal from an order denying a motion to vacate an order of arrest.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

M. Hale, for appellants. *John W. Hovan*, Dep. Atty. Gen., for the People.

LANDON, J. We think this order must be reversed for the reason that it does not appear by the affidavits presented that the cause of action stated in the complaint against the defendant actually exists. The right to the order of arrest in this case depends upon the nature of the action, and the Code requires that it must appear by affidavit that the cause of action also exists.

Section 557. The cause of action must not only be stated, but its existence must be made to appear by affidavit. The arrest of the defendant in a civil action founded upon an alleged wrongful act is a provisional and extraordinary remedy, is allowed before final judgment, and therefore before it can be definitely known whether the plaintiff can maintain his case. The provision of the Code, that before the order can be granted it must appear by affidavit that such a sufficient cause of action exists against the defendant, is the only positive safeguard of his personal liberty which the law affords to a defendant against whom such a cause of action is stated. In this case affidavits are submitted, but in none of them is it stated that the affiants know that the cause of action actually exists, nor do the statements made by the several affiants, taken together, show that all the facts constituting the cause of action are known among them. In legal sense, a cause of action exists when the facts constituting it are provable, and, failing more exact proof, the plaintiff can make out his case for an arrest by showing that the proof of the necessary facts is within his procurement. Many of the material facts are here stated upon information and belief. Such a statement is evidence of the good faith of the affiant, but it is worthless as evidence of the material facts constituting the cause of action, unless the affiant also states such other facts within his own knowledge as tend to show with satisfactory certainty that the material facts are within the knowledge of others, and provable by them. In the latter case it is obvious that the affidavits of such other persons should be produced if it is reasonably practicable to do it; for when they are not produced there is danger that the court will be misled by overstatements induced by the zeal of parties and counsel. The non-production of the affidavits of persons whose knowledge of the facts is relied upon should be satisfactorily excused. When the plaintiff resorts to methods most liable to mistakes he should take the more care to guard against them. It is believed that these views are supported by a great weight of authority, and are as liberal to the plaintiff as can well consist with a proper regard for the right of personal liberty. *Martin v. Gross*, 4 N. Y. Supp. 337; *Thompson v. Best*, Id. 229; *Crandall v. Bryan*, 15 How. Pr. 48; *Whitlock v. Roth*, 5 How. Pr. 143; *De Nierth v. Sidner*, 25 How. Pr. 419; *Roderigas v. Institution*, 76 N. Y. 316, 323; *Bennett v. Edwards*, 27 Hun, 352; *Hallock v. Van Camp*, 8 N. Y. Supp. 588.

The cause of action stated in the complaint is that the defendants fraudulently conspired together to defraud the state of money and property by means amounting to a cheat, (Pen. Code, § 168;) and that, in furtherance of such conspiracy, and in pursuance of it, the defendants did the several acts set forth in the complaint, whereby they did cheat and defraud the state of large sums of money. In the view which we take of the complaint, and which is professedly the theory of the pleader, the conspiracy is the *gravamen* of the charge. The specifications of the acts done are specifications in support of the charge of the conspiracy, and, although manifestly some of the specifications might have been so pleaded as to set forth separate causes of actions against one or more of the defendants, yet, so far as the order of arrest is concerned, we cannot regard them as so pleaded. The plaintiff, therefore, must show, within the rules already stated, that the cause of action for a conspiracy, as stated, exists,—not necessarily in every part and detail of all the charges, but in every material part necessary to constitute the conspiracy, and in every material part of some one of the sufficient specifications under such charge of conspiracy. The complaint charges that the defendants unlawfully conspired together to cheat and defraud the state of large sums of money substantially in this wise: (1) To procure the passage of chapter 582, Laws 1888, being an act for the removal of the old ceiling of the assembly chamber in the capitol, and its replacement by a new one; (2) to procure the commission authorized by the said act to make contracts for such work in be-

half of the state, to award the contract therefor to the defendant Snaith, and enter into a contract therefor with him in such fraudulently deceptive and imperfect form as would permit him, with the co-operation of the defendant Andrews, to do the work in such second-class form and style as would enable them to take as large profits under it as they should venture to take the risk of; (8) to obtain payments as for work properly done, when in fact not done, and in excess of what would be due if properly done; (4) to substitute different and inferior plans and specifications for those approved by the commission, so as to make it appear that the contract embraced the substituted plans and specifications. The complaint then charges the acts done in execution of the conspiracy, with the net result of defrauding the state of \$250,-563.09. It is not charged in the complaint that the conspiracy to procure the passage of the act was followed by any overt act in furtherance of its purpose. The existence of such a conspiracy is not shown to be provable. Respecting the conspiracy to procure the award of the contract to Snaith, it undoubtedly is provable that he was the lowest bidder; that one of the other competing bids was made at his instance; that the contract was awarded to him; that such contract was based upon plans which had been prepared by an architect employed by Andrews in his capacity as superintendent of public buildings, assuming to act under the authority conferred by the act of 1888 referred to; that such plans and specifications were approved by the commission acting in behalf of the state; that the said contract and the plans and specifications, except the drawings accompanying them, or which were to accompany them, are as set forth in the complaint. There can be no doubt that the contract was sufficient for the proper performance of the work if the plans and specifications were properly prepared. The act of 1888, § 1, provides that the committee "shall have power to employ an architect to make plans and specifications, and all repairs and alterations shall be made in accordance with such plans and specifications after the same shall be approved by said committee, or a majority of them, in writing, and said plans and specifications, when so approved, shall not be changed, except upon the written consent of a majority of said committee." The plaintiffs must repel the presumption of sufficiency which arises from the official preparation and approval of these plans and specifications, and show their ability to prove, not only that they were insufficient, but that they were so made or left in pursuance of the fraudulent conspiracy of the defendants. For the reasons stated above and in the opinion of the court below, we reject as unreliable all the conjectures and inferences drawn by the affiants from alleged documents and testimony, no part of which the plaintiffs have deemed it important to place upon the record. Also the conversations of persons who, refusing to verify their statements, have been excused from verifying them.

The affidavit upon which the plaintiffs must mainly rely to show that they can prove this part of their case is made by A. Russell. Mr. Russell was one of the committee of architects appointed by the assembly to examine the assembly ceiling and make report thereon. This report is presented with Mr. Russell's affidavit. The report states that the specifications are general in character; that they are not adequate, unless accompanied by complete, clear, and carefully prepared drawings; that 27 drawings were first submitted to these experts, and 24 additional drawings later. Upon the testimony or proofs presented to the committee of experts, they report that only 9 of the 51 drawings existed prior to the award of the contract. These 9, the committee report, are so vague and incomplete as to render any competitive bids upon them useless as estimates of the value of the work. The committee therefore express doubt of the *bona fides* of such bids. The committee do not say that the 9 drawings, taken in connection with the specifications, do not indicate the nature, character, and extent of the work, but they do say they do not do so adequately. The committee, however, do find them sufficiently specific

and clear to enable them to report five substantial subsequent departures from them in the subsequent performance of the work. The committee do not report upon the effect of the 42 other drawings, which they assume were made subsequently to the award of the contract. They report that 24 of them were apparently used in the construction of the work, and they maintain a silence as to the other 18, except that most of them were made in pencil, without date, unsigned, and without titles. A Mr. Rowe, as it elsewhere appears, was the chief draughtsman and architect. His name was unknown to the committee of expert architects as an expert name. Mr. Russell states in his affidavit that "all the facts stated in said report are true." This language is equivocal in form, but we do not think any equivocation was intended. What the experts mean to express is that, upon the conclusions of facts which they inferred to be true from the evidence and appearances before them, the specifications were, in their opinion, at the time the award was made, inadequate to indicate as fully as was necessary the extent, details, and quality of the work required. Their opinion, upon established architectural facts, is without doubt entitled to confidence, but their assumption that the facts which they assumed as the basis of their opinion were established in no wise tends to establish them. Looking into the other affidavits in the case, we fail to find that of the 51 drawings in the case only 9 were in existence at the time the award was made. But, assuming that the plans and specifications were imperfect, we still need something more than conjecture to show that the imperfection is due to a criminal conspiracy. The complaint is so framed as to suggest the idea that the people may fail upon this part of their case, and, if so, that they may charge the conspiracy as beginning after the award and execution of the contract, and as embracing the fraudulent departure from it as made, and the substitution of inferior and less expensive work, and the procurement of overpayment for that. The papers presented do show that the plaintiffs will be able to prove that Snaith did not perform the contract as made, and in many respects substituted an inferior and different work for that which he had agreed to perform, and that he obtained payment beyond what was his due. It also appears that the defendant Andrews approved the bills upon which payments were made to Snaith. This, however, does not show that a conspiracy between Andrews and Snaith is provable. Facts must be presented tending to show that Andrews' approval was collusive, and in pursuance of the conspiracy. The fact is shown that Mrs. Andrews has acquired some property which may have been given to her by or through Snaith, but such gift does not appear to be provable. That Andrews and Snaith were friendly and intimate is probably provable. If there were evidence of collusion and confederacy such evidence would tend to confirm it, but it does not of itself tend to show it. There is a charge that Andrews obtained \$7,500 for alleged expenses of the commission upon his promise to produce the vouchers, which promise he did not fulfill. There may be a separate cause of action against Andrews for this sum, as there may be against Snaith for defrauding the state. But, as before remarked, the order of arrest must fail with the failure to show that the charge of conspiracy is provable. It cannot be sustained by showing separate causes of action against the defendants severally, since, in such case, the order would be granted for one purpose and perverted to another,—to the subversion of the right of personal liberty. We do not mean to say that the people may not be able to maintain the cause of action they have stated. What we do say is, they do not now show their ability to prove it with that clearness which can justify an order depriving the defendants of their liberty. Undoubtedly great labor must be performed and great difficulties surmounted to make a clear presentation of ability to prove such a case. Possibly this fact, and the gravity of the wrong charged, and the indignation it would naturally excite, may have induced some reliance upon a judicial presumption against the defendants. Be this as it

may, we must take care lest we trench upon the safeguards of liberty itself. Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs. All concur.

PEOPLE v. MAXON.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

1. **INDICTMENT—DESCRIPTION OF OFFENSE.**

Under Code Crim. Proc. N. Y. § 276, which requires an indictment to state both the name of the crime, and the facts whereby it was committed, a substantial variance between the crime charged and the facts charged is fatal to the indictment.

2. **RAPE—SEXUAL INTERCOURSE WITH FEMALE UNDER SIXTEEN YEARS OF AGE.**

Pen. Code N. Y. § 278, defines rape "as an act of sexual intercourse with a female, not the wife of the perpetrator, committed against her will or without her consent." It then provides for the punishment of a person committing the crime of rape, "or an act of sexual intercourse with a female not his wife, where the female is under the age of sixteen." *Held*, that an indictment charging defendant with having committed the crime of rape, describing it as sexual intercourse with a female, not defendant's wife, under the age of 16 years, is fatally defective, as an essential element of rape is sexual intercourse committed "against the will, or without the consent, of the female."

Appeal from court of sessions, Ulster county.

Indictment of Daniel Maxon for rape. He was convicted and sentenced, and now appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

D. M. De Witt, for appellant. *J. N. Vanderlyn*, Dist. Atty., for the People.

LANDON, J. The defendant was found guilty upon an indictment containing two counts. In each count it is alleged that the "grand jury of," etc., "accuse Daniel Maxon, late of," etc., "of the crime of rape, committed as follows." In the first count the acts charged as constituting the crime charge a rape as defined in section 278 of the Penal Code, namely, "An act of sexual intercourse with a female, not the wife of the perpetrator, committed against her will, or without her consent." In the second count the acts charged as constituting the crime charge an act of sexual intercourse with a female, not the wife of the defendant, under the age of 16 years. The testimony given did not tend to establish the acts charged in the first count, but did tend to establish the acts charged in the second count. The point was distinctly presented upon the trial, that the crime charged in the second count was rape; and the facts charged did not constitute the crime of rape, but did constitute the crime of the act of sexual intercourse with a female, not the wife of the defendant, under the age of 16 years. The court was thereupon requested to hold that under this count the defendant could not be convicted. The court refused so to hold. We think the request was a proper one, and that its refusal was error. Section 278 of the Penal Code defines "rape" as follows: "Rape is an act of sexual intercourse with a female not the wife of the perpetrator, committed against her will, or without her consent." No other definition of "rape" is given. The section continues: "A person perpetrating such an act, [*i. e.*, rape,] or an act of sexual intercourse with a female not his wife, (1) when the female is under the age of sixteen years;" then follow several other conditions not material here, the section concluding, "is punishable by imprisonment for not less than five, nor more than twenty, years." Since the statute makes it an essential of the crime of rape that the act of sexual intercourse must be committed "against the will, or without the consent," of the female, any other criminal sexual intercourse which does not embrace that essential must be other than rape. The section in question makes the acts of criminal sexual intercourse other than rape equally punishable with rape, but it does not make them rape; and it dis-

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tinguishes them from rape, not only by the differences in definition, but also by separating them from each other by the disjunctive "or" in the sentence, "A person perpetrating such an act, [*i. e.*, rape,] or an act of sexual intercourse," etc. The defendant was therefore accused in the second count of the indictment of rape, and was charged with acts, as constituting it, which did not in fact constitute it. The accusation of crime was not supported by a charge of acts constituting that crime. The crime charged was not supported by the acts proved. The defendant was found guilty of rape without having been proved guilty of rape. He may have been proved guilty of the "carnal abuse of a child," if we may adopt the language of the title of the chapter in which section 278 of the Penal Code is placed, or of "an act of sexual intercourse with a female, not his wife, under the age of sixteen years," if we use, as we think is preferable, the language of the section itself; but he was not accused in the indictment of this crime.

Section 276 of the Code of Criminal Procedure requires that the indictment shall state both the accusation of the crime, and the facts whereby it was committed. A substantial variance between the crime charged and the facts charged is fatal. *People v. Dumar*, 106 N. Y. 502, 13 N. E. Rep. 825. The judgment of conviction and sentence must be reversed, and the case be remitted to the sessions of the county of Ulster for such proceedings as may be proper. All concur.

LYNN v. CITY OF TROY.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

1. MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—PERSONAL INJURIES.

In an action against a city for personal injuries, evidence that plaintiff fell in a hole in the sidewalk, which had caved on the side of a yard eight feet below its level, is sufficient to go to the jury on the question of defendant's negligence.

2. SAME—EVIDENCE.

The quarterly bill of the city hospital against the city, showing when plaintiff went to and left the hospital, is the mere statement of the hospital authorities, and is not evidence against plaintiff.

Appeal from circuit court, Rensselaer county.

Action by Michael Lynn against the city of Troy for personal injuries suffered from a fall in a hole in the sidewalk.

Argued before LEARNED, P. J., and LANDON, J.

R. A. Parmenter, for appellant. *Smith, Furman & Cowen*, (*Levi Smith*, of counsel,) for appellee.

LEARNED, P. J. This is an appeal from a judgment on a verdict, and from an order denying a new trial. The action was to recover compensation for injuries alleged to have been suffered by plaintiff by his falling in a hole in the sidewalk of North First street or North First street alley. According to the map, the roadway is fourteen feet wide, and the sidewalk on each side three feet. This might be properly called an alley. One of the witnesses testifies that the sidewalk had been paved with brick, and was about four feet wide; and there was no fence or house at the side of the street where plaintiff fell, but a yard about eight feet below the level of the sidewalk; that the walk had fallen away about two feet, leaving only a space of about two feet wide, bricked, from the curb-stone. There is evidence on the part of the defendant tending to disprove the foregoing statement of the plaintiff's witness. We have stated enough to show how plaintiff alleges that the injury was caused.

The defendant urges that the court erred in excluding the quarterly report and bill of the Troy Hospital against the city of Troy for board and care of patients, in which is plaintiff's name. This seems to have been offered to show when the plaintiff went to and came from the hospital. It was a mere

statement by the hospital authorities to the defendant, and was not in any way binding on plaintiff.

No exceptions were taken to the charge. The defendant asked the court to charge that if the jury should find that plaintiff, when he fell, was outside of the sidewalk, he could not recover, and the court so charged. The court appears to have charged exactly as the defendant wished, and we see no ground for exception. The court held that if there were no defects in the sidewalk, and the injury resulted from plaintiff's being outside the sidewalk, he could not recover. This seems to be quite fair to the defendant.

The defendant insists that plaintiff should have been nonsuited. We think not. There was a question proper for the jury as to the condition of the sidewalk,—whether the sidewalk itself had caved away into the adjacent yard, or whether the slope into the yard was entirely outside of the sidewalk, and thus in a part which the defendant was not bound to keep in order. It can easily be seen that on a sidewalk of three or four feet wide any hole or place where the walk had fallen away, and where there was no fence or house at the side, and where a yard lay eight feet below, would be a dangerous place, and that the city would be liable if it had unreasonably neglected to put the place in repair; and we cannot say that there was no evidence to this effect. Judgment and order affirmed, with costs. All concur.

DELANEY v. HEARTT *et al.*

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

MASTER AND SERVANT—DEFECTIVE APPLIANCES—PERSONAL INJURIES.

In an action for wrongful death, it appeared that deceased was employed in defendant's foundry to handle, fill, and empty the ladles of melted iron operated by a crane. The chain to which the ladle was attached broke, and deceased was struck by the ladle. It was not shown what caused the chain to break, as it was of sufficient size, and had not been in use too long. It often got twisted while passing over the drum, and would slip from the previous coil upon which it "rode" onto the drum, "snapping" down an inch or two. Deceased was aware of the tendency of the chain to twist. *Held*, that a nonsuit was properly granted.

Appeal from circuit court, Rensselaer county.

Action by Mary Delaney, as administratrix of Daniel Delaney, against Jonas S. Heartt, George W. Sweet, and Fred W. Sweet, for the wrongful death of her husband, who was killed in defendants' foundry. Plaintiff appeals from nonsuit.

Argued before LEARNED, P. J., and LANDON, J.

Robertson & Whitman, (James M. Whitman, of counsel,) for appellant.
Warren, Patterson & Gambell, (Charles B. Patterson, of counsel,) for respondents.

LEARNED, P. J. This is an appeal from a judgment on a nonsuit at circuit. The plaintiff sues to recover for the death of her husband, Daniel Delaney, alleged to have been caused by the negligence of defendants, in whose employment he was at his death. Defendants are manufacturers, and part of their business is the manufacture of cast-iron car-wheels. In their foundry are revolving cranes, consisting of an upright shaft, and a horizontal arm at the top. The upright revolves. Near its bottom is a windlass, around the drum of which an iron chain is wound by the turning of the crank of the windlass. The chain passes from the drum along upward to the end of the horizontal arm, and so down, ending in a hook. That hook supports a large ladle or kettle, which receives the melted iron. By means of the windlass, this ladle is lowered into a pit, about 10 inches deep, near the furnace, and the melted iron is allowed to run into it. Then it is swung by means of the crane, and the iron is poured into smaller ladles, from which it is emptied into the moulds. This ladle has a projecting handle on each side, and each

of these handles is at the end divided into two, so that the workman, standing between, takes one in each of his hands. In this way, two workmen move the suspended ladle to the place where the iron is needed, and, by tipping it, pour the iron out. It is the business of workmen, of whom deceased was one, to handle, fill, move, and empty the ladles. On the day of the accident, the workmen had commenced to pour off. The large ladle had been filled with melted iron, and had been hoisted so as to be about three feet from the pit, and about fifteen inches from the ground. The chain broke. The ladle came down. One end, as described, of the ladle (that is, apparently, the projecting handle) was turned down upon the deceased, and held him down; and the melted iron flowed over him. He died in a few days from the effects of the burning. The deceased, had nothing to do with the hoisting of the ladle. That was done by laborers at the windlass. The plaintiff's contention is that the chain broke by reason of its being old and worn out, and, secondly, by a defect, owing to which it did not wind around the drum in a proper manner, but "rode;" that is, the chain wound upon the part of the chain already wound, and then slipped off to the drum, and thus allowed the ladle to drop an inch or two. The broken link was not produced at the trial, and no evidence was given as to its condition. A broken link had been found, but it had been lost before the trial. The chain was a seven-sixteenths or half inch chain. The weight of the iron which it was required to hoist, including the ladle, was 1,400 pounds; and this it did about 12 times a day. The strength of such a chain is 13,444 pounds, when new and perfect. There was evidence that some of the links on this chain were half worn, or a third worn, where they came together. It is shown that such an amount of work, as above stated, does not strain the iron, or cause it to crystallize, and that the life of such a chain is five to ten years. This chain had been used two years. How much longer is not shown.

There is evidence tending to show that the riding of the chain on the drum of the windlass was owing to the twisting of the chain; and it can readily be understood that a twist in the chain might make it, instead of following the the grooves in the drum, rise up, and ride the adjoining coil of chain. One witness testifies that in the "shaking out" (whatever that may be) there is a long slack of chain that goes from the horizontal part of the crane to the hook, and a twist would come in that slack. The deceased was a "kind of foreman" of the floor, and it was the duty of the man that had charge of the floor to take the twist out of the chain. Another witness testifies that the twist would be in the part of the chain between the drum and the sheave. There was a "snapping" heard occasionally. But it is shown that this snapping came from the same circumstance above mentioned,—that is, the riding of the chain, and its then slipping off upon the drum,—and this snapping had been several times noticed by the deceased, and he had complained about it. There is some evidence that one part of the chain was of a different size from the other. But that which was smaller was the part which went around the drum, and that was not the part which broke. There is no evidence showing what it was which caused this twisting of the chain. It is not shown that this was due to the wear of the links, although that is urged by the plaintiff. Indeed, an expert for the plaintiff testifies that, if the links were worn a third, the chain would be less liable to twist. We cannot, therefore, say that there was evidence that the machinery provided by defendants was not suitable and proper. True, the chain was somewhat worn, but, plainly, not enough to make it insufficient to do the work. What was the immediate cause which broke the link does not appear; but it may be supposed that it was the riding of the chain, and its sudden slipping off upon the drum, thus letting the ladle drop, as said in some cases, an inch or two. This may have caused a sudden strain, more than the chain would resist. Now, an examination of the case shows that this riding was the result, not of the wearing of

the chain, but of its twisting; and this is apparent from a consideration of the circumstances. A twist in the chain in one direction would tend to make it ride, while a wearing of the links would not, so far as we see, have that tendency. Such, too, is the evidence in the case. It cannot be said to have been the duty of the defendants to take the twist out of the chain. That should be done by the workmen who were using it. It does not appear that there was any appliance in ordinary use which would prevent this twisting. A witness who worked on the floor testified that he had often seen the chain twisted, and had taken the twists out himself. So that it appears that this was a matter which devolved upon those who were using the chain, and upon the deceased, among the rest; and deceased had knowledge of this tending in the chain. If, then, he neglected to take out the twist, that was his own negligence. If other workmen neglected this, that was the negligence of co-employees. The machinery of the defendants was not improper for its purpose, as the machinery was admitted to be in *Stringham v. Stewart*, 100 N. Y. 516, 8 N. E. Rep. 575; for, if not twisted, the chain worked right. We might further say that it is rather matter of conjecture than of proof to assert that the riding was the cause of the breaking of the link. There might have been a flaw in the iron, or some unknown defect for which defendants would not be responsible. There is not even proof what force would be exerted by the fall of a weight of 1,400 pounds for the space of one inch or two, and whether that force would be sufficient to break such a chain as that in question. The authorities on matters like the present are so well known that it is unnecessary to cite them. The only difficulty is in applying them to the case at hand. On a careful examination of the evidence, we think the nonsuit was properly granted. Judgment affirmed, with costs.

THOMSON v. POOR *et al.*

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

1. CONTRACTS IN WRITING—VERBAL MODIFICATIONS.

A contract to peel and take away a certain number of cords of bark yearly from trees growing on plaintiff's land is a contract for an interest in land, which must be in writing; and, in action to enforce it, a subsequent verbal modification of the contract in writing is inadmissible.

2. SAME—ESTOPPEL.

Plaintiff is not estopped from enforcing the contract because of an alleged verbal modification whereby defendants were only to take half as much bark each year as was specified in the original contract.

Appeal from circuit court, Warren county.

Action by Lemon Thomson against John O. Poor and others on a sealed contract for the sale of bark to be peeled from plaintiff's trees by defendants at the rate of 1,000 cords a year. Judgment for defendants. Plaintiff appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

I. & J. M. Lawson, for appellant. *H. A. Howard*, (*D. S. Potter*, of counsel,) for respondents.

LEARNED, P. J. This is an appeal from a judgment on a verdict in favor of defendants, and from an order denying a new trial. The complaint sets out at length a sealed contract between plaintiff and defendants, dated April 1, 1885, for the sale to them, at a certain price, of hemlock bark on trees of a certain specified size, in a certain lot; the bark to be peeled by them, 1,000 cords in each year after the first; the timber to be cut and piled by the plaintiff in the same year in which the bark is peeled. The complaint charges that in the year 1886 the defendants peeled 935½ cords, took a part thereof, but refused to take the remainder, and asks judgment for a certain sum. The answer, with some denials, avers a modification of the contract, to the effect

that defendants were required to peel only 500 cords, instead of 1,000, in that year; that they peeled that amount, and paid therefor. On the trial the plaintiff proved the contract. He proved that defendant peeled, in 1886, 500 cords, and paid therefor; that he directed the same man who had peeled for defendants to peel more; that 485½ cords more were peeled. The plaintiff then rested. The defendants moved for a nonsuit on the ground that the action was not for a breach of the contract, but for not paying for a part of the bark which defendants had peeled. The nonsuit was refused.

It seems to us that the complaint is not well framed to set forth the real matter in issue. But, considering that the real controversy appears in the answer, and that the complaint might be easily amended to suit the evidence, we think it better to pass to the important question between the parties.

It will be seen that the plaintiff was the owner of the lot in question, and that he was engaged in lumbering from the lot. It was the bark only which he sold to defendants. This bark should be removed before the trees were felled for lumbering. The same man, Wakeley, seems to have been employed at both kinds of work on the lot,—peeling the bark and felling the lumber. Wakeley had a contract with plaintiff, dated August 8, 1885, to fell the trees, which work was to be done "in such manner as to comply with the agreement for peeling and selling the hemlock bark." The bark contracted for by defendants was to be used in their tannery. This tannery burned down July 6, 1885. After this, their agent, Wait, called on plaintiff, in November, 1885, and had a conversation with him. The versions given by Wait and by the plaintiff differ. The jury having found for defendants, they are entitled to have the version of Wait taken as correct. The important part is that, after mentioning the fire, Wait said defendants had to get the contract reduced, if possible, in order to sell the bark to other parties; that Wakeley was there as a jobber, and needed something to do; that, if they could reduce the amount to 500 cords, they could make arrangements; that plaintiff said any arrangement they could make with Wakeley would be satisfactory to him. There were two conversations, but this was the substance. Wait knew that Wakeley had the job from plaintiff to take off the logs.

The plaintiff insists that this alleged verbal agreement was inadmissible to alter the terms of the sealed agreement between the parties. That is the important question. It should be noticed, however, that the plaintiff explains the conversation thus: That he said he would be willing to accommodate defendants in any way he could, but the only embarrassment he had was the contract he had with Wakeley; that, if they could make it satisfactory to Wakeley, he would do what defendants wished,—that is, that the plaintiff would consent to reduce the number of cords to be peeled annually if defendants could induce Wakeley to modify in a corresponding manner his contract of August 8, 1885, for felling the trees. The defendants afterwards, on February 26, 1886, made a contract with Wakeley to peel 500 cords each year, or more if they elected, to the amount of 1,000 cords each year. As, by the terms of the written contract, the defendants were to peel 1,000 cords each year, it is plain that their agreement with Wakeley to peel 500, or more if they elected, up to 1,000, was not any greater or other act than they were obliged to do by the original contract. Therefore, their agreement with Wakeley gave no greater validity to the alleged verbal agreement between the plaintiff and Wait than it would have had if the plaintiff, at Wait's request, had agreed to reduce the annual amount to 500 cords. No new obligations were undertaken or acts done by defendants in consequence of the verbal agreement, which they would not have had to undertake and do under the written contract. In regard to the verbal modification, it will be seen that, if valid, it doubled the time within which the sealed contract was to be performed, and within which defendants had the right to enter the lot; and as the sale was of bark on trees of a definite size, the growth of the trees might

bring the bark on other trees into the sale than those included in the original contract.

It does not seem to be disputed that a sale of bark on growing trees is a sale of an interest in lands, and must be in writing. *Green v. Armstrong*, 1 Denio, 550, at 556. "The better opinion," say the court in *Swain v. Seamans*, 9 Wall. 254, at 272, "is that a written contract, falling within the statute of frauds, cannot be varied by any subsequent agreement of the parties, unless such new agreement is in writing." See *Emerson v. Slater*, 22 How. 28, at 42. There are cases, like *Homer v. Insurance Co.*, 67 N. Y. 481, where one party, by agreeing to extend the time for a payment, has induced the other to neglect payment at the appointed day, and it has been held that the former could not take advantage of the neglect. But such cases are not like the present. So, also, there are cases, like *Dodge v. Crandall*, 30 N. Y. 306, where, for a valuable consideration paid by the debtor, a person buys a mortgage already payable, and agrees to extend the time of payment. Such cases are not like the present. The contract was between new parties, and the original contract had been broken. But it was said in the case last cited that before any breach, and when the subsequent agreement is executory, it requires a writing of equal solemnity to effect a change in a contract under seal. So it was held in *Eddy v. Graves*, 23 Wend. 84, referring to *Allen v. Jaquith*, 21 Wend. 628. See, also, 1 Chit. Cont. (11th Amer. Ed.) 155; 2 Add. Cont. (8th Ed.) 894. The alleged change in the contract in the present case was very material, was executory, was before any breach of the contract had arisen, was verbal, and purported to affect a contract which, unless in writing, would have been void. It therefore came most strikingly within the prohibition. And we may well inquire, if the original contract must have been in writing in order to be valid, by what logic can a material change, executory in character, be made verbally? To permit such a change thus to be made is to violate directly the statute of frauds. If A. contracts in writing to sell B. Blackacre, may B. prove a subsequent verbal agreement modifying the contract so that A. is made to contract to sell Whiteacre, also? Or, to make the case more analogous to the present, may B. prove a subsequent verbal agreement that he is to buy only half of Blackacre? The very evil at which the statute was aimed appears in this case. The parties disagree as to the alleged verbal agreement; and, in place of a written contract clearly expressing their meaning, we are left to the conflict between conflicting recollections of a brief conversation.

The defendants also insist on the doctrine of estoppel. Now, if the plaintiff were asserting that the defendants had forfeited all their rights under the contract for some failure to perform, and they could show that some act of the plaintiff had induced them to neglect performance, then there would be a place for the doctrine of estoppel. But the plaintiff asks no forfeiture of the contract. He insists that the defendants should perform it, and should have all its benefits. They say, "The contract was changed by verbal agreement, and we performed the contract as changed;" that is, instead of performing the contract to its full extent, they performed it only half-way. There is no estoppel here. Peeling half as much bark as they agreed does not prevent them from peeling and taking the whole.

The defendants also urged that a party may waive a condition. *Pechner v. Insurance Co.*, 65 N. Y. 195. As, for instance, that notice of other insurance given to an insurance company may operate as a waiver by them of the statement of such other insurance in the policy; that is, the company shall not insist that the policy is void for failure to comply with a condition which they have waived. But, as pointed out before, the plaintiff does not claim that this contract is void. He insists on its validity. We think the judgment and order should be reversed, and a new trial granted, costs to abide the event.

EIGHME v. ROME, W. & O. R. Co.*(Supreme Court, General Term, Fifth Department. June 20, 1890.)***RAILROAD COMPANIES—FIRE FROM LOCOMOTIVE—NEGLECT OF STATION AGENT.**

Where a fire which originated from a locomotive spark upon the premises of the railroad company, near a station, in some dry grass, was communicated thereby to a house, the company is liable for the destruction thereof where it appears that the station agent's attention was attracted to the burning grass, but that, seeing some boys engaged in an apparently successful attempt to stamp it out, he gave it no further attention.

Appeal from circuit court, Niagara county.

Action by George W. Elghme against the Rome, Watertown & Ogdensburg Railroad Company. Verdict and judgment for the plaintiff, and a new trial denied. Defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

Edmund B. Winn, for appellant. *A. K. Potter*, for respondent.

MACOMBER, J. This action was brought to recover the value of a house situate in Wilson, N. Y., destroyed by fire on the 25th day of April, 1888, alleged to have been caused by the negligence of the defendant or its employes and servants. The house was located on the south side of the defendant's railroad, and near its depot, the rear portion of the lot touching upon the defendant's railroad. On the day mentioned one of the defendant's trains had passed over the road westwardly, stopping at this station, the locomotive being brought to a stand in the vicinity of and opposite the plaintiff's lot. Soon after, the train passed on, and before it was out of sight a fire was discovered in the grass and weeds along the defendant's road, opposite the plaintiff's premises. The contention in behalf of the plaintiff at the trial was that the fire passed from the lands of the railroad to those of the plaintiff, and burned towards the house, about 20 rods distant, through the grass that was there growing, and finally caused the destruction of the building. So much of the plaintiff's case is hardly controverted. Evidence was given for the purpose of showing that the locomotive which was supposed to discharge the coals causing the fire was defectively constructed or was out of repair. But this branch of the case was entirely withdrawn by the trial judge from the jury, under instructions advising them that there was not sufficient evidence to hold the defendant liable by reason of any such defects in the engine. The case therefore narrowed itself down to one of diligence or care in the station agent in suppressing the fire after he had been apprised of its existence. The fire originated about 4 o'clock in the afternoon. The attention of the station agent was called to it soon thereafter, and before it had passed to the plaintiff's premises, but he made no effort to extinguish it, except that he stepped out of the station building and observed that two boys were engaged in the effort to smother the flames, and that, so far as he could observe or was informed, they had succeeded in so doing. Further than this he seems not to have given the matter any personal attention. It is claimed in his behalf that he did all that could be reasonably expected of him under the circumstances, inasmuch as he had no assistant or clerk to take his place, and that his duties were so various as to require him not only to act as ticket agent, but as train dispatcher, telegraph operator, and station-master. Yet, at 5:30 o'clock, notwithstanding the multiplicity of such duties, he left the station to go to his home for supper, and while seated at table he was informed that the plaintiff's house was on fire. It was then too late, with the appliances at hand in the village, to avert the total destruction of the house.

The court, in substance, charged the jury that if they were satisfied that there was carelessness or inattention on the part of the defendant and of its agent at that station in effort to check and subdue the fire, and that the plain-

tiff himself was not chargeable with any want of care on his part, there could be a recovery in the case, if the jury were satisfied that the fire originated upon the premises of the defendant from coals coming from the locomotive, even though the engine was not shown to have been made without proper appliances for either the extinguishment of sparks from the smoke-stack, or the retention of the coals in the fire-pan. This portion of the charge presents the material question raised on this appeal. Touching the plaintiff's failure to extinguish the fire after the same had communicated with his own premises, little, if anything, need be said, for the premises were vacant, and had been for some time, as the plaintiff resided at a considerable distance therefrom, and knew nothing about the threatened dangers to it, and neither he nor any agent of his was in a position to assist in the protection of the property.

The learned counsel for the appellant says in his brief that this case is essentially different from any railroad fire case that he has ever known to be presented for review on appeal. We agree with him that it has one feature which separates it from the general run of cases where reclamation is made upon a railroad for damages caused by the escape of cinders or sparks from the locomotives, in that, under the ruling of the trial judge, there can be no pretense made in this case that the locomotive was either defectively constructed or carelessly managed. Yet that the fire was started on the defendant's premises from the escape of coals or cinders from this locomotive admits of no reasonable doubt, under the evidence. Testimony was given to the effect that the defendant had permitted the grass to grow along the way-side of its tracks, so that the same was of considerable height (nearly a foot and a half) in the vicinity of the beginning of this fire. There was some evidence to show that this had been permitted to remain in such condition for a year or so. Further than this, there is nothing to show that the defendant had permitted the accumulation of combustible matter. In the case of *O'Neill v. Railway Co.*, 115 N. Y. 579, 22 N. E. Rep. 217, which was an action to recover damages for injuries to certain woodlands belonging to the plaintiff lying near the defendant's road, set on fire through the negligence of the defendant, where it appeared that the sparks from the locomotive passing on the defendant's road set fire to brush, wood, old rails, and other combustible material which it had allowed to accumulate on its lands, the fire spreading to the plaintiff's premises through the lands of another, it was held that, even conceding that the escape of the fire from an engine is inevitable, a railroad company is bound to remove combustible material from its path, and to prevent such accumulation thereof by the side of the tracks as will, in consequence of fire falling upon it, endanger the property of others. In *Webb v. Railroad Co.*, 49 N. Y. 420, the negligent act consisted, not merely in suffering coals to fall from the engine, but was made up of other circumstances, such as, among others, the dryness of the atmosphere, of the earth and its herbage, and the accumulation of weeds, grass, and rubbish by the side of the defendant's track. A recovery therein was sustained on the ground of an omission of duty by the railway's employees to protect the plaintiff's property damaged by fire originating on the company's lands. In *Coolidge v. Railroad Co.*, 5 N. Y. Supp. 301, which was an action to recover damages for injuries to the plaintiff's farm, caused by fire set by live coals and sparks dropping from the defendant's locomotive and communicating to the plaintiff's lands, it was held that, assuming the engines to have been properly constructed, it was a question of fact for the jury whether the dropping of coals did not show that the engine was out of order or improperly managed. In *Douglas v. Railroad Co.*, 5 N. Y. Supp. 214, which was an action to recover for hay alleged to have been destroyed by fires kindled from sparks or coal that fell from the defendant's engine, evidence was given tending to show that where the fires occurred the defendant had permitted old ties, dry

grass, and weeds to accumulate along the sides of its track. The fires were discovered immediately after the defendant's train had passed. The spreading thereof to the plaintiff's lands was caused by the accumulation of rubbish along the defendant's track. The fires were set by coals and sparks that were scattered along its tracks by one of its engines, some of them as large as a butternut. It was held that such facts are sufficient to justify the submission of the defendant's negligence to the jury. In *Tanner v. Railroad Co.*, 108 N. Y. 623, 15 N. E. Rep. 379, the plaintiff's goods, which were shipped on the defendant's road, to be transported to Rome, were destroyed by fire while in a freight-car at Rome, the fire being communicated to the car from the freight-depot, near which it was standing. The fire was caused by sparks thrown from a defective engine, which set the depot on fire. Evidence was given by the defendant to show that the smoke-stack and the spark-arresting arrangement of the locomotive that was supposed to have caused the fire were in perfect condition, and that the fire could not have been set from the sparks therefrom. It was held that the burning of the car containing the plaintiff's goods was, under the conditions existing at the time, a natural result of the burning of the freight-house, and, if that was attributable to the negligence of the defendants, it was responsible for the loss of the plaintiff's goods. In none of these cases, it is true, did it affirmatively and distinctly appear that the locomotive was properly constructed and properly managed, but the decisions therein afford analogies from which we think we can safely arrive at the same conclusion as the learned trial judge in this instance.

The fire having its origin on the defendant's premises, and inflammable matter by the side of the railroad becoming a medium to spread the fire to the plaintiff's premises, the defendant was charged in law with the duty of using all reasonable means to arrest the fire, so as not to injure the plaintiff. The evidence is sufficient, we think, to sustain the finding of the jury in this regard, and that the defendant's agents failed to exercise proper and reasonable diligence in preventing the spread of the fire from the lands of the railroad to the house of the plaintiff. The judgment and order appealed from should be affirmed. All concur.

BOSSOUT v. ROME, W. & O. R. Co.

(*Supreme Court, General Term, Fourth Department. July 1, 1890.*)

INJURY TO BRAKEMAN—COLLISION.

Plaintiff was injured in a collision between a passenger train and a freight train, both of which belonged to defendant, and on the former of which plaintiff was a brakeman. The trains were coming from opposite directions on the same track, and it was the duty of defendant's flagman to fully stop the freight train far enough away to allow the passenger to take a switch, and then signal the passenger to come on. The flagman made some signal to the freight train, and then signaled the passenger to come on. Both trains came on, resulting in the collision. Plaintiff claimed that the freight train was not properly signaled, that the flagman was incompetent, and that defendant was negligent in employing and retaining him. Held, that the case should have been submitted to the jury on the questions of the negligence and incompetency of the flagman, and defendant's negligence. MARTIN, J., dissenting.

Appeal from circuit court, Jefferson county.

Action by Winfield E. Bossout against the Rome, Watertown & Ogdensburgh Railroad Company. From a judgment entered on an order dismissing the complainant plaintiff appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

D. G. Griffin, for appellant. Edmund B. Wynn, for respondent.

MERWIN, J. The plaintiff was injured on the 12th day of September, 1887, by the collision of a passenger train of the defendant, upon which he was a brakeman, with a freight train of the defendant, at or near the Mill-Street

crossing, in the city of Watertown. It was alleged that the cause of the collision was the omission of one Joy, an employe of the defendant, and the flagman at that crossing, to give the proper signal to the freight train to stop. This train was coming from the east, and on the main track. The passenger train was coming from the west on the same track, but designed to take the switch near that crossing that would bring it upon the branch leading to Carthage. In order to allow this to be done it was necessary for the freight train to stop far enough eastward to allow the passenger train room to come forward and take the switch. The flagman was there, and made some signal to the freight train, and then signaled the passenger train to come on. The result was that both trains came on, and the collision occurred before the passenger train reached the necessary point to enable it to take the switch. This was at mid-day, and apparently nothing existed to prevent the flagman doing his duty, assuming he was competent. His duty was, before he signaled the passenger train to come on, to see to it that the freight train had fully stopped far enough eastward to allow the passenger train to take the desired switch. Whether he did this was, we think, upon the evidence, a question of fact. The claim of the plaintiff is that the flagman was incompetent for the performance of the duties intrusted to him; that by reason of such incompetency the accident happened; and that the defendant was negligent in his employment and in retaining him, and therefore chargeable with the results of his acts. At the close of the plaintiff's evidence the defendant moved for a nonsuit upon the ground that no negligence was shown on the part of defendant in the employment of the flagman, or that the flagman was incompetent. This motion was at that stage of the case denied. At the close of the evidence it was renewed upon the same grounds. Thereupon the order was made dismissing the complaint, it being suggested that the plaintiff was in a position to be chargeable with knowledge of the flagman's incompetency, and that the flagman had in fact stopped the freight train, and was therefore not negligent.

A careful consideration of the evidence, as it is presented before us, leads to the conclusion that the case should have been submitted to the jury. It was a question of fact whether the collision was caused by the negligence of the flagman, whether such negligence was due to his incompetency, and whether the defendant was guilty of negligence in employing or retaining him. The defendant was bound to exercise reasonable care in such employment, having respect to the particular duties and responsibilities of this locality, and if it failed to do this, and loss occurred by reason of such failure without fault on the part of the plaintiff, the defendant would be chargeable. *Baulee v. Railroad Co.*, 59 N. Y. 362. It was also a question of fact whether the plaintiff, by reason of his opportunity of seeing the flagman, in the performance of his duties, was chargeable with knowledge of his incompetency.

The defendant further claims that a release executed by the plaintiff on the 18th January, 1887, is a bar to this action. This point was not taken on the motion for a nonsuit. This release was executed while the plaintiff was in the employ of the defendant, and is in form like the one in *Purdy v. Railroad Co.*, 5 N. Y. Supp. 217, decided by this court. The circumstances of this case do not, upon this subject, vary materially from the *Purdy Case*. The point, therefore, is not well taken. Judgment reversed upon the exceptions, and new trial ordered; costs to abide the event.

HARDIN, P. J., concurs.

MARTIN, J., (*dissenting*.) This action was founded on the alleged negligence of the defendant. The plaintiff was injured by a collision between a freight train and a passenger train, which were running on the defendant's railroad. The alleged cause of the collision was the omission of the defend-

ant's flagman to give the proper signal to stop the freight train so as to allow the passenger train to move forward far enough to pass over a switch onto another track. It was the duty of the flagman to give the danger signal to stop the freight train, and then to give the passenger train the safety signal, so that it might proceed to make the switch. So far as there was any proof on the subject, it was to the effect that the flagman gave the freight train the proper signal, and that it stopped in obedience to it. While some of the witnesses testified that they could not say that the train came to a full stop, others testified that it did. None testified that it did not, nor that the danger signal was not given. The proof tended to show quite conclusively that after the flagman had signaled the freight train, and it had stopped, he then turned towards the passenger train, and gave it the safety signal, and thereupon the engineer of the freight train, as well as the engineer on the passenger train, started his engine, and a collision followed. This proof may have tended to establish negligence on the part of the engineer of the freight train, but it did not show negligence in the flagman. If the engineer was negligent, the plaintiff cannot recover, as it is neither alleged nor proved that the defendant was negligent in employing him, or continuing him in its employ. I am of the opinion that the court properly held that the evidence was insufficient to justify it in submitting the question of the defendant's negligence to the jury. I have examined the exceptions taken by the plaintiff to the rejection of evidence to which he has called attention, but have found none that would justify a reversal of the judgment. I think the judgment should be affirmed.

PEOPLE *ex rel.* MOUNT MAGDALEN SCHOOL OF INDUSTRY v. DICKSON,
Treasurer.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

1. REFORMATORIES—RIGHT TO COMPENSATION FOR COUNTY PRISONERS.

The county is liable, on a bill audited by the supervisors, for the maintenance of children committed to a charitable institution under Pen. Code N. Y. §§ 291, 292, providing that children in certain cases may be committed to such institutions.

2. MANDAMUS—VALIDITY OF COMMITMENTS.

The question of the validity of the commitments which are not absolutely void does not arise in a proceeding to collect the audited bill for the maintenance of the children.

Appeal from circuit court, Rensselaer county.

Proceeding by *mandamus* at the relation of the Mount Magdalen School of Industry to compel Thomas Dickson, as treasurer of Rensselaer county, to pay relator's bill, audited by the board of supervisors, for the maintenance of certain girls committed to it by committing magistrates. Peremptory writ awarded. The treasurer appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Smith & Wellington, (George B. Wellington, of counsel,) for appellant. *James H. Ryan*, for respondent.

LEARNED, P. J. This is an appeal from a final judgment, after a trial, awarding a peremptory writ of *mandamus*. The relator is a charitable institution incorporated under chapter 819, Laws 1848, and having the approval of the state board of charities, under chapter 446, Laws 1883. During the year 1889, down to October 1st, the relator had had in its charge certain girls, committed to it by certain committing magistrates. It rendered to the board of supervisors a bill, duly verified, for the board and maintenance of these girls. The board audited the bill, December 16, 1889, at \$4,015.86. The county treasurer refused to pay it, and the *mandamus* was granted to compel him to pay. His position is that the claim is not a county charge, and that the auditing was unauthorized. The question here is not whether any

or all of the children committed by magistrates to the relator might not have obtained a discharge from custody by *habeas corpus*, on the ground of imperfections and errors in the commitments. That would be a very different question, and one which would arise between the children, respectively, and the present relator, as in *People v. Mount Magdalen School*, 7 N. Y. Supp. 737. In the case now before us the relator has received and cared for these children under commitments made by magistrates, and has duly rendered its bill to the board of supervisors, and that bill has been audited. The county treasurer refuses to pay, and he places his refusal on the ground that the bill is not a county charge. Chapter 240, Laws 1879, provides that children under 16, convicted as vagrant, truant, or disorderly, must be sent to some reformatory or other institution, as provided for in the case of juvenile delinquents; and the act requires boards of supervisors to take such action in the matter as may be necessary to carry out the provisions of this act. Section 718, Pen. Code, as amended, requires that a child under 16, committed for misdemeanor under any of the provisions of that Code, must be committed to some reformatory, charitable, or other institution authorized by law to receive such child. And subdivision 5, § 291, Id., as amended by chapter 46, Laws 1884, and by chapter 145, Laws 1888, declares that a child actually or apparently under 16, found doing certain acts described in the preceding subdivisions, or coming within the descriptions in section 292, may be committed to any incorporated charitable reformatory. Subdivision 6 authorizes a similar temporary commitment for trial, and a similar commitment of a child held as a witness, and provides that the institution shall be entitled to like compensation proportionally as on a final charge. Now, these provisions plainly show that under these statutes the institution to which children are thus committed is to receive compensation. The institution, as to these children, is placed in the position of the jail or the poor-house, as the case may be. The law makes a wise and humane substitution of a charitable and reformatory institution for the prison, to which an adult, convicted or detained, would be sent; and for the poor-house, to which an adult pauper would be sent. And where provisions of this nature are made by the statute, it is evident that it is not intended, as the respondent seems to claim, that these children thus committed are to be kept without compensation, when the board of supervisors have allowed and audited the bill for such compensation.

It will be seen that section 718, above referred to, is imperative; and, although it does not use the words "juvenile delinquents," yet a child under 16, committed for a misdemeanor, is plainly a juvenile delinquent. Now, chapter 240 of the Laws of 1879 is general. It is not necessarily limited in its effect to institutions then existing. It directs that vagrant, etc., children be sent to the same kind of institution to which juvenile delinquents are to be sent; and that kind is defined in section 718 of the Penal Code, above cited. It is not necessary for us to decide whether, without the approval of the board of supervisors, the committing magistrates may send to any institution, of the character named, which they may select. It is enough in this case that the selection has been ratified by the board; and we cannot think that the institutions intended by these sections of the Penal Code are necessarily such as were in existence when chapter 240 of the Laws of 1879 was passed. That an institution to which children are thus committed for vagrancy, etc., is to receive compensation, is further shown by the subdivision 6 of section 291, above cited, which speaks of the compensation for temporary commitments and for the detention of witnesses as proportional to that on final commitments. The same is also shown by section 921, Code Crim. Proc., which, in case of a commitment of a child to an institution under the Penal Code, authorizes a magistrate to order the father to pay a sum for the child's support, which is to be credited by the institution to the city, town, or county against any sum due for maintenance.

It is further urged by the respondent that this bill should not be paid by reason of the imperfection, or, as alleged, invalidity, of the commitments. We have already remarked that this litigation is not between the persons committed and the institution. Questions which might be very important on a *habeas corpus* do not necessarily arise here. The children made no question as to the legality of their commitment. They acquiesced in it. The relator accepted their custody, and cared for them. If, under commitments of a similar character as to their alleged irregularity, an adult had been confined in jail, and the board of supervisors had allowed the sheriff's bill for maintenance, could the county treasurer lawfully refuse to pay? We may notice here that chapter 145, Laws 1888, passed April 18th, would seem, as to many of these commitments at least, to make them sufficient. And chapter 220 of the same year, amending section 888 of the Code of Criminal Procedure, expressly authorizes, in certain cases, the commitment of a vagrant child described in subdivision 8, § 887, Code Crim. Proc., as provided in section 291, Pen. Code. We think, then, that, as between the relator and the board of supervisors, the custody of these children was such that the board might allow it as a county charge. *Osterhoudt v. Rigney*, 98 N. Y. 232. The respondent relies for his objection solely on the commitment. No proof was given as to any record, other than the commitment, of the trials of these children. *People v. Baker*, 89 N. Y. 466. Now, while we need not deny that a commitment could be made so entirely beyond the power of the magistrate on its face that an institution like the relator could not lawfully be paid for the custody of a child thereunder, even after the audit by the board, we do not think that such a case is here; and, though the form of the commitments is not as perfect as it might be, yet, as between the relator and the county treasurer, we are of the opinion that he should pay the audited bill. Judgment affirmed, with costs.

SIMONDS v. SIMONDS.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

DIVORCE—ALLOWANCE—RENEWAL OF APPLICATION.

Though by Code Civil Proc. N. Y. § 1769, it is provided that the court may, on motion of either party to a divorce case, make, and from time to time modify, an order for an allowance for counsel, alimony, or expenses of trial, yet after an order has been made granting defendant an allowance for counsel and expense, but refusing her prayer for alimony, she cannot thereupon, on the same grounds, move before another justice, at a different special term, for additional allowance, and for that part of the relief which was before refused, without a showing of a subsequent change of circumstances materially affecting the rights of the parties, and furnishing grounds for the granting of the relief which did not previously exist.

Appeal from special term, Montgomery county.

Action by George O. Simonds against his wife, Soudie M. Simonds, for a divorce on the ground of adultery. Cross-bill by defendant on the same ground. Defendant filed motion for alimony and counsel, which was denied, with leave to renew. On second motion an order was made refusing alimony, but allowing \$150 for counsel and expense. Thereupon another motion for alimony, support, and additional allowance was granted, and plaintiff appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

John S. Warren, for appellant. *Edgar Hull*, for appellee.

LEARNED, P. J. This is an action for divorce on the ground of adultery. The defendant denies the adultery, and also alleges adultery on plaintiff's part. The defendant made a motion, December 8, 1889, for alimony and counsel. The motion was denied, with leave to renew. The learned justice (Judge PUTNAM) wrote an opinion explaining his reasons. In pursuance of such leave the defendant made a second motion of the same kind, before the same justice, January 7, 1890. Numerous affidavits were used on each side.

The learned justice wrote another opinion. He denied the motion for alimony, but granted the allowance of \$150 for defendant's expense in conducting the action and her defense. Thereupon the defendant gave notice, February 13, 1890, for another motion, to be heard the 25th of February, to require plaintiff to pay her \$15 per week for support of herself and her child, and for an additional sum of \$250 to procure evidence and witnesses and counsel in the action. That motion was heard before Justice FISH. Numerous affidavits were again read on each side. The learned justice, in his opinion, states that the sum of \$150, theretofore allowed, will fall short of the necessities of the case. An order was made that plaintiff pay an additional sum of \$250 for counsel, and, for the failure so to do, that his complaint be struck out; that he also pay \$100 in 30 days for the support of defendant's child, and \$25 per month thereafter. And the question of the allowance of alimony was reserved for further consideration.

It is evident that no change of circumstances had arisen since the decision of the second motion which materially affected the rights of the parties. This third motion was practically an appeal from the decision of Justice PUTNAM. He had determined the amount deemed necessary for counsel fee and expenses, and he had denied the motion for alimony. His order, though dated the 7th, was entered the 20th, of January. It was not proper, therefore, for the defendant, in the short time of two weeks thereafter, to renew this motion, at least without showing that some new circumstances had arisen. The place of trial is in Washington county. The first and second motions were made in Saratoga; the third, in Fonda. It would seem as if the defendant was unwilling to renew her application before the same justice who had heard the first and second motions. The reason given, in defendant's affidavit on this last motion, why she renews it, is that, as alleged, the plaintiff's affidavit used on the second application is so full of falsehood that she believes the court was misled. That alleged falsity must have been known on the hearing of the second application. The defendant could then have asked leave to have the motion stand over, that she might serve other affidavits; and that request would, undoubtedly, have been granted. But she proceeded with her motion, and she retains the benefit of the allowance then granted, and by this third motion seeks to increase it. Of course, when circumstances change, it may be proper for the court to make new orders in respect to alimony and allowances. But this rule does not imply that the party dissatisfied with the discretion exercised by one judge may apply to another to exercise his discretion on what are substantially the same circumstances, as a buyer might go to another shop to get for the same money an article which he liked better. We have examined the affidavits used on all of these motions. They are contradictory, and, evidently, some of them are false. It is not best for us to comment on them. It is enough to say that the right in the court to make and modify from time to time such orders as these (Code, § 1769) does not justify the defendant in the practice followed in this case. The order of Justice PUTNAM had denied the matter both as to allowances and as to alimony. The defendant could have reviewed it on appeal, but an appeal does not lie to another special term. If it did, the plaintiff might now move before Justice PUTNAM to reduce the allowance and alimony granted by Justice FISH. Order reversed, with \$10 costs and printing disbursements, and motion denied, with \$10 costs.

TAYLOR v. TOWN OF CONSTABLE.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

BRIDGES—DEFECTS—CONTRIBUTORY NEGLIGENCE.

In an action against a town for injuries caused by the falling of a bridge by reason of a defective stringer, it appeared that plaintiff had been employed by the bridge commissioner, about a month before the accident, to assist in repairing the

bridge, at which time they examined it together. Afterwards, and about three weeks before the accident, a brace was replaced, whereupon the commissioner pronounced it safe, though it was then decided to replace another brace on a certain day in the following week, and the commissioner directed plaintiff, in case of his absence, to replace the brace himself; but, owing to a storm on the day set, the work was prevented, and nothing more was done up to the time of the accident. Before making the repairs, plaintiff had said that the bridge was rotten, and in danger of falling, but there was no evidence that he knew of the defective condition of the stringer. Just before the accident, many persons had crossed with loads heavier than that hauled by plaintiff when the bridge fell. *Held*, that the question of contributory negligence should have been submitted to the jury.

Appeal from circuit court, Franklin county.

Action by Herbert M. Taylor against the town of Constable for injuries sustained by the falling of a defective bridge. A nonsuit was granted, and plaintiff appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Kellas & Munstll, for appellants. *J. P. & W. P. Badger*, for respondent.

LEARNED, P. J. This is an appeal from a judgment on a nonsuit at circuit. The action was brought to recover damages for injuries caused to plaintiff by reason of the fall of one of defendant's bridges, by means of which he was thrown into the water. There was no doubt, on the proof given at the trial, of the defective condition of the bridge, of its fall, and of plaintiff's injury. The defendant insisted that the plaintiff was guilty of contributory negligence, and upon that ground the nonsuit was granted. The plaintiff was overseer of the highways of the district in which the bridge was. There were two spans to the bridge. One only, the east, is over the river, and is the one in question. It was built with five stringers, each 54 feet long, extending over the river, on which rest the planks. The stringers were a little less than 8 feet apart, from outside to outside; the planks 12 feet long. On each of the outside stringers was a brace made of three sticks,—two slanting, and the top stick horizontal,—thus forming a truss; a rod running down where the slanting stick joined the horizontal. About a month before the accident, plaintiff and Mr. Callahan, commissioner of highways, and one Badore, met at the bridge, and examined it. Two or three weeks before the accident, they straightened up the brace on the south side of this east span, which had leaned over for a year, and decided that the north brace was so rotten that there must be a new one. Timber was gotten for that purpose, for the horizontal beam, and one of the slanting pieces. They made an appointment for the next Tuesday to put in the north brace. The commissioner told them, if he was not there, to go to work. Tuesday it snowed and stormed so no one could work. This was two weeks before the accident. Plaintiff did nothing to the bridge up to the time of the accident. Before they repaired it, plaintiff had frequently said that the bridge was rotten, and in danger of falling. Plaintiff's wife, four or five weeks before the accident, had cautioned him about going across. After they had repaired it, as above stated, Mr. Callahan said he thought they had fixed it so that it was safe to draw potatoes across, and to travel across. He examined the stringers, and said it was safe to cross. Plaintiff worked by the day for Callahan. Mr. Spencer drew potatoes over the bridge nearly every day after the bridge was thus repaired. He drew with a double wagon and a team. The potatoes weighed about 3,500 pounds. The plaintiff drove across the morning of the accident; then loaded a threshing separator on his wagon, weighing about 1,300 pounds. On returning with this load, the bridge broke. Mr. Fresno was riding with plaintiff. He had previously driven over with a wagon and double team, and 35 bushels of potatoes. At the time of the accident, he says, the north stringer broke first. When that went down about nine inches, the brace on the north side broke in the middle. He says people crossed on the bridge every day.

We do not see that, as overseer, the plaintiff was bound to keep this bridge in repair. 1 Rev. St. marg. p. 508, § 6; *Bartlett v. Crozier*, 17 Johns. 447; *Day v. Day*, 94 N. Y. 153, at 159. The defendant urges that, by the arrangement made with the commissioner of highways, the plaintiff had agreed to repair the bridge; hence, that he cannot recover for injuries occasioned by his neglect to do so. *Sterger v. Van Stien*, 7 N. Y. Supp. 805; *Walker v. Importing Co.*, 4 N. Y. Supp. 193. It appears from the evidence that plaintiff was not a contractor who had agreed with the commissioner to make these repairs. He was only an employe working by the day, and paid by the day. The commissioner had agreed to meet plaintiff and Badore on Tuesday, and had told them to go on with the work if he were not there, and if the day were so that they could work. It proved to be too stormy, and the commissioner did not come. The plaintiff had, therefore, assumed no duty. The whole duty to repair was with the commissioner.

Again, it is urged that plaintiff knew of the unsafe condition of the bridge, and was therefore negligent. It is said his wife had cautioned him. That was some three months before the accident. And she says that her remark referred to the part of the bridge where there were no guards to keep a horse from going over, if frightened; that, after the bridge was repaired, nothing was said about its being dangerous. As to plaintiff's own knowledge, there is evidence tending to show that the beginning of the accident was the breaking of the north stringer, and that then stringer after stringer followed. It is not shown that the plaintiff knew of the rotten condition of the stringers. He says that, when he was working at the bridge with the commissioner, he saw nothing to indicate that they were unsound. It was the north brace which was to have been repaired on the appointed Tuesday; and there is evidence that, when the accident happened, this brace did not break until after the stringer had broken and sunk down. So that it might have been found that the immediate cause of the accident was the breaking of the stringer. Furthermore, there were circumstances tending to show to plaintiff that for the present it was safe to cross the bridge. After the repairing, the commissioner said to him he "thought we had fixed it so it was safe to draw potatoes across, and to travel across." And teams drawing potatoes, 50 bushels or thereabout, had crossed thereafter from day to day. These loads of potatoes weighed about 3,500 pounds,—much more than the load which plaintiff had on his wagon. Whether, under all these circumstances, the plaintiff was negligent, was a question for the jury. In *Bullock v. City of New York*, 99 N. Y. 654, 2 N. E. Rep. 1, where a sidewalk was known to plaintiff to be unsafe, it was held that she had a right to use it, and that the question of her negligence was for the jury. So, in *Link v. Brunswick*, 10 N. Y. St. Rep. 642, the plaintiff's property was injured by the fall of a bridge over which he was driving. A nonsuit for contributory negligence was held improper. The court remarked: "To say that a bridge was dangerous would not necessarily imply that there was a probability of its immediate fall." "Negligence is a relative term, and depends on the degree of care necessary in a given case." *McGuire v. Spence*, 91 N. Y. 303, at 305. Negligence is the doing what a prudent man would not do; and, when the question is one of the negligence of the plaintiff, it is generally for the jury to decide. The argument of the defendant is that, if the defendant was negligent in not repairing, then the plaintiff had the same knowledge with the commissioner, and was therefore negligent in crossing. But we think that argument is not sound. The responsibility is with the commissioner. He must exercise his judgment, and see that the bridge is safe; and, when he leaves the bridge open for public travel, he practically asserts to the public that the bridge is safe. The traveler has a right largely to rely on this opinion of the officer intrusted with such an important duty. In the present case the plaintiff had not only this assertion of safety by the act of the commis-

sioner, but he had also the express statement made to him at the time of the repairing. The decay in such a structure is gradual. It continues to bear the ordinary weight of traffic till at last the decay reaches such a point that the structure falls. It is not the duty of the commissioner to see how near to that moment of breaking he can keep up the structure. On the other hand, the traveler, who is almost under the necessity of crossing the bridge, though he may see that it is old, and shows some marks of decay, may certainly suppose that the commissioner has done his duty.

On the whole, we are of opinion that it was for the jury to decide whether, under all the circumstances, the plaintiff was negligent. Judgment reversed, new trial granted; costs to abide event. All concur.

STRAWBRIDGE *et al.* v. VANDENBURGH.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

1. EVIDENCE.

In an action to recover back an overpayment for cabbages delivered by defendant to plaintiffs, where the dispute is as to the number delivered, it is error to permit plaintiffs' witness to testify that defendant's man had told him that he did not draw cabbages on a certain day, when the fact whether he did or not is directly in issue.

2. SAME.

It is error to refuse to allow a question whether plaintiff is sole owner of the claim, as that fact might affect his credibility.

Appeal from Rensselaer county court.

Action by William Strawbridge and others against George L. Vandenburg, to recover back an overpayment for cabbages delivered plaintiffs by defendant. Judgment for plaintiffs. Defendant appeals.

Argued before LEARNED, P. J., and LONDON and MAYHAM, JJ.

B. C. Stratt, (*N. C. Moak*, of counsel,) for appellant. *W. S. Kelley*, (*George L. Stedman*, of counsel,) for respondents.

LEARNED, P. J. This is an appeal from a judgment of the county court affirming a judgment of a justice of the peace. The action is to recover back \$47, which sum is alleged to have been overpaid to defendant by plaintiffs for cabbages. The plaintiffs bought cabbages of defendant at \$2 per hundred, and paid him on settlement \$515, which sum was the amount which he claimed they owed him. Their contention now is that he claimed and received payment for 2,350 more than were in fact delivered. These disputed cabbages, if delivered at all, were delivered before October 25th. The plaintiffs claim that from October 25th onward defendant delivered 23,398. Adding to these the disputed cabbages, we have a total of 25,748, which, at \$2 per hundred, would make a few cents less than \$515. It is plainly proved that there was a dispute as to these 2,350 cabbages at the time of settlement, and that the defendant then claimed that he had drawn and delivered them prior to October 25th. The defendant says that on the settlement the plaintiff would allow only 100 cabbages for every 104 delivered. This is probably some custom of the trade. And he says that they settled the difference of the accounts on plaintiff's figures, at \$515. The plaintiff Strawbridge also says that he settled with defendant, and paid him about \$500. At any rate, it will be seen that a dispute as to 4 cabbages out of the 100 would make a difference of less than 1,000. So that such a dispute could not have amounted to the 2,350 cabbages, or to the \$47 now claimed. Therefore that dispute is not what was settled by the parties, as plaintiffs claim on argument. In such cases as these, the appellate court is to decide according to the justice of the case. Code, § 3068. It is not so easy to say that the justice of the case is with the plaintiffs. There was a settlement, and there was a disputed question of fact, and a voluntary payment. There is no proof of any request

to return the overpayment, if any overpayment existed. *Southwick v. Bank*, 84 N. Y. 420.

There are several errors. A witness was allowed to testify for plaintiff that Patrick McDonald told him he did not draw any cabbage that first day; that is, October 23d. That was a fact directly in issue. Charles Dexter, a witness for defendant, had testified that Patrick McDonald did draw a load that first day. The justice must have held that the testimony of Dexter was untrue, and may have been influenced by this hearsay story. There was another error in allowing witnesses to read from certain memoranda. The plaintiffs urge that, if this was error, it was immaterial, because those memoranda only showed the number of cabbages delivered on and after October 25th, while the issue relates to an alleged delivery before; and in that view the error does not seem to be important. Another error was in refusing to allow a question to plaintiff Strawbridge, when on the stand, tending to show that he was the sole owner of the claim. This might have affected his credibility. *Cady v. Bradshaw*, 116 N. Y. 188, 22 N. E. Rep. 371. These errors are slight, and, if we were satisfied as to the justice of the judgment, they might be disregarded. But there is so much doubt on the question of fact and on the right of recovery that we cannot disregard these errors. Where there has been a dispute on the fact, and the parties have settled their dispute, and one has paid accordingly, there should be very strong evidence to justify a recovery back of the money thus paid. Judgment of county court and justice of the peace reversed, with costs.

TYRRELL v. YORK.

(Supreme Court, General Term, Third Department. July 7, 1890.)

1. EXECUTED GIFTS—CHANCES OF POSSESSION.

Where the husband and wife are living together an executed gift of the household furniture by the husband to the wife is not proved by a mere parol gift, where there is nothing to show her possession beyond the ordinary use of the family.

2. CONTRACTS—ILLEGAL CONSIDERATION.

An agreement by the husband to give the wife certain furniture if she would continue to live with him is illegal and void where it appears that at the time they were married the wife knew that the husband had a former wife living, from whom there is no evidence of a divorce, and that they went to another state to have the ceremony performed.

Appeal from Albany county court.

Action by Maggie Tyrrell against James York to recover damages for the taking of personal property. Judgment for plaintiff. Defendant appeals. For former report see 8 N. Y. Supp. 939.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

John H. Gleason, (Andrew Hamilton, of counsel,) for appellant. *Merritt & Ryan*, (James H. Ryan, of counsel,) for respondent.

LEARNED, P. J. This action was brought in a justice's court, to recover damages for taking goods and chattels. The plaintiff recovered, and the defendant appealed. On a new trial in the county court the plaintiff again recovered and the defendant appealed. The plaintiff claims to have been the owner of this property (household furniture) when it was taken by defendant. The defendant avers that on the 14th of January, 1888, John Tyrrell, then the owner, mortgaged the property to defendant, and that by virtue of the mortgage defendant took and sold the property February 29, 1888. Tyrrell bought the property of defendant in December, 1886, and took it to his house, where he and plaintiff were living as husband and wife. They had been married (at least formally) in September, 1886. On February 20, 1888, Tyrrell went away from plaintiff. She claims that in January, 1887, and again in July, 1887, Tyrrell gave her this property. Of course the material ques-

tion is as to her title. If she owned the property, Tyrrell could not give a valid mortgage on it. If she did not own it, then it is immaterial whether the mortgage was for more or less than Tyrrell owed York. Her title must depend on the alleged gift by Tyrrell to her, because it is plain that before such alleged gift the property was Tyrrell's. She says Tyrrell secured a house in December, 1886, and put the furniture in it; that he gave it to her the first week in January, 1887; that she had him arrested in July, 1887, when he had been drinking, and she also commenced an action for divorce against him; that he then took the pledge, and agreed, if she would return and live with him, that all the furniture should be hers, and that she returned and lived with him till he went away. This last arrangement is also testified to by the police justice before whom Tyrrell was brought. The defendant insists that there was not sufficient proof of a gift to go to the jury, and not sufficient delivery of possession to go to the jury, as showing a completed gift.

The doctrine applicable to this case is shown in *Armitage v. Mace*, 96 N. Y. 538, where, on slight evidence of the gift by a husband to his wife of a mare, it was held that there was enough to show "all the possession that a wife living with her husband could have." And the law is further shown in *Whiton v. Snyder*, 88 N. Y. 299. There, after speaking of personal ornaments, etc., the court says: "As to * * * furniture * * * adapted to the use of and used by the family generally, and in their common possession, a different rule must apply. * * * The difficulty of establishing an executed gift by showing a delivery or a separate and personal possession remains." That is, that while slight evidence of gift may suffice as to a wife's personal ornaments, on the other hand, as to such things as furniture, which are in common use in the family, an executed gift must be shown by delivery to the wife, and possession by her. The ordinary use in the family does not show her possession. It is plain that there was no proof of an executed gift in January, 1887, nor was there any such change of possession as would make an executed gift out of the transaction of July, 1887. But it might be said that there was then a contract by plaintiff to return and live with Tyrrell, after by his conduct he had forfeited all right to her society. In answer to this the defendant says that if she was not the lawful wife of Tyrrell, then the contract was for future illicit intercourse, and was void. The plaintiff says she had lived in West Troy 34 years; had known Tyrrell a great many years by sight; had known of his wife and family; and that Tyrrell told plaintiff he was not a widower. It is undisputed that Tyrrell and his wife lived in West Troy 30 years, and had nine children born there; and that four or five years before the trial Tyrrell and his wife separated. She went to North Adams, where she was living at the time of the trial, and he remained in West Troy. Tyrrell and plaintiff went to New Jersey; were there two hours; were married, and returned to West Troy. She says she did not feel like getting married in West Troy; that Tyrrell thought it would be more binding to be married in New Jersey. We have, then, the fact that plaintiff knew that Tyrrell had been a married man for many years, and knew he had children, and that his wife was living. There is no evidence that he had been divorced, or that plaintiff had any reason to suppose that he had been divorced. These facts, together with the circumstances that she and Tyrrell went to another state merely to have the marriage ceremony performed, without any explanation, shows that the relationship between them, though under the pretense of marriage, must have been known to her to be illegal. Her promise to continue therein could therefore afford no valid consideration for a contract on his part. Indeed, the learned court thus charged, with the qualification, if she knew the fact of Tyrrell's marriage. We think that there is no contradictory evidence on that point. The judgment and order should be reversed, and a new trial granted, costs to abide event.

THOMPSON et al. v. DATER et al.*(Supreme Court, General Term, Third Department. July 7, 1890.)***1. ATTACHMENT—GROUNDS.**

The fact that defendants' stock has decreased from \$6,000 to \$2,000 during a period of eight months of unsuccessful business will not sustain an attachment on the ground that they have fraudulently disposed of their property.

2. SAME.

That defendants were negotiating for the sale of their business at its value, but declined to pay plaintiffs, or to promise to pay them out of the avails of the sale, if it should be made, and also refused to make a *pro rata* general assignment, is no evidence of an intention to fraudulently dispose of their property.

3. SAME—PRACTION—DISSOLUTION—APPEAL.

An order refusing to dissolve an attachment which shows that both parties were heard on the motion is appealable whether formal notice of the motion was given or not.

Appeal from Rensselaer county court.

Application by Charles W. Dater and another to vacate an attachment levied on their property at the suit of James Thompson and others. Application denied. Defendants appeal.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Davenport & Hollister, (Nelson Davenport, of counsel,) for appellants. James Lansing and Frank S. Black, for respondents.

LEARNED, P. J. This is an appeal from an order refusing to vacate on the original papers an attachment against property of defendants. The grounds recited in the attachment are that a cause of action exists on breach of contract for sale of goods and on a promissory note, and that defendants have assigned, disposed of, and secreted their property with intent, etc., and are about to assign, etc., with like intent. The action, therefore, is not for injury to property, but for breach of contract in not paying a debt. The question on the appeal is whether there was evidence justifying the holding that defendants had assigned, etc., or were about to assign, etc., with intent, etc. One of defendants, on the 14th of February, 1890, said that they were hopelessly insolvent, owing \$20,000, and having assets about \$10,000; that they had been insolvent for six or eight months, and had known their insolvency since October 1st previous; that defendants then owed the Manufacturers' Bank \$3,000, and the Mutual Bank \$2,500; that defendants were trying to sell their property to one Patton, expecting to receive about \$10,000; that they had no proposition to make as to plaintiffs' debt. Said defendant refused to pay plaintiffs' debt, or secure it, or to promise to pay it from the sale to Patton, and stated that they would not apply their property to their debts *pro rata*. The affidavit avers that Knight, one of defendants, had been a partner of another firm until a short time before the commencement of this action, when he assigned all his interest therein to his wife; that defendants had tried to sell their property and business to one Cleveland, but could not, for reasons immaterial on this motion.

An affidavit of one Stickney states that he was, until June 1, 1889, in the employment of defendants; that while he was with them the average stock in manufactory and lands was about \$5,000 or \$6,000 worth; that he examined their stock about February 14, 1890, and found less than \$2,000 worth. From these statements of Stickney the plaintiffs believe there has been a great and sudden change in the amount of stock. The plaintiffs' affidavit states that they are informed by said Stickney that this change from \$5,000 to \$2,000 was within two weeks prior to February 14th. Stickney's affidavit, on the contrary, shows that it occurred between June 1st and February 14th,—eight months and a half. This shows the difference between hearsay and sworn statements. There is nothing in the least suspicious in the diminution of a stock from \$6,000 to \$2,000, during a period of over eight months, in a concern which is

not successful in business. Such a circumstance, standing alone, in no way tends to sustain an allegation that the defendants have disposed of property with intent to defraud. There is no other evidence of any transfer of defendants' property, except that it is stated that one of the defendants had sold his interest in another firm to his wife. What such interest was worth is not stated. What he received is not stated. Whether there was any value whatever in his interest after payment of the debts of that firm is not stated. There is no evidence that that transfer was fraudulent. Therefore the allegation that defendants had assigned their property with intent to defraud fails entirely.

There is no evidence that defendants were about to assign with intent to defraud. The defendants had been negotiating for a sale of their business, but had not been successful. One defendant declined to pay plaintiffs, and thus to give them a preference over other creditors. He declined to promise to pay them out of the avails, if they should sell. He declined to make a general assignment *pro rata*. In all this there was no evidence of intent to defraud. Defendants had a right, within the statutory limit, to make preferences. It was not fraudulent for one of defendants to refuse to promise to assign *pro rata*. The plain case is this: The defendants were badly embarrassed. They had ineffectually tried to sell out their business. They owed, largely, certain banks in Troy. They were not ready to say what steps they would take in disposing of their property among their creditors. The plaintiffs wished to get a preference, and they sought to do this by entangling defendants in their talk, by asking for promises and for payment, by sending a former employe of defendants to estimate the stock, and then by making an affidavit as to their own beliefs and suspicions. Attachments are not to be granted on beliefs and suspicions. They operate to give an advantage to one creditor over others; and some wrongful act, or the evident intent to do some wrongful act, must be shown to justify them. We must not overlook the phrase "with intent to defraud his creditors." That is the gist of the allegation, and this intent must be shown by evidence. We see nothing in these papers which shows any such intent in regard to transfers made, or transfers about to be made. In fact the only transfer in prospect was one to Patton for \$10,000, and there is not the slightest allegation that this was not a fair price, or that Patton was not responsible. If the defendant had promised to pay plaintiffs their debt of over \$7,000 out of this \$10,000, as they asked him, he would have been promising a preference beyond that allowed on a general assignment. Of course, it is natural that plaintiffs should wish to be paid, and that they should desire, if they can, to get a preference over other creditors; but when such preference can only be had by showing an actual or expected transfer with intent to defraud creditors, courts should be careful to see that the evidence clearly shows that such fraudulent intent really existed in the mind of the defendants, and not merely in the ingenuity of the plaintiffs.

A point is made that this order is not appealable because it is said to be *ex parte*. This is a mistake. The order was made on defendants' motion, and on hearing plaintiffs' counsel in opposition. It is of no consequence on this appeal whether the parties appeared voluntarily, or on a formal notice. Indeed, it does not affirmatively appear on the papers that there was not a regular notice. Nor was it necessary that this should appear on the papers. It is enough that the order shows that both parties were heard on the motion to vacate the attachment. As that was the case, the order denying the motion was not *ex parte*, and is appealable.

We have examined the affidavits carefully, though we have not set forth all the allegations at length, and we are satisfied that there was not such evidence as justified the attachment. Order reversed, with \$10 costs and printing disbursements, and motion to vacate granted, with \$10 costs.

KEENHOLTS v. CHURCH.

(Supreme Court, General Term, Third Department. July 7, 1890.)

ACTIONS FOR MONEY HAD AND RECEIVED—RECOVERY BACK.

In an action to recover back money overpaid in the settlement of an account it appeared that, there being a dispute as to the amount of the account, defendant agreed that if plaintiff would pay the amount of his demand, which included an indebtedness from plaintiff to a third person, who had assigned it to defendant, he would repay whatever sum it should be ascertained on a settlement of the account between plaintiff and the third person had been overpaid by plaintiff. Plaintiff effected a settlement with his debtor, and got a receipt showing the exact amount of his indebtedness. *Held*, that he could recover back the difference between the amount of the receipt and the sum paid defendant.

Appeal from Albany county court.

Action by John Keenholts against Walter S. Church to recover a sum overpaid defendant in a settlement. Judgment for plaintiff. Defendant appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Wm. S. Dyer, (Geo. L. Stedman, of counsel,) for appellant. *Jacob H. Clute*, for respondent.

LEARNED, P. J. The complaint alleges that the plaintiff, on the 8d day of January, 1888, paid to the defendant \$424.35; that this was the amount which the defendant claimed that the plaintiff owed to one Martha Batcher; that the plaintiff at the time claimed that he owed said Batcher much less; that plaintiff paid the money under an agreement that, if said Batcher's claim against plaintiff was less than that sum, then, as soon as plaintiff had settled with said Batcher, defendant would pay back to plaintiff the difference. It avers that plaintiff about March 24, 1888, settled with said Batcher for said claim; that he owed her only \$98 at the time when he paid defendant \$424.35; that she gave plaintiff a receipt in full; that he presented this to defendant, and demanded the difference; and the complaint demands \$331.35, with interest. The answer admits the payment of that sum of \$424.35, and denies everything else. The testimony of Simon E. Keenholts and of Elou Crounse tends to show that such an agreement was made. The testimony of the plaintiff is to the same effect. He also testifies to his subsequent settlement with Martha Batcher for \$98, and also to the demand on the defendant for the balance. The receipt of Martha Batcher for \$98, dated March 24, 1888, is produced, stating that this was all which was due her. The testimony of Judge Clute states the transaction substantially as set forth in the complaint, to the effect that, on the 8d of January, 1888, the defendant said that he had this claim of said Batcher against the plaintiff, and that defendant agreed that if plaintiff would pay the amount to defendant, and then would settle with said Batcher, and bring her receipt, the defendant would refund the difference. Mr. Ludden testifies to the settlement about January 5, 1889, between plaintiff and said Batcher for \$98. On the other hand, the defendant testifies that in the interview of January 8d he said that he had a claim against said Batcher for the security of debts due him, and that the claim must be provided for; that plaintiff claimed that such debt was less, and defendant claimed it was more. One portion of the claim was a note of plaintiff to George A. Batcher or bearer, for \$400, dated May 1, 1869; and another was an account against plaintiff. Defendant further testifies that said Martha Batcher turned over the note and account to him, and that he told her that whatever he collected from plaintiff over and above the amount due defendant from her husband (George A.) she should have the benefit of. There is evidence of Schoonmaker to the same effect, as to the agreement between Martha Batcher and the defendant. The testimony of Martha Batcher, on the contrary, is to the effect that the defendant was to collect this claim from

plaintiff and pay it to her. Without going over the testimony in detail any further, it is seen that there was a conflict on the evidence as to the transaction of January 3d. At that interview Judge Clute wrote down, and put his initials to, the following paper: "Martha Batcher has in Church's bill, \$424.35. If her claim is less, Church is to give his check for the balance. J. H. C." The defendant insists that this was read aloud, and assented to by the parties, and that it is the binding agreement between them, and should exclude all other evidence of the agreement. It is evident that this paper, without some extrinsic evidence, is hardly to be understood. But it appears that at the time of the interview the plaintiff and the defendant were having a settlement in regard to some rent claimed by defendant against the plaintiff, and that for some reason this alleged debt of plaintiff to said Batcher was brought into the settlement. This is the meaning of the words: "Martha Batcher has in Church's bill, \$424.35." All the testimony shows that this meant that the claim of said Batcher against the plaintiff was in the bill or demand of defendant against plaintiff. The writing then states that if her claim is less,—that is, if her claim against plaintiff is less than \$424.35,—defendant is to give his check for the balance. The writing does not say to whom the check is to be given. But all the circumstances show that it was to be given to plaintiff; for if plaintiff paid more than was really owing by him to said Batcher, the excess would justly be refunded to him. If we take the defendant's statement, viz., that he told said Batcher that whatever he collected from plaintiff over and above what was due to defendant from her deceased husband, George A. Batcher, she should have the benefit of, still that does not seem to affect the question of defendant's liability to plaintiff for money paid in excess of the debt, and paid on an agreement to refund. Whether defendant or said Batcher held the claim, the plaintiff was not bound to pay more than he owed. If he had paid without the agreement to refund, it might have been said that the payment was voluntary. But no such position is taken here. Evidence was given as to how much was actually owing from plaintiff to said Batcher, and the referee has found the amount, so that the plaintiff does not rely solely on his settlement with her. There is some conflict as to what were the exact rights of the defendant in the Batcher claim; whether he was absolute owner, or a holder as security. At any rate, he could make an agreement as to the terms on which plaintiff should pay. So far as affects this case it does not seem to be very important whether on the 3d of January defendant was holding the Batcher note and account as absolute owner or as agent for said Batcher. In either case, if an agreement was made between plaintiff and defendant that, if plaintiff paid defendant the whole \$424.35 claimed to be owing said Batcher, and if her claim should in fact be less, then that defendant would refund, the defendant would be liable, whether he was absolute owner or not. The plaintiff did not know that defendant claimed not to be absolute owner. The referee has found as a fact not only that plaintiff settled with said Batcher on the 6th of January for \$98.31, but that that was the amount of the indebtedness to her. The defendant urges that the referee erred in refusing to find that the Batcher claims belonged to defendant. But if it did so belong we do not see any ground why the defendant should retain more than was due thereon, when the payment had been made on an agreement that if the claim was less defendant should give his check for the balance. There are no rulings as to the admission or exclusion of evidence which require a reversal of the judgment. The judgment should be affirmed, with costs.

ADAMS v. TATOR.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

1. CONFESSION OF JUDGMENT.

Code Civil Proc. N. Y. § 2864, giving jurisdiction to justices of the peace to enter confessions of judgments, does not confer authority to confess for a contingent liability. Section 8011 provides that, on the confession of judgment before a justice, there must be an affidavit stating that the defendant is honestly indebted to plaintiff in the sum specified, over and above all just demands which defendant has against plaintiff. *Held*, that a justice of the peace had no authority to enter a confession of judgment in favor of a surety on certain notes against the principal maker, where the surety had not paid the notes at the time of the entry of judgment, although before such entry he had agreed with the principal to make such payment.

2. SAME.

The judgments being based principally on such notes, they were not valid as to certain minor items, covered by the judgments, which were actually due at the time confession was made.

Appeal from circuit court, Schoharie county.

Action by Ambrose W. Adams, as constable, etc., against John H. Tator. Argued before LEARNED, P. J., and LANDON, J.

Watson Lamont and William C. Lamont, (Nathaniel C. Moak, of counsel,) for appellant. *Albert Baker, (Hobart Krum, of counsel,)* for respondent.

LEARNED, P. J. This is an action to recover damages for taking personal property. The plaintiff recovered, and defendant appeals. The plaintiff was in possession of the property by virtue of executions issued on two judgments recovered by one Mickle against one King on confession, March 10, 1885, before a justice of the peace,—one for \$500, the other for \$200. The defendant took the property by virtue of a chattel mortgage, executed to him by King, December 30, 1884, and not filed until March 14, 1885. On the first trial it was urged that plaintiff was not a constable. That point was disposed of when the case was here before, (42 Hun, 384,) and will not be again considered. The principal questions now are as to the validity of the judgments and the regularity of the executions. It is urged that the confessions of judgment were in fact fraudulent, and also that the justice had no authority to take a confession of judgment, given, in fact, to secure contingent liabilities. In form the confessions authorize a judgment, but they state no facts of any kind, and show no cause of action. It is further claimed by the defendant that the affidavit attached to each confession is defective. On the trial it appeared that the alleged indebtedness for which these judgments were confessed was made up as follows: (1) A joint and several note made by King and Mickle, dated October 30, 1884, for \$400, at one year, held by a bank at Middleburgh, when the confession was given. As between the parties, Mickle was surety for King, who received the avails. (2) A promissory note made by King and Mickle, dated March 14, 1884, for \$49 and interest, at one year, held by George D. Brayman, on which Mickle was in fact surety. (3) A promissory note made by King and Mickle, dated March 13, 1884, for \$68.40 and interest, at 10 months, held by Mrs. Foland, on which also Mickle was in fact surety. (4) An indebtedness on book-account of about \$64.37, and perhaps borrowed money, \$130. There is evidence to the effect that, just before the confessions, Mickle and King looked over their affairs, and that there were found liabilities to over \$700, including these notes; that they agreed to call the amount \$700; that Mickle agreed to pay the notes if King would give the security; and that on this arrangement the judgments were confessed.

It is evident that the notes above mentioned formed the principal part of the indebtedness for which the judgments were confessed. The learned justice who tried the case expressed some doubt on the question of the confes-

sion of these judgments for a contingent liability, but decided to hold the judgments good in that respect. Section 2864 gives a justice of the peace jurisdiction to enter confession of judgments as prescribed in title 6 of chapter 19. Sections 3010, 3011, prescribe the mode, and are substantially like the provisions of the Revised Statutes. The third subdivision of the latter section requires that, when the judgment exceeds \$50, there must be an affidavit of the parties, "stating that the defendant is honestly and justly indebted to the plaintiff in the sum specified therein, over and above all just demands which the defendant has against the plaintiff." The argument of the defendant is that King was not indebted to Mickie at the time of the confession upon the notes, nor even upon Mickie's agreement to pay them, though he might become so indebted when Mickie paid. It is worthy of notice, in considering this question, that, in regard to confessions in courts of record, the Code is precise and clear. It gives express authority to confess for a contingent liability, and requires a verified statement of the facts constituting such liability. Sections 1273, 1274. See *Bank v. Doty*, 41 Hun, 76. And some inference may be drawn therefrom that, if confessions of judgment in justice's court were authorized for contingent liability, a similar provision would have been made for a statement of facts. In the present case the confession states no facts whatever. It does not show for what cause of action the judgment is to be entered,—whether for assault and battery, for damages in taking a chattel, for money loaned, or for goods sold. It only authorizes a judgment for a certain amount, or no cause of action whatever. We have doubts whether such is the proceeding authorized by the Code. A "confession" means, ordinarily, the acknowledgment of some facts; and it is reasonable that facts should be stated at least as fully as would be done in a complaint in the same court. This might be quite important in order to show the nature of the execution to be issued. Section 3026.

But, passing this, we come to the question as to the contingent liability. It is certain that at the time of the entry of the judgments King was indebted on the notes, not to Mickie, but to the holders. A principal is not indebted to the surety until the surety has paid the debt. Even though Mickie, in consideration of the giving these judgments, had agreed to pay the debt, still it could not be said that King was indebted to Mickie for these notes at the time when the judgments were given. Whether Mickie would pay them or not was uncertain. If he paid them, King would owe him; if he did not, King would not owe him. All was contingent. This is not saying that it would not be a lawful arrangement for King to secure Mickie, on receiving such a promise. We are only examining whether the language required in the affidavit, viz., that the defendant is justly and honestly indebted to plaintiff in the sum specified, can be construed to comprehend such an arrangement. Mickie was already liable on these notes. He assumed no new obligation. He simply obtained a judgment against King before paying the notes, which he would have been able to recover after paying them. Only after he had paid them, King would have become indebted to him; before, King was not. When, then, the Code requires such an affidavit, it shows that there must be an existing debt to the plaintiff. Probably the debt need not be yet payable. For that case a stay of execution is provided. Section 3010. But the defendant must owe the plaintiff. *Debitum in presenti solvendum in futuro*. Debt existed in the present case, but not to this plaintiff; that is, as to the three notes. *Smith v. Krauskopf*, 13 Hun, 526, and cases cited.

But the plaintiff insists that by the effect of the agreement between Mickie and King, just prior to the confessions, \$700 was due and owing by King to Mickie, without any contingency. Very probably, the agreement, based on the promise by King to confess judgment, might have been valid. But the agreement was nothing more than making Mickie the principal debtor, and

King the surety, on the notes, as between themselves; and it could not be said that King was indebted to Mickle in that amount over and above all just demands. The plaintiff urges that judgment may be confessed for a tort, and that a tort is not a debt. That may be true. But, when the parties have settled and agreed on the damages which are to be paid in compensation for a tort, it might not be a forced construction to say, in such an affidavit, that the defendant was indebted in that amount. Whether, however, a case of tort is within these sections we need not decide. It is true that in this case Mickle did subsequently pay these notes. But we think that the learned justice correctly held that such payment was immaterial as to the point now considered. In confessions of judgment in courts of record, there is a special provision for the issue of execution when the debt is not all due; the word "due" there meaning "payable." Section 1277. See *Jaffray v. Sausseman*, 5 N. Y. Supp. 629, and *Bank v. Salomon*, Id. 682. In section 3026, it is provided that executions on justices' judgments must specify the sum recovered and the sum actually due. Now, whatever the meaning of the word "due" in this section, as the executions were issued the same day with the judgments, it is plain that, as to the amount of the notes, nothing was due, in either meaning. And the executions in fact did not state that any amount was due,—a defect which may be a mere irregularity. We think, then, that the absence of any special provision for the entry of judgments on confession in justices' courts for contingent liabilities, with the requirement of the affidavit above referred to, shows that no such confessions were contemplated by the statute. There is reason for this, because proceedings in justices' courts are simple, and adapted to plain cases. And it would seem strange, if judgments on contingent debts had been contemplated, that provisions similar to those of section 1274 were not added.

The plaintiff urges that the judgments are good at least to the extent not given to secure the notes. We do not see how, in regard to these justices' judgments, we can hold this. There is a slight variation in the form of affidavits from that required by Code, § 3011, subd. 3. The affidavits follow the language of 2 Rev. St. marg. p. 245, § 114, subd. 3. We do not think the variation is fatal. We think, therefore, that these judgments on confession cannot be sustained, and that the judgment and order appealed from must be reversed, and a new trial granted, costs to abide event.

GOULD v. TRASK *et al.*

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

1. FACTORS AND BROKERS—DEPOSIT OF MARGINS—EXTENSION OF TIME.

Defendants, as brokers, purchased certain stocks for plaintiff under a contract by the terms of which he was to deposit a certain per cent. of their par value as margins, and in case a decline in stocks should reduce the margins below an agreed minimum per cent. defendants might demand deposits sufficient to increase the margins to the original amount required to be deposited, in default of the payment of which they were authorised to sell without notice. Plaintiff, having been repeatedly called upon for margins, gave defendants his note, which was placed to his credit and receipted for as "temporary collateral," but there was no settlement of the accounts between the parties at the time. Afterwards, on plaintiff's failure to comply with repeated demands for margins, defendants sold the stock, rendered an account of this and other sales, returned his note, and on his approval of the account, and at his request, paid him the balance due. Held that, in the absence of an express agreement, the note did not amount to a deposit, nor operate to extend the time for depositing margins until the note should mature.

2. SAME—ESTOPPEL.

Where plaintiff, at the time, makes no objection to the sale, and subsequently receives back his note, and asks for, receives, examines, and approves the statement of his account, and accepts a check in full settlement of the balance appearing due him, and afterwards acquiesces therein until the stock shall have greatly increased in value, he will be estopped to repudiate the acts of defendants, and hold them for the advance.

8. SAME—INTEREST.

The action being for conversion of stocks, and not for a balance due on account, plaintiff cannot place in issue the question whether the accounts were incorrect by reason of excessive charges of interest, where it does not appear that such excessive charges would equal the deficit in margins.

Appeal from judgment on report of referee.

Action by William Gould, Jr., against Spencer Trask and others for the conversion of certain stocks held by defendants as brokers. Judgment for defendants on the report of a referee. Plaintiff appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

D. Cady Herriek, for appellant. *George L. Nichols*, for respondent.

LEARNED, P. J. This is an appeal from a judgment in favor of defendants entered on the report of a referee. The action is to recover damages alleged to have been sustained by plaintiff on account of the alleged conversion by the defendants of certain shares of stock. The plaintiff commenced buying stocks on a margin through the firm of Trask & Traver, about May, 1880. The present defendants succeeded that firm in May, 1881, and the plaintiff's business of buying stocks, as aforesaid, was transferred to and continued by the present defendants. It is found by the referee that the agreement made between plaintiff and these firms was that he should deposit as margin 10 per cent. on the par value of stocks; that, if there should be a decline so that the margin should be reduced to 7 per cent., plaintiff should deposit enough to make the margin 10 per cent.; that if he failed to do so they were at liberty to enter stop orders or to sell his stocks without notice. On the 27th of September, 1887, defendants were carrying for plaintiff's account 200 shares Missouri Pacific, 200 shares St. Paul, 200 shares Western Union, bought by them, as brokers for him, with their own capital and credit. They were also carrying in his account 50 shares American Express and 50 shares of National Exchange Bank, Albany, which had been delivered by him as margin. These last-mentioned stocks were sold October 26, 1887, by plaintiff's express direction, and no question arises as to them. On or about September 27, 1887, the margin on plaintiff's account was less than 2 per cent. on the par value of stocks carried by defendants. From that date till October 24th the highest margin was less than 8 per cent. Between those dates the defendants made repeated demands on plaintiff to deposit additional margin, which demands were not complied with, unless as follows: On the 15th day of October plaintiff executed and delivered to defendants his promissory note, at 30 days, to his own order, and indorsed by him, for \$5,000, and they gave him a receipt therefor, describing it as "to be held as collateral, temporarily." At the time of the delivery of said note defendants told plaintiff that they would not close his account that day, but that the stocks must be sold unless he could assure them within a short period that he would have the money. The plaintiff informed them that he would have it by the 17th or 18th of October, to which they replied that they would wait till that time before taking action. On the 18th day of October defendants sold 100 shares of plaintiff's St. Paul stock by his direction. On the 20th defendants notified plaintiff that they would enter a stop order the next day on the remaining stocks, specifying them, at certain specified prices. At his request, on the 22d, they changed the limit on two of these parcels of stock. On the 24th the limits on the stop orders were reached, and the stocks were sold at the stock exchange in New York. A stop order, as found by the referee, signifies that where an order has been given to sell stocks at such a price, and like stocks sell at that or a lower price, the broker who has the order must sell the stocks at the next market price following the sale of like stocks. The proceeds of these sales were applied to plaintiff's debt to defendants, and the balance, \$68.76, was paid to him October 29th, and retained by him. The referee finds that the plaintiff received a detailed statement of account from defendants, examined and ap-

proved it, and accepted the above sum in full of the balance. Afterwards, on November 17th, the plaintiff notified defendants that he was informed that they had no right to sell his stocks while they held his note as collateral until the note was due and dismissed. He therefore ordered the stocks to be sold at market rates. They had returned to him that note on the 27th of October.

The point at issue between the parties is whether the receipt by defendants of plaintiff's note aforesaid took from them the right to sell the plaintiff's stocks for want of a sufficient margin. At the time the note was delivered, according to the testimony, the margin which plaintiff had was less than one-half of 1 per cent. Even if the note then were to be considered as additional margin, the total amount of the margin would not be 10 per cent. on the stocks carried, calling them only \$60,000 at par; and the finding is that, if the margin should be reduced to 7 per cent., plaintiff would, by his agreement, pay enough to make it 10 per cent. In the most favorable view for the plaintiff, therefore, he did not at that time make his margin good. On the days of the actual sales, October 18th and 24th, also, plaintiff's margin was less than 1 per cent.; so that at least on the former of those days the plaintiff, even with the note, had not 10 per cent. margin with defendants. The plaintiff urges that the receipt of the note was an extension of the indebtedness then owing to defendants, and a suspension of the right of action; but the receipt given by them shows that this view is not correct. The note was not given for an amount actually due and owing. There was an unsettled account between the parties. The fluctuations in stocks might change the balance of that account when brought to a settlement. Nothing had been agreed upon which this note was intended to extend. Further, the receipt states that the note is to be held as collateral, temporarily. The plaintiff cites *Pomeroy v. Tanner*, 70 N. Y. 550. But it was there found as a fact that there was a valid agreement to extend the time. Here no such agreement is proved, and the note and receipt do not establish such an agreement.

But, again, the testimony shows that the note was not accepted as a margin. It gave the defendants no security. The plaintiff was no more liable on the note (in defendants' hands) than he would have been on the balance of account. It formed no lien on any property. It never passed out of defendants' hands until it was returned to plaintiff. Therefore no recovery could ever have been had against him on the note except for such amount as he might be found to owe on the settlement of his speculations. The construction which plaintiff gives to the transaction imposes on defendants an obligation, for no value received, to hold plaintiff's stocks, without selling them, for 33 days from October 15th. It would seem almost incredible that defendants would enter into such an agreement when they were constantly calling in vain on plaintiff to make his margin good; and the testimony of the witnesses on this point shows that no such agreement was made or contemplated. The plaintiff himself accepted his returned note 12 days after it had been given, and received, without objection, a few days afterwards, the balance of his account owing him on the sales of stocks. It was not until some two weeks after this receipt and acceptance that he complained that the action of defendants was not proper. The defendants had made these purchases of stock with their own capital and credit for plaintiff. He was bound to indemnify them against loss, according to the terms of their agreement; and according thereto they were entitled to be kept safe, to a certain extent, by means of the margins against the risk of loss. Under these circumstances they notified him October 20th of their intention to enter stop orders. The next day plaintiff requested a change in these orders, which was made. He made no other objection to the sales which might be made under these stop orders. He did not insist that his note was an extension of time, or was a sufficient margin. Therefore he knew that his brokers were about to make sales, in certain events, which he now asserts they had no right to make. But he made no objection.

The sales were made. He received a statement of the account, asked for and received his note, which, he now says, was an extension of time to November 17th. On the 29th of October he asked for and received a check for the balance, and then had an interview with defendants, where he examined the account and found it correct. No complaint was made during all this time that the sales were not justifiable. It may be that, if he had then objected to the sales, and the defendants had thought that the objection was just, they could have bought the like amount of stocks without any loss. But the plaintiff waited without complaint until the stocks had risen, and then informed the defendants that their acts were unauthorized. Good faith demanded of plaintiff an immediate repudiation of the defendants' acts as soon as he knew of them and a refusal to accept any of the avails.

The plaintiff further urges that the accounts of the defendants were incorrect, inasmuch as they charged plaintiff interest on interest. That question cannot be raised here. The complaint is not for a balance due on account. It is for conversion of stocks. There cannot be a recovery as on an accounting. If the charge of interest on interest is incorrect, the amount overcharged is not enough to show that the margin of plaintiff was good. Therefore it is immaterial. If the defendants owe plaintiff a balance on their account, he must bring another kind of action to recover it. The judgment is affirmed, with costs. All concur.

BOYNTON v. LADDY.

(*Supreme Court, General Term, Third Department. July 17, 1890.*)

1. EXECUTORS AND ADMINISTRATORS—LIABILITY.

Where a will provides that the expenses of administration shall be charged upon, and paid out of, the estate of the testator, both real and personal, the administratrix, to whom one-half of the estate has been devised for life, and who is the assignee of the other half, is not personally liable for such expenses.

2. SAME—COSTS.

In an action against an administratrix to recover for services performed and moneys expended as expenses of administration, costs may be awarded against her, under Code Civil Proc. N. Y. § 8246, providing that, in an action brought against an executor or administrator in his representative capacity, costs must be awarded as in an action against a person defending in his own right, except as otherwise prescribed in sections 1835 and 1836, which except generally cases where a judgment for a sum of money only is rendered.

Appeal from judgment on report of referee.

Action by Adelbert W. Boynton against Jane Laddy, as administratrix with the will annexed of the estate of Alpheus Wilkins, deceased, to recover for services performed and moneys expended in probating the will. The will provided that all expenses of administration should be charged upon, and paid out of, the said estate, both real and personal. Code Civil Proc. N. Y. § 8246, provides that, in an action brought by or against an executor or administrator in his representative capacity, costs must be awarded as in an action by or against a person prosecuting or defending in his own right, except as otherwise prescribed in sections 1835 and 1836. The latter sections provide that, with certain exceptions, costs shall not be awarded in such an action where a judgment for a sum of money only is rendered against an executor or administrator. Judgment was given for plaintiff, and defendant appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Edgar T. Brackett, for appellant. Hand, Kellogg & Hale, for respondent.

LEARNED, P. J. The principal question in this case was decided by this court on a former appeal. 8 N. Y. Supp. 93. Since that decision the case has been tried before a referee. From the judgment on his report the present appeal is taken. The report and judgment make the defendant personally liable for the claim, and the defendant insists that this is erroneous. There

are cases in which property is devised or bequeathed, and the devisee or legatee is required to pay a certain debt or charge. In those cases the devisee or legatee accepting has been held personally liable. *Gridley v. Gridley*, 24 N. Y. 130; *Van Orden v. Van Orden*, 10 Johns. 80. This is on the ground that such devisee or legatee accepts the devise or bequest with the condition, and that such condition is that the devisee or legatee shall pay the debt. There is no such language in this will. The estate is by the will charged with certain claims, as we previously held, of which this is one, but there is no express direction that the devisees or legatees shall pay. In *Kelsey v. Western*, 2 N. Y. 500, at 507, it was said that, if there was no express promise by the devisee, an action at law would not lie to recover the legacy against the devisee. Without going over the whole subject of charges on estates, we may say that in this case there is nothing in the will to make the defendant personally liable. The claim in suit was, with other claims, including debts, charged on the real and personal estate. There was no definite sum named, subject to which the devisee or legatee was to take. A further charge for the support of minor children was made. One-half of the estate was given to a son, and the other half, for life or widowhood, to defendant. Defendant has become owner of the part given to the son, subject to the support of the minor children. This is not, then, a case where, on accepting a devise, a devisee agrees to pay a certain definite charge on the land, and hence becomes personally liable. We do not see, therefore, how a judgment against defendant personally could properly be rendered.

Costs seem to be properly awarded, as the judgment is not for a sum of money only. Sections 1835, 3246. Whether section 1823 applies, inasmuch as the defendant is devisee or assignee of the devisee, we need not inquire. If she were only administratrix, there might be some difficulty. But the title to one-half in fee, and to the other half for life, seems to be in her, subject to the charge for support of children, and to the charge in litigation. We think that the judgment should be modified so far as it makes a personal liability against defendant, and as so modified affirmed, without costs.

FISHER v. VILLAGE OF CAMBRIDGE.

(Supreme Court, General Term, Third Department. July 7, 1890.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS.

The defendant village constructed, along side of a highway bridge over a stream, a sidewalk bridge, about three inches lower than the highway bridge, but otherwise with no line of demarcation between them. Plaintiff drove lengthwise upon the sidewalk, in front of a store close to the stream, to receive a load, and then continued to drive along the sidewalk onto the sidewalk bridge, which gave way, injuring him. Plaintiff had full knowledge as to where he was driving. Pen. Code N. Y. § 662, makes it a misdemeanor to willfully, and without authority, drive "along upon" a sidewalk, and defendant had established a penalty for the offense. Held that, though it was more convenient for plaintiff to drive as he did, and though others, to plaintiff's knowledge, had sometimes driven upon the sidewalk bridge, he was not justified in going upon such bridge, and a judgment for him could not be sustained.

Appeal from circuit court, Washington county.

Action by Warren D. Fisher against the village of Cambridge. Judgment was given for plaintiff, and defendant appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Westfall & Whitcomb, for appellant. Charles M. Davison, for respondent.

LEARNED, P. J. This is an appeal from a judgment on a verdict in favor of plaintiff, and from an order denying a new trial. The action is to recover damages for injury occasioned by breaking through a bridge on which plaintiff drove with a team. Main street is one of the principal streets in the village. It is crossed or intersected, about at right angles, by a creek or stream

18 to 20 feet wide. Prior to the incorporation of the village, a highway bridge, having a span of about 20 feet, crossed this stream,—a wooden bridge about 28 feet wide. Pedestrians crossed the stream on this bridge. Soon after the passage of the charter, defendant constructed on each side of this highway bridge another bridge, on nearly the same level, extending from this highway bridge to the center line of the street. Each of these bridges had about the same span with the highway bridge, and each was about 12 or 13 feet wide. The highway bridge, and these two side bridges, thus covered the whole width of the street. There was no very distinct demarkation between them except that the south bridge was some three inches below the highway bridge. It seems to be conceded that it was not the duty of the defendant to keep in repair the highway bridge, while it was its duty to keep in repair these side bridges. These were in a line with, and formed a part of, the continuous sidewalks on the sides of the street. On the south side of the street is the Eldredge store, adjoining the stream on the east, with a platform in front coming about to the south line of the street. In front of the store is a stone-flagged walk five feet wide, and about three feet from the platform of the store. Some three feet beyond the walk is a gutter in the earth, which continues along to the stream. The south line of the sidewalk bridge, above described, is about in a line with the south line of the flagged walk, and its north line is about in a line with the south line of the gutter, so that the sidewalk bridge is of about the width of the flagged walk, the gutter, and the intermediate space of three feet. Where the gutter comes to the bridge, there is what may be called a "sluiceway," by which the water running in the gutter pours under the sidewalk bridge into the stream below. Eldredge's store is about 30 feet in front. Two hitching posts, about 17 feet apart, stand between the flagged walk and the gutter. The western is about 13 feet from the east end of the bridge. The plaintiff, with a team of horses and a truck wagon, drove from the east, coming upon the sidewalk where an alley adjoining Eldredge's store meets the street. He drove upon the sidewalk in front of Eldredge's store, so that his high horse was south of the flagging, and his team and wagon were parallel with the store. He then put a stove on his wagon, and drove west. He continued along the sidewalk, inside of the west hitching post, and thus upon the south sidewalk bridge. As he was going then diagonally, so as to pass from the sidewalk bridge to the middle of the street, the sidewalk bridge gave way. The hind wheels of the wagon were left on the abutment of the bridge. The forward wheels went into the creek. His horses' hind feet went down, the off horse having one of his fore feet on the highway bridge. The plaintiff was thus injured.

There is evidence enough to go to the jury on the question of the defective condition of the bridge, if considered as a bridge intended to support the weight of teams of horses and loaded wagons. It is not shown that the bridge was insufficient for foot passengers. It is proved that plaintiff knew that this sidewalk bridge was the place where foot passengers crossed, and that it was built for them. The principal question in this case must be whether the plaintiff was justified in driving his team across this sidewalk bridge, and whether the accident was not caused by his own negligence in going where it was improper to go, and, in close connection with this, whether it was negligent for defendant not to build this sidewalk bridge so that it would be strong enough for teams and wagons. It must be noticed that the evidence shows that, even after the plaintiff had driven upon the sidewalk lengthwise in front of Eldredge's store, instead of backing the end of the wagon up to the platform, he might, by backing sufficiently into the alley, have gone out between the hitching posts. Of course, it was more convenient to drive right along upon the sidewalk. But no reason is shown why all trouble could not have been avoided in the first place by backing the wagon between the posts up to the platform of the store. Obviously, the difficulty in which plaintiff

found himself was owing to the manner in which he had chosen to approach the store,—a place with which he was entirely familiar; and, after he had loaded his wagon, instead of getting off from the sidewalk at once, he chose to continue to drive thereon, for his own convenience.

It is said by the plaintiff that there was very little to distinguish the highway bridge from the sidewalk bridge. Now, if the plaintiff had been driving along the street, where wagons belong, and if, on coming to the highway bridge, he had been deceived as to its boundary, and, by driving too far on the south side, had gone over on the part called the "sidewalk bridge," then there would have been ground for the argument that there was no demarkation between them, and that he had been misled, and had mistakenly driven on the sidewalk bridge. But this plaintiff is not in that position. He knew he was on the sidewalk when he was in front of Eldredge's. He knew that the part of the bridge before him was a continuation of that sidewalk. With this knowledge, he drove directly forward, and upon it. It was of no consequence to him where the exact line was between the two. It was enough that he knew he was driving upon a bridge evidently intended for foot passengers. Whether he knew where the highway bridge began, or did not, would be a matter quite immaterial; for he had knowingly driven on the part which was not the highway bridge. Such cases as *Jewhurst v. City of Syracuse*, 108 N. Y. 808, 15 N. E. Rep. 409, cited by plaintiff, are just the reverse of this. There the injured party, intending to go on the proper part of the highway, was misled by appearances, and got beyond the true boundaries. It was said that the situation was such as to induce the belief in one passing along, and exercising reasonable care, that he was within the line, and therefore he might recover, although the defective place was beyond the line. No such case is here. There is evidence that, in many instances, teams driving from the west were fastened to the west hitching post, and that when so fastened the off wheels of the wagons would be on what is called the "south sidewalk bridge," and the off horses generally in the gutter. It is evident, therefore, that in these cases only a part of the weight of the wagon, and the weight of one horse only, would be on the sidewalk bridge. It appears, also, that draymen, like the plaintiff, driving westward from Eldredge's store, did sometimes take the same course which plaintiff took, driving along the sidewalk and on the sidewalk bridge, and so to the middle of the street. The plaintiff urges that he had seen this done, and had done it himself, and that defendant and its officers had acquiesced. Hence he claims that he was justified in the manner he drove, because he was led thus to drive by the appearances. But it was pointed out in *Cusick v. Adams*, 115 N. Y. 55, 21 N. E. Rep. 673, that it was not a question of appearances, but a question what duty the defendant owed to the plaintiff. So, also, in *Splitstorf v. State*, 108 N. Y. 206, 15 N. E. Rep. 822. He certainly was not and could not have been, misled into a belief that this sidewalk and this sidewalk bridge were places where the authorities designed that teams should drive. Of course, in cities and villages, teams may temporarily obstruct sidewalks. *Welsh v. Wilson*, 101 N. Y. 254, 4 N. E. Rep. 633. This is a necessity. And possibly they may do this in the manner in which plaintiff acted when he drove the side of his team and wagon up by Eldredge's store, instead of backing in. If he had done only this, he would not have been injured. But we are not willing to say that even in that act the person who thus drives does not take the risk of the condition of the sidewalk. It way well be doubted whether municipal authorities are bound to keep sidewalks in such order that teams and wagons can safely drive upon them. In the case last cited the obstruction was caused by skids, not by driving a wagon upon the sidewalk.

The Penal Code, § 652, makes it a misdemeanor, willfully and without authority, to drive "along upon" a sidewalk. The by-laws of defendant establish a penalty for the offense. The learned justice charged that if plaintiff

was willfully driving on the sidewalk, and the injury came from that, the action would be barred. But he charged that the public had been allowed to use the sidewalk in a way that plaintiff might have supposed he had a right to go there; if so, that he would not be willfully violating the statute. We think that was incorrect. "Willfully" is in opposition to "accidentally" or "ignorantly." The plaintiff knew that this was a sidewalk, and he drove thereon intentionally. The fact that he had seen others violate the law could be no excuse. It is said in *Cordell v. Railroad Co.*, 64 N. Y., at 538, that disobedience of a statute is legal negligence. See, also, *Hayes v. Railroad Co.*, 111 U. S., at 240, 4 Sup. Ct. Rep. 369, and cases cited; and also *Lambert v. Railroad Co.*, 70 N. Y. 104; *Salisbury v. Herchenroder*, 106 Mass. 458; *Van Norden v. Robinson*, 45 Hun, at 573. We are not willing to assert that the violation of this law and ordinance would be in all cases a bar to a recovery. That may "depend on the purview of the legislature in the particular statute, and on the language which they have there employed." *Atkinson v. Water-Works Co.*, 2 Exch. Div. 441. Yet the law and the ordinance constituted a notice to him that the sidewalk was a place where the defendant did not authorize him to travel. It was a place where, if he drove his team, they did not owe the duty of giving him a safe road; and, though others had traveled there, as in the case of *Cusick v. Adams*, the duty of the defendants was not thereby enlarged, for the place was plainly and unquestionably a sidewalk. However many times plaintiff had seen other draymen, in going from Eldredge's, violate both the statute and the ordinance, he would not hereby be justified in his violation. As before remarked, the omission of the defendant to prosecute for violations, or its supposed acquiescence in former acts, could be material only when it misled the plaintiff so that he did not know that the place where he was driving was a sidewalk; and no such mistake was, under the circumstances, possible.

It is evident, also, that the question whether defendant was negligent must depend on similar considerations. The defendant had built a bridge strong enough for foot passengers, but not, as it appeared, strong enough for teams, though teams had been on it before. There had been used in its construction some partly-decayed timbers, so that there was evidence for the jury as to sufficiency of construction. But, obviously, no question could exist on this point unless the plaintiff was in some way authorized to believe that this sidewalk bridge was a place intended for teams. So that the question of defendant's negligence could only be submitted to the jury if it should appear that plaintiff was justified in going upon this sidewalk bridge. It seems apparent from the testimony, also, that the part of the sidewalk bridge which fell was that nearest to the highway bridge, where the defective timbers had been used. Inasmuch, however, as the plaintiff came on that part, not from the highway bridge, but from the south part of the sidewalk bridge, that fact does not seem to be material on the question of defendant's negligence.

In the view we have taken, we have not deemed it necessary to consider objections to evidence, or particular exceptions to the charge. Judgment and order reversed; new trial granted; costs to abide event.

DEPIERRIS v. MATTERN.

(Supreme Court, Special Term, New York County. May 31, 1890.)

NUISANCE—ERECTION OF BUILDING—INTENDED BUSINESS.

The fact that a building in course of construction may, when completed, be used for a business which will be a nuisance to an adjoining owner, is not a ground for restraining the completion of the building, where it is not of itself a nuisance.

At chambers. Action by Bertrand D. Depierris against Jacob Mattern, that defendant be perpetually enjoined from using the building No. 215 West Fifty-Third street, in the city of New York, or the extension to be erected

thereto, for a wagon shop, paint shop, or forge. Plaintiff moves for an injunction *pendente lite*.

Thomas F. Murtha, for plaintiff. *Clemens J. Kracht*, for defendant.

LAWRENCE, J. The plaintiff asks for an injunction restraining the defendants, his agents, servants, and employes, from proceeding with the alteration, adaptation, and use of the building known as "No. 215 West Fifty-Third Street," in the city of New York, or with the building or construction of an extension or addition thereto. It appears from the papers submitted by the plaintiff that the defendant threatens to build an extension to the house in question, and intends to make, and is making, alterations on the same. It is alleged, on information and belief, that the business to be carried on by the defendant in said building when completed, and in said house when altered, is that of building and repairing wagons and vehicles, and, in addition to and in conjunction with said business, it is the intention of defendant to carry on a blacksmithing establishment and paint shop. The affidavits submitted by the defendant show that the building will not be completed or ready for use until about September 1, 1890. There is no allegation in the complaint that the alteration to and extension of the building would amount to a violation of the building laws. Indeed, it appears that the plans have been submitted to and approved of by the superintendent of buildings. The possibility or probability that the property may be used when the building is completed in a manner detrimental to the plaintiff's rights is no ground for granting an injunction in the first instance. The building itself is not a nuisance. See *Bridge Co. v. Patge*, 83 N. Y. 188, where **EARL, J.**, in delivering the opinion of the court, says: "A wrong or unlawful motive in erecting a building otherwise lawful does not make the building itself unlawful or a nuisance." See, also, *Morgan v. City of Binghamton*, 102 N. Y. 500, 7 N. E. Rep. 424. I am therefore of the opinion that this application is premature, and that it should be denied, with costs.

WEILL v. WEILL.

(*Supreme Court, Special Term, New York County. April 12, 1890.*)

1. ATTORNEY AND CLIENT—COMPENSATION—LIEN ON ALIMONY.

The attorney for plaintiff in an action for a limited divorce has no lien for his services on the alimony awarded, which he can enforce by proceeding against defendant for contempt in failing to pay the alimony.

2. COSTS—HOW ENFORCED—CONTEMPT.

The costs of an action for divorce cannot be collected by a proceeding to punish for contempt.

Action for limited divorce. Plaintiff obtained a decree directing defendant to pay her certain alimony, attorney's fees, and costs; and her attorneys filed an affidavit alleging that they had received no compensation for their services, but had expended large sums for plaintiff in carrying on the suit, and asked that defendant be punished for contempt in failing to make the payments directed by the court. Defendant filed affidavits showing that he and plaintiff were again living together as husband and wife, and that plaintiff does not wish to enforce the judgment for alimony.

Marks & Terry, (*Montague L. Marks*, of counsel,) for plaintiff. *Joseph Steiner*, (*Alfred Steckler*, of counsel,) for defendant.

ANDREWS, J. The husband and wife both swear that the alimony has been paid, and, besides, I am not referred to any case in which it has been held that an attorney has a lien upon the alimony awarded to the wife by a final judgment rendered in her favor, in an action for a separation. The costs cannot be collected by a proceeding to punish for contempt. *Jaquin v. Jaquin*, 36

Hun, 378. Apparently, all that the court can do is to permit the attorney to issue an execution to collect the costs, and an order giving such permission, with \$10 costs of this motion, may be entered.

GOODWIN v. BURKE.

(Supreme Court, General Term, First Department. July 18, 1890.)

1. CONTRACT—INTERPRETATION—PROVINCE OF COURT.

In an action for breach of contract to sell railroad bonds, plaintiff claimed the number sold was 600. Defendant claimed it was 500. The evidence was conflicting, and would have supported a verdict either way. Five days after the making of the contract, which was oral, defendant gave plaintiff a written order for 60 of the bonds to be delivered on payment of "85 per cent. flat;" the order continuing: "You may also deliver him any other of said bonds, not exceeding \$600,000 in all, he may take at same time." *Held*, that the court, in speaking of this order, erred in charging that defendant "delivered to the plaintiff what substantially shows the contract and its terms;" and, so far as the agreement between the parties is concerned, it fixes plainly the terms, the number of bonds the plaintiff was to be entitled to thereunder, which was 600."

2. SAME.

Nor was this error cured by the further charge: "There is a discrepancy between the parties in relation to the number of bonds which were included in this arrangement, and an explanation is offered by both the plaintiff and defendant, to be considered by you."

Appeal from circuit court, New York county.

Action by Henry J. Goodwin against Stevenson Burke. From a judgment for plaintiff, and from an order denying motion for a new trial on the minutes, also from an order denying motion for a new trial on the ground of newly-discovered evidence, defendant appeals.

Argued before VAN BRUNT, P. J., and BARRETT and BARTLETT, JJ.

Burton N. Harrison, for appellant. Edgar M. Johnson, for respondent.

BARTLETT, J. This action is brought to recover damages for the alleged breach of a contract whereby the defendant agreed to sell certain railroad bonds to the plaintiff. The case turned on two questions: *First*, whether the number of bonds sold was 500 or 600; *secondly*, whether the bonds were sold by the defendant individually, or as president of the Columbus, Hocking Valley & Toledo Railway Company. The defendant insisted that the sale comprised only 500 bonds, and that he made it solely in behalf of the railroad corporation. Either proposition, if true, would be fatal to the plaintiff's claim; for the plaintiff admitted having received 518 bonds, or more than enough, if the contract called for only 500, and he sought to recover damages on account of the failure to deliver the 82 necessary to make up the 600, not from the Columbus, Hocking Valley & Toledo Railway Company, but from the defendant, Mr. Stevenson Burke, individually. Now, as to the proof upon the two principal questions in the case, it is sufficient to say that it would sustain a verdict either way, according to the degree of credibility which the jury might attach to the oral testimony of the several witnesses, and the inferences which they might draw from the various writings in evidence, when read in the light of the oral testimony. If, therefore, the jury had been allowed to pass upon both these questions, we should not feel at liberty to interfere with their findings as being against evidence, or without evidence to sustain them. But the question as to the number of bonds, which constituted the subject-matter of the contract, was practically withdrawn from the consideration of the jury, and decided by the court as matter of law; and this, it seems to us, was so serious an error as to call for a reversal of the judgment.

The contract was made orally in Cleveland, Ohio, on November 15, 1886. Five days later, in New York, the defendant delivered to the plaintiff a written order upon the Central Trust Company for 60 listed bonds of the Columbus, Hocking Valley & Toledo Railway Company, and the Hocking Coal &

Railroad Company, for which the order said Mr. Goodwin would pay "85 per cent. flat." The order continued: "You may also deliver him any other of said bonds, not exceeding \$600,000 in all, he may take at same time." This paper, signed so shortly after the oral agreement, undoubtedly tends strongly to support the statement of the plaintiff that the number of bonds sold to him at 85 per cent. flat was 600. Still the order is not the contract, but is only evidence of what the contract was. Nor can it be deemed so conclusive as to warrant the court in taking the question of the number of the bonds from the jury, in view of the other evidence in the case tending to show that only 500 bonds were sold at the terms mentioned, notwithstanding the reference to \$600,000 in the order of November 20, 1886. The learned trial judge, however, regarded this order as settling the question as to the number of bonds contemplated by the contract. He instructed the jury that on the 20th day of November the defendant "delivered to the plaintiff what substantially shows the contract and its terms, and the paper is signed in his individual name. The plaintiff took that; and, so far as the agreement between the parties is concerned, it fixes plainly the terms, the number of bonds the plaintiff was to be entitled to thereunder, which was 600." At the conclusion of the charge the counsel for the defendant excepted to so much thereof as stated that the contract related to 600 bonds, thus calling the attention of the court to the point that the jury had been so instructed as matter of law; but the instruction in this respect was in no wise modified thereafter. We think the exception was well taken. The judge had told the jury, not that it was for them to determine whether the defendant, in whatever capacity he acted, agreed to sell the plaintiff 600 bonds, but that the order of November 20, 1886, established the fact that he agreed to sell that number.

It may be urged that the effect of this statement was nullified by the language used in a subsequent portion of the charge, beginning with the words: "There is a discrepancy between the parties in relation to the number of bonds which were included in this arrangement, and an explanation is offered by both the plaintiff and defendant, to be considered by you." But nowhere in what followed were the jury told, in plain terms, that the question of the number of bonds was for them to determine; and nowhere did the court take back the explicit statement that the order of November 20, 1886, fixed the number of bonds to which the plaintiff was entitled under the agreement at 600. It is hardly possible, considering the charge as a whole, to believe that the jury could have supposed that they were at liberty to find otherwise than in favor of the plaintiff on this question; and to this extent the portion of the charge to which exception was taken was misleading, and may well have been detrimental to the defendant. The judgment should be reversed, and a new trial granted, with costs to the appellant, to abide the event. All concur.

PEOPLE v. FITZPATRICK.

(*Supreme Court, General Term, First Department. July 18, 1890.*)

KIDNAPPING—WHAT CONSTITUTES—INVEIGLING.

Inducing a person to go to a foreign country by the promise of work at a specified compensation, when the person making the promise knows that such compensation will not be obtained, is not an inveiglement, within Pen. Code N. Y. § 211, providing that any person is guilty of kidnapping who willfully "seizes, confines, inveigles, or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of the state, or to be sold as a slave, or in any way held to service, or kept or detained against his will." Distinguished from *People v. De Leon*, 109 N. Y. 236, 16 N. E. Rep. 46.

Appeal from court of general sessions, New York county.

John Fitzpatrick was convicted of the crime of kidnapping, and appeals.

Argued before VAN BRUNT, P. J., and BARRETT and BARTLETT, JJ.

Howe & Humel, (William F. Howe, of counsel,) for appellant. John R. Fellows, (McKenzie Semple, of counsel,) for the People.

BARTLETT, J. The defendant was indicted for kidnapping David Kennedy. There were two counts in the indictment. The first count need not be considered, as the district attorney virtually abandoned it upon the trial. The second count charges that the defendant on the 9th day of May, 1889, "did feloniously and willfully inveigle and kidnap one David Kennedy, with intent to cause him, the said David Kennedy, to be sent out of the state, to-wit, to the state of Yucatan, in the republic of Mexico, and to be there kept and detained against his will." According to the testimony of the complainant, he met the defendant on May 9, 1889, at Ward's pier, in this city, at which the steam-ship City of Washington was lying at the time. The complainant went there in consequence of some statement, not disclosed by the evidence, which had been made to him by a stranger. He asked the defendant "what sort of a job it was," presumably referring to some job which he had heard of from the stranger. Fitzpatrick said "it was a job in Mexico; \$35 in American dollars, and board, a month." He also said it was a good job, and things were cheap there. The work was work on a railroad. The complainant further testified, in substance, that the defendant said that "the company" at Progreso, in Yucatan, was to pay the \$35 a month in American money, and provide the board, when Kennedy and the other laborers who went out at the same time should arrive at their destination; and that Fitzpatrick said there was a job at Progreso waiting for them, and that Progreso was a healthy place. After talking with the defendant, Kennedy signed a paper at his request, on which there were already 20 or 30 names, and then went on board the steamer. There is some testimony to the effect that subsequently, when the complainant was coming down the gang-plank, and told the defendant that he was coming ashore for tobacco, Fitzpatrick lifted his stick, and spoke to him threateningly, telling him to get back into the ship; but this becomes unimportant, as the district attorney did not insist that Kennedy was sent out of the state by violence, and the learned trial judge so instructed the jury in his charge. The complainant and his companions went to Progreso on the steamer. It is not necessary to review in detail their unpleasant experiences in Yucatan. After some delay they were given work in handling freight on a railroad, for which they were paid at the rate of a Mexican dollar a day, without board, instead of at the rate of \$35 a month in American money, with board. The price of food appears to have been so high that it was difficult, if not impossible, to make a fair living on such wages. In the opinion of the complainant, the climate was unhealthy, and after working for a Mexican dollar a day at Merida for about two weeks, and boarding himself, he left the capital of Yucatan, and managed to make his way back to New York. The defendant, in testifying in his own behalf, denied having told Kennedy or anybody else that the men would receive \$35 a month in American money, or having said anything about their board, or in reference to the climate in Yucatan. As to the making of these statements, however, the verdict of the jury is against him, and the case must be disposed of in this court on the assumption that he made them. I am also of the opinion, after reading all the testimony through very carefully, that it affords ample support for the inference, which must have been drawn by the jury, that the defendant knew the complainant would not find work on a railroad in Yucatan at the promised compensation, and for the further inference that the defendant's purpose in making the statements which he did make was to induce the complainant to go out of the state. Assuming all these facts, the question is whether the act of the defendant constitutes the crime of kidnapping under the provisions of the Penal Code. The defendant was convicted under the first subdivision of section 211, which declares that any person is guilty of kidnapping who

willfully "seizes, confines, inveigles, or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of the state, or to be sold as a slave, or in any way held to service or kept or detained against his will." In view of the proof, the verdict must have been based on a finding that Fitzpatrick inveigled Kennedy for the purpose of causing him, and thereby did cause him, to be sent out of the state against his will; and, if the evidence will support such a finding, the conviction will have to be sustained.

In the case of *People v. De Leon*, 109 N. Y. 226, 16 N. E. Rep. 46, it was said that an inveiglement, in the ordinary sense of the word, implies the acquiring of power over another by means of deceptive or evil practices, not accompanied by actual force; and it was held that the defendant had inveigled the complainant, within the meaning of the kidnapping statute, when he procured her consent to go to Panama upon the pretense that honest employment had been secured for her there, while in fact his secret design was that she should become an inmate of a brothel. But every deceptive or evil practice does not constitute an inveiglement; and I think a material distinction exists between the case at bar and the case of *People v. De Leon*, *supra*, in respect to the nature of the deception. There the promise of honest employment was not only to be broken, but a distinct affirmative wrong was to be done the complainant by forcing her into a life of prostitution in a foreign land. Here the facts are very different. The complainant was promised honest employment, and he got it. The deceptive part of the promise, which was not kept, was the assurance that he should be paid \$35 a month in American money, and receive his board, instead of which his wages were so meager that he could only just live on them. I attach little importance to the alleged false representations concerning the climate of Yucatan and the prices there, since it is plain enough that they were not the procuring cause of the complainant's consent to go thither. He was induced to go by the promise of work at a specified compensation, and we are called upon to determine whether the making of a promise of this kind, by a person who knows it will not be kept so far as the rate of compensation is concerned, is an inveiglement within the legal signification of that term, so as to subject the person making it to punishment as a kidnapper. I do not think it is. In the case of *Ranney v. People*, 22 N. Y. 413, 417, it was said that a false representation, essentially promissory in its nature, had never been held to be the foundation of a criminal charge. In effect, the defendant's statements to Kennedy about work at Progreso were merely promises to give him work when he arrived at that port. Their true character is not changed by reason of their form. Saying to the complainant that there was a job waiting for him in Yucatan was only another way of promising him employment if he would go to that country. The legal effect of making such a promise with an intent not to fulfill it, so far as relates to the wages to be paid, must evidently be the same if the contemplated employment were in New Jersey instead of in Mexico; yet I hardly think it would be held that a man was guilty of kidnapping who came to this city and induced a laborer to cross the Hudson river on a ferry-boat to Hoboken, by a promise to give him work there at a dollar and a half a day, when he really intended to pay him only a dollar a day. Such a proceeding would be a shabby trick, but not a crime. As was said by COMSTOCK, C. J., in *Ranney v. People*, already cited, "the offense of making a false and delusive promise, with no intention of performing it. This is not indictable;" and, as has been suggested, the deception in the *De Leon Case* consisted not only in the design to withhold honest employment from the complainant, but to compel her to enter upon a life of shame. In view of the great hardship sometimes inflicted upon those who are induced by false promises to go from this state to foreign lands, the legislature might well provide for the punishment of the wrong-doers in such cases through the agency of the criminal law; but under

the law as it now is I do not think the facts disclosed in the record before us authorized the conviction of the defendant of the crime of kidnapping. In my opinion, the judgment should be reversed. All concur.

RONALD v. MUTUAL RESERVE LIFE FUND ASS'N.

(Supreme Court, General Term, First Department. July 18, 1890.)

1. LIFE INSURANCE—CONDITIONS OF POLICY—ACCEPTANCE OF OVERDUE PREMIUM.

A policy of life insurance stipulated that, upon a failure to pay any premium when due, the policy should become void. There was such a failure; and, upon a tender of the amount thereafter, the insurer accepted it, and gave a receipt which stated that it was accepted upon condition that the insured was of temperate habits, and in as good health as when the policy was issued, otherwise the payment and receipt and the original policy should be void. Such acceptance and receipt were provided for in the constitution and by-laws of the insurance company, which were made a part of the original contract of insurance. *Held*, that such payment and receipt constituted a new contract, by which insured was bound, whether he read the receipt or not; and, it appearing that he was not at that time of temperate habits, nor in as good health as when he was originally insured, the receipt was of no effect, and the policy remained void.

2. SAME—WAIVER.

A life insurance company does not waive a forfeiture of a policy by requesting proofs of the death of the insured, and giving instructions in regard thereto.

Affirming 7 N. Y. Supp. 152.

Appeal from circuit court, New York county.

Action by Agnes Ronald against the Mutual Reserve Life Fund Association. From a judgment entered on dismissal of complaint at close of plaintiff's case, (7 N. Y. Supp. 152,) plaintiff appeals.

Argued before VAN BRUNT, P. J., and BARTLETT, J.

Chas. B. Meyer, for appellant. *Alfred Taylor*, for respondent.

PER CURIAM. It would be unprofitable to add to the reasons given by Mr. Justice BARRETT, on the trial of this action, for dismissing the complaint. It is enough to say that those reasons seem to us entirely satisfactory and convincing, and that we fully concur in the conclusion to which they led the learned judge. Judgment affirmed on the opinion of the court below, with costs.

GRAY v. DE CASTRO & DONNER SUGAR REFINING Co. et al.

(Supreme Court, General Term, First Department. July 18, 1890.)

CORPORATION—DISSOLUTION—INJUNCTION.

In an action by the receiver of one of the corporations in the combination known as the "Sugar Trust," to dissolve the combination, an injunction restraining defendants from disposing of the property and effects of the corporation, of which plaintiff is receiver, is properly granted on a showing that, if the combination is finally held unlawful under the laws of the state, then its property and effects will be removed from the state. Such injunction, however, should not extend to other property of the combination.

Appeal from special term, New York county.

Action by Henry Winthrop Gray, as receiver of the North River Sugar Refining Company, against De Castro & Donner Sugar Refining Company and others. From an order of March 7, 1890, granting plaintiff a temporary injunction, John E. Searles, Jr., one of the defendants, appeals. For former report, see 8 N. Y. Supp. 237.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Elihu Root and *John E. Parsons*, for appellant. *Platt & Bowers*, (*John M. Bowers* and *De Lancey Nicoll*, of counsel,) for respondent.

DANIELS, J. This action has been brought to dissolve the combination or partnership held to have been unlawfully formed and maintained as a trust

for the manufacture and sale of syrups and molasses, and the refining and sale of sugars. It was formed or created under a deed or contract entered into in the latter part of the year 1887. The North River Sugar Refining Company, which was a corporation formed under the laws of this state, became one of the associates in the combination; and for that reason it was considered to have forfeited its charter, and become liable to be dissolved in an action brought for that object by the attorney general. 3 N. Y. Supp. 401. And that decision has been affirmed by this general term. 7 N. Y. Supp. 406.¹ And, as a legal result of the decision, a receiver was appointed of the property and effects of that corporation. The receiver has now brought this action to dissolve the combination itself, as a partnership in which the North River Sugar Refining Company became a partner, and for the appointment of a receiver of its property, rights, and good-will, with power to dispose of the same, and to collect all its debts and assets; and the injunction now brought before the court has been issued to promote that end. By its terms, the defendants, and all persons acting for and under them, have been restrained until the further order of the court from in any manner parting with any of the assets, property, or moneys coming into their hands under the trust deed or agreement; and in support of it the affidavits disclose a probability that, in case the combination or association shall finally be held to be unlawful under the laws of this state, then its property and effects will be removed from the state, and its business carried on under a charter already obtained in Connecticut for that object. And that probability has been sufficiently established to sustain the injunction, so far as it will affect and preserve the property to which the plaintiff has become entitled in his capacity as receiver.

But that is by no means all the property, effects, and money of this combination. It is no more than the property of the North River Refining Company, and of the shareholders of that company, whose rights are represented by the receiver. There are no creditors of the corporation to be represented or protected by the action of the receiver; and no indisposition exists on the part of the sugar trust to pay the shareholders of the sugar refining company their respective proportionate parts of the earnings of the sugar trust. And they have not yet invoked or desired the assistance of the receiver for their protection in this respect, and no necessity has been shown for his intervention in their behalf. Over the property rights and interests of other shareholders, not deriving their rights or shares under or for the shares of the North River Sugar Refining Company, the receiver is without authority. His appointment did not extend to or include those rights or shares, but only those represented by, or substituted for, the shares of the North River Sugar Refining Company, and the property of the company itself. The injunction was accordingly unauthorized so far as it included the other property, shares, and rights of the sugar trust or combination. In no event could they be administered by him, or be brought within his control. But the utmost extent to which he, in any event, would be entitled to proceed or extend his authority is the possession and disposition of the property and effects of the North River Sugar Refining Company, and including the interests of the shareholders of that company, if that shall become necessary, now represented by the shares of the sugar trust combination; and, as already observed, these shareholders are now in no manner dependent on his interposition or assistance. There is but one description of property, therefore, which can at this time be regularly brought within the range or protection of an injunction at the suit of this receiver; and that is the property and effects of the North River Sugar Refining Company. And as to that the injunction may very well be sustained without deciding the point of illegality upon which so much stress has been made for the complete support of the appeal. For that purpose the case of

¹Affirmed by court of appeals, 24 N. E. Rep. 884.

Carlson Co. v. McMillin, 6 N. Y. Supp. 433, is an authority, although not entirely decisive of this controversy. Whether the deed or agreement under which the trust has been formed can be annulled, and an accounting of its operations secured, may better be relegated to the trial of the action than considered with any degree of particularity at this time. In the mean time all the corporate property of the North River Refining Company should be retained in this state, and subject to the control of this court; and the injunction should be restricted and modified to that extent, and, as modified, affirmed, without costs of this appeal; and the same order should be made in the appeals of Julius A. Strusburgh and others. All concur.

FIRST NAT. BANK OF JERSEY CITY v. BARD et al., (four cases.)

(Supreme Court, General Term, First Department. July 18, 1890.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—CONFESSION OF JUDGMENT.
The single circumstance that a judgment is confessed at or about the time of the execution of a general assignment does not alone warrant the conclusion that the confessed judgment is a part of the assignment.

2. APPEAL—RECORD—EVIDENCE.

Where the record does not show that it contains all the evidence, the findings of the lower court on questions of fact will not be reviewed on appeal.

Appeal from special term, New York county.

Four actions by the First National Bank of Jersey City against Frederick B. Bard individually, and as assignee of Clarke, Radcliffe & Co. and others, to determine the validity of certain confessed judgments in favor of the defendants Kenyon, Carter, Shepard, and Walker; all of which actions were tried together by consent. Judgment in favor of the defendants, and plaintiff appeals.

Argued before VAN BRUNT, P. J., and BARRETT and BARTLETT, JJ.

Hamilton Wallis, for appellant. *Lucian Oudin*, for respondent Kenyon. *Warren W. Foster*, for respondents Carter, Shepard, and Walker.

BARTLETT, J. The omission to insert in the case on appeal any statement that it contains all the evidence prevents us from considering the interesting and important points made in the argument of the appellant against those portions of the judgments which are appealed from. *Porter v. Smith*, 107 N. Y. 531, 14 N. E. Rep. 446. The appellant attacks the confessed judgments in favor of the several respondents on the ground that they, together with the general assignment to the defendant Bard, constituted a single instrument, executed in pursuance of one scheme or device to withdraw the property of Clarke, Radcliffe & Co. from the reach of the creditors of that firm, and thereby hinder, delay, and defraud such creditors. But the trial court refused to find this proposition, and, on the contrary, did find as matter of fact that the judgments were not confessed for the purpose of hindering, delaying, or defrauding creditors, but were in all respects fair and just. The single circumstance that a judgment is confessed at or about the same time that the debtor executes a general assignment does not, of itself, standing alone, and irrespective of the other facts connected with the transaction, necessarily require the conclusion that the confessed judgment is a part of the assignment. All that *White v. Cotzhausen*, 129 U. S. 329, 344, 9 Sup. Ct. Rep. 309, decides is that under the proof in that case the conveyances, bill of sale, confession of judgment, and other transfers made by the debtor, pursuant to an understanding previously reached, were in effect a preferential assignment forbidden by the laws of Illinois. There, also, there was an express finding that the confession of judgment was made without adequate consideration, and with intent to hinder, delay, and defraud creditors, both of which propositions are negatived in the case at bar.

We cannot say that the findings of fact made by the trial court are wholly without support in the proof, nor can we inquire as to whether they are against the weight of evidence, without being assured that all the evidence is before us. Our attention is called to the absence of the requisite certificate by one of the counsel for the respondents, and the omission may not be disregarded. For these reasons the judgments should be affirmed, with costs of one appeal. All concur.

KRENZLE v. MILLER.

(*Supreme Court, General Term, First Department. July 18, 1890.*)

JURY TRIAL—JUDGMENT FOR MONEY ONLY.

A complaint demands equitable relief, and not a judgment for a sum of money only, within Code Civil Proc. N. Y. § 968, providing what issues are triable by jury, which states that a chattel mortgage purporting to secure a debt due the defendant was made in trust for her by the plaintiff's husband, induced by undue influence, and that it has been foreclosed, and the proceeds appropriated by the defendant; the prayer being that he be required to account for the amounts received, with interest, and that the chattel mortgage be adjudged null and void. VAN BRUNT, P. J., dissenting.

Appeal from special term, New York county.

The plaintiff, having demanded a jury trial, appeals from the refusal of the judge at special term to grant it. Code Civil Proc. N. Y. § 968, provides that an issue of fact must be tried by a jury in an action in which the complaint demands judgment for a sum of money only.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

W. M. Rosebault, for appellant. *Martin & Smith, (George C. Strong, of counsel,)* for respondent.

BRADY, J. This appeal is presented in such imperfect form and substance that it might be dismissed. It contains no certificate or consent, as required by the Code and rules of the court; but having examined it, and having discovered that it presents no merits, it may readily be disposed of adversely to the appellant on the question attempted to be presented.

The plaintiff claimed that a chattel mortgage made to the defendant, and foreclosed by him, was given to him in trust for her benefit, and that the proceeds which she sought to recover belonged to her. The defendant succeeded on the merits; but the plaintiff, having demanded a jury trial, appeals from the refusal of the judge presiding at special term to grant it. The complaint presented a case for equitable intervention. The paper referred to was by the complaint alleged to be different from its purport, and the court was asked to reform it by impressing a trust upon it, and then to carry out that result to its legitimate ends, namely, a judgment declaring the proceeds of the sale of the trust-estate to belong to the plaintiff. The complaint alleges undue influence, and asks that the defendant may be required to account. This makes the action, taken in connection with other facts asserted, one of equity. As said in *Bell v. Merrifield*, 109 N. Y. 207, 16 N. E. Rep. 55: "The mere fact that the complaint asks for a money judgment does not necessarily show that the case is one for trial by jury. Courts of equity give a judgment for money only where that is all the relief needed." Here, however, relief is needed which is essentially preliminary to the money judgment, namely, a change in the character, design, and object of the mortgage; then, if that be ordered, an accounting to determine pecuniary results by that proceeding; and then a judgment for the sum found to be due. It is unnecessary, indeed, to state anything more to show how certainly right the ruling was which is complained of. The case cited illustrates the principles to be applied here, and none other is requisite. The appeal was, it would seem, only a waste of time and expense, for the reason that the plaintiff lost upon the merits, but appealed not. The judgment should be affirmed, with costs.

VAN BRUNT, P. J. I dissent. I am of the opinion that the appeal should be dismissed.

DANIELS, J., (*concurring*.) I agree to the result, although the court might very well decline to hear the appeal because of the incomplete condition of the papers.

COLWELL v. MANHATTAN RY. CO.

(*Supreme Court, General Term, First Department. July 12, 1900.*)

1. CARRIERS—INJURY TO PASSENGER LEAVING CAR.

Plaintiff, a passenger on defendant's elevated train, arose as the train approached the station at which she wished to stop, and passed to the door of the car, which the brakeman held open. The jar of the train impelled her to place her hand on the door-casing, when, as the train stopped, the brakeman let go of the door, which slammed together, and injured her hand. *Held*, that the brakeman, who had been so seated as that he must have seen that plaintiff wished to get off at the station, was negligent in letting go of the door, in the absence of suitable appliances to hold it from shutting when the train stopped.

2. SAME—LEAVING SEAT BEFORE CAR STOPS.

It is not negligent for a passenger in an elevated railway car to leave his seat, and go towards the door, which at the time is held open by one of the trainmen, as the train approaches the station.

3. SAME—DAMAGES—SERVICES OF NURSE.

Testimony of plaintiff that she paid her nurse \$100 is sufficient evidence of the value of such services to authorize an instruction that the nurse's bill was proved at \$100.

Appeal from circuit court, New York county.

Action by Annie Colwell against the Manhattan Railway Company for injuries sustained by plaintiff while a passenger on defendant's car. Judgment was entered on a verdict for plaintiff, and a motion for a new trial was denied, and defendant appeals.

Argued before VAN BRUNT, P. J., and BARRETT and BARTLETT, JJ.

Henry D. Sedgwick, Jr., for appellant. William B. Ellison, for respondent.

BARTLETT, J. It seems to me there is no difficulty in sustaining the plaintiff's right to recover in this action. The facts to which she testified, and the inferences which may legitimately be drawn from them, make out a case of negligence on the part of the defendant. The plaintiff was a passenger upon one of the defendant's elevated railway trains on the west side of the city of New York. She entered the cars at the Twenty-Third Street station, intending to go to the station at Fifty-Ninth street and Ninth avenue. As the train came into the latter station, the trainman who had charge of the gates got up, opened the door of the car, and held it open. The plaintiff rose to pass out, and reached the sill of the door just as the car stopped. "It jarred me," she says, "and he let go of the door, which slammed upon my fingers instantly, smashing the three first fingers." When the door caught her fingers the trainman had just passed behind the plaintiff, and was at the time crossing in front of her to open the door of the other car. She says that the jarring of the car caused her to grasp hold of the side of this door-frame to save herself. This testimony of the plaintiff was not in any manner controverted. The defendant introduced no evidence whatever upon the trial, but went to the jury upon the proof put in by the plaintiff, contending that it failed to establish any negligence on the part of the trainman in the management of the car-door, and that it did affirmatively establish contributory negligence on the part of the plaintiff in getting up, and going to the door, before the train stopped, and before the guard had called out the name of the station, or invited passengers, in any manner, to leave the train. The plaintiff recovered a verdict of \$500 damages. There was sufficient evidence of

negligence to take the case to the jury. As the train ran into the station, the trainman opened the door, and held it open, and the plaintiff got up to pass out. The trainman had been sitting almost opposite the plaintiff; and the circumstances were such that he must have seen her, and must have been aware that it was her intention and desire to leave the car at that particular station through the door which he had just opened. If the mechanical appliances of the door were such that, when he let go, it was liable suddenly to slam shut by reason of the ordinary jarring of the train upon coming to a stop, then it was his duty to retain his grasp upon it until the plaintiff had safely passed out. Either a door should have been provided which, under ordinary circumstances, would remain stationary after having been opened by the trainman to permit the egress of passengers, or the trainman should have exercised due care to prevent any injury to passengers by a door which he had opened to offer them an exit, and which was under his immediate control at the time. The learned trial judge, therefore, did not go too far in telling the jury that, if the facts were substantially as testified to by the plaintiff, then the act of the servant in letting go the door, under the circumstances, and not securing it in any way, was a negligent act.

Nor can it be held, as matter of law, that the plaintiff was guilty of contributory negligence. It is not negligent for a passenger in an elevated railway car to leave his seat, and go towards a door which at the time is held open by one of the trainmen, as the train approaches the station. There would be serious complaints, indeed, on the part of the elevated railway companies, if it were the general practice of passengers to wait to leave their seats until the train came to a full stop. The unnecessary delay would be very detrimental to the business of these railroads. In the brief for the appellant, it is said that the guard had not given the plaintiff any invitation to leave the train, and, furthermore, that when she left her seat, and went to the door, it was open, not being caught back, but swinging on its hinges, so that the danger that, when the car stopped, the door would swing to, was perfectly obvious. But the plaintiff's testimony is not that the door was swinging on its hinges when she got up to pass out, but that it had been opened by the trainman, who held it open. This act was certainly an implied invitation to leave the train, and must have been so understood by the passengers who desired to get out at the station which it was then approaching. As MILLER, J., said in *Nichols v. Railroad Co.*, 38 N. Y. 131: "I am not aware of any rule which demands that a passenger on a railroad car in a city shall wait, and remain in his seat, after indications have thus been made manifest that the car is about to stop." See, also, *Wylde v. Railroad Co.*, 53 N. Y. 156. Upon the proof in the case, no error was committed in charging the jury that the plaintiff's act in getting up before the train stopped, or before the name of the station was called, was not contributory negligence on her part.

Another question remains to be considered. In order to prove the actual pecuniary loss which she had incurred by reason of the injury, the plaintiff testified that she employed a nurse, who remained with her for six weeks, and to whom she paid \$100. No other evidence whatever was introduced as to the value of the services of a nurse. The trial judge, in his charge, instructed the jury that, in assessing the plaintiff's damages, they were to consider the expense which she had incurred for medical services and in the payment of the nurse, and told them that the nurse's bill was proven at \$100. The counsel for the defendant asked the court to charge that the plaintiff could not recover for the nurse's bill of \$100, because there was no proof as to what the services were reasonably worth. The court declined to charge as requested, stating as a ground for the refusal that it had been proved that the amount was paid for six week's attendance by the nurse, whereupon an exception was duly taken in behalf of the defendant. I do not think the trial

judge erred in refusing to give the instruction thus prayed for. No doubt it is the rule that there can be no recovery for services unless there is some evidence as to their value. In *Leeds v. Gas-Light Co.*, 90 N. Y. 26, and *Kane v. Railway Co.*, 3 N. Y. St. Rep. 145, the judgments were reversed because, under the instructions given, it seemed probable that damages had been awarded to the plaintiffs on account of loss of time, whereas there was no proof as to the amount of their earnings, nor any other evidence by which the value of the time lost could properly be estimated. In the case at bar, however, there is not the same absolute lack of evidence as to value that there was in those cases. In regard to property the rule is well established that the price therefor is some evidence of value. *Hoffman v. Conner*, 76 N. Y. 121. Similarly, I think, the price actually paid for personal services, such as those of this nurse, may be considered as some evidence of the value of the work performed, and constitutes competent proof sufficient to warrant the jury in considering the item in the assessment of damages. The judgment should be affirmed, with costs. All concur.

BRANTH v. BRANTH.

(*Supreme Court, General Term, First Department. July 12, 1890.*)

1. ATTORNEY'S LIEN.

Where a wife, in an action for separation, procures a decree for alimony, costs, and attorneys' fees, and defendant, though verbally advised of a lien of plaintiff's attorneys on the judgment, secretly procures plaintiff to execute a satisfaction of the decree, the satisfaction will be set aside for the protection of plaintiff's attorneys, even after the death of plaintiff.

2. SAME.

But in such case plaintiff's attorneys must rely for their compensation upon the costs and counsel fees awarded, and are not entitled to any part of the alimony.

3. SAME—ENFORCEMENT.

It not appearing that a commitment of defendant under Code Civil Proc. N. Y. § 779, for refusal to satisfy the decree related exclusively to costs and counsel fees, it will be set aside.

Appeal from special term, New York county.

Action for separation by Theresa Branth against John H. Branth. A decree was given awarding plaintiff alimony, costs, and attorneys' fees, and defendant induced plaintiff to execute a satisfaction of the decree. From an order setting aside such satisfaction, vacating an order which vacated a warrant of commitment of defendant for refusal to obey the decree, and permitting plaintiff's attorneys, Langbein Bros. & Langbein, to issue execution on the decree, defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Wilder, Wilder & Lynch, for appellant. Langbein Bros. & Langbein, pro se.

BRADY, J. A detailed statement of the facts and incidents of this action, if necessary, would show efforts on the part of the defendant to escape the consequences of his failure to do what he was required to do, and, among others, a flight to avoid the service of process by which he was prevented from bringing on an appeal prosecuted by him. The serious charge against him now is, however, the settlement made with the plaintiff, and by which her attorneys were to be deprived of their rights, secured by the orders of this court and its decree. The defendant was advised of the attorneys' lien by verbal notice, and cannot escape the evil results to him of the settlement, if the judgment or decree be maintained as to it, as it will be, if the order appealed from be in that respect sustained. The discovery of the settlement accomplished secretly by the defendant, and secured by the plaintiff's execution of a satisfaction piece, induced a motion by the attorneys to set it aside,

which motion was granted, and hence this appeal. It is not necessary to cite authorities to sustain the proposition that an attorney's lien will be protected against any kindred attempt to the one made herein to destroy it, and all ingenious devices by act or thought when discovered which have such a tendency. On the facts disclosed it is sufficient to say that the exercise herein of this power was abundantly authorized, and must be maintained. The death of the plaintiff, therefore, prior to the motion to set aside the satisfaction piece, the effort on the part of the plaintiff's attorneys to secure to them the payment of any alimony, and the power to enforce payment of their costs by commitment, present the only questions which are to be regarded worthy of consideration herein. The conduct of the defendant in obtaining the satisfaction piece had the effect of substituting the attorneys of the plaintiff, the plaintiffs herein, thus to enable them to carry on the case by the appropriate remedies until their lien is paid, or the modes of procedure for collection exhausted. The case of *Lachenmeyer v. Lachenmeyer*, 65 How. Pr. 422, determines this right, even after the death of the plaintiff, and is a kindred case. The alimony, however, although it be obtained by assignment, cannot be secured by the plaintiff's attorneys. It is intended for the support of the party to whom it is given, and the greater the necessity for such an allowance the greater the reason why the courts should discountenance its appropriation for any other purpose. The counsel must rely upon the costs and counsel fee awarded for his compensation, and therefore no claim to the alimony or any part of it, or to the enforcement of it by any process issued or otherwise, can inure to the benefit of her attorneys. We do not doubt that the amount of costs and counsel fee may be collected in the same manner under section 779 of the Code, as if the plaintiff were alive. The punishment as for contempt of court is prescribed by that section, and the payment of costs and counsel fee might doubtless be enforced in a proper case by a fine imposed which would cover them. The respondents do not appear on the record to have secured any such remedy as to their costs and counsel fee by an independent proceeding, and there is nothing, therefore, on that subject to be considered. The result of this appeal is consequently that, so far as the order appealed from vacates the order vacating the order of commitment dated July 15, 1887, it is reversed, but affirmed in all other respects. The respondents have not shown that the commitment related exclusively to costs and counsel fee, as already suggested, and not to alimony, which was incumbent upon them if they desired to retain the power to enforce it. The alimony, by the settlement and death of the plaintiff, is expunged from the record, and ceases to have the least vitality. For the reasons given the order appealed from must be reversed as to the order in relation to the commitment, and affirmed in all other respects, without costs to either party.

VAN BRUNT, P. J., concurs.

DANIELS, J. I agree to the result, but not in what has been said in support of the right to collect the costs by a fine for contempt; the remedy for the collection of the costs being confined to an execution.

ALBERTZ v. BACHE *et al.*

(*Supreme Court, General Term, First Department. July 18, 1890.*)

MASTER AND SERVANT—NEGLIGENCE OF MASTER.

Plaintiff, employed by defendants, was sent, on the application of defendants' foreman for more help, to assist in handling cases of glass weighing from 180 to 200 pounds. The foreman at first refused to set plaintiff at work, on the ground that he was not strong enough, and was inexperienced. But, on being sent back again by defendants, plaintiff was assigned to the duty of holding some of the glass at an elevated position, and was injured by some of the cases falling upon him. The

work was dangerous to one without experience, and plaintiff had not been informed of such danger. Held, that the question of defendants' negligence should have been left to the jury.

Appeal from circuit court, New York county.

Action by August Albertz against Seman Bache and others. Judgment was given dismissing the complaint, and plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

August P. Wagener, for appellants. Sol. Kohn, for respondents.

BRADY, J. The plaintiff was sent by one of the defendants' firm, Mr. Ulman, to assist in handling glass, which was in cases upon the sidewalk, and weighed from 180 to 200 pounds each. He was so sent upon the application for more help by the defendants' foreman, but sent back by the latter because he was only a glass-cutter, not strong enough for the work to be done, and inexperienced at it, but again directed, nevertheless, to go to the foreman, and do what was required by Mr. Ulman. The duty assigned him was to hold at an elevated position the glass, so that other glass, behind that which he held up, could be removed from its place,—could, in other words, be taken out; but in doing it the glasses held by him, which were high, toppled over and upon him, breaking his leg. Experience would have enabled him to hold the glasses, it appears, at such an angle and in such balance as would prevent them from falling over, aside from any superior strength which he might have had; and the foreman seems to have known and appreciated his infirmity. The work, to a person not thus experienced, was dangerous, according to the foreman's statement, but the plaintiff did not know it; no notice to that effect having been given to him. The complaint was nevertheless dismissed. The plaintiff's counsel asked to be allowed to go to the jury on the whole case, "and as to whether the defendants were not negligent in not providing a sufficient number of men to do this work in which the plaintiff was engaged at the time of the accident, and by reason of it the accident occurred; and (6) as to whether the plaintiff had knowledge of the risks of the service in which he was engaged at the time of the accident." All of which was refused. Exceptions were duly taken to these rulings, and the question now presents itself whether any of them was erroneous.

It is clear that whether the defendants had furnished sufficient help to do the work was important, as in the case of *Flike v. Railroad Co.*, 53 N. Y. 549, the defendants were held liable for a failure to have the necessary help to accomplish the work in hand with safety. The defendants here sent an incompetent person to assist the workmen engaged in the object to be carried out, and insisted on his doing as directed after notice that he was not acceptable to their foreman. He was not, in other words, fit for the duty. He was thus placed, by the defendants' own act, where, from his own infirmities, he might be injured himself, or be the cause of injury to others. He was not responsible for this, however, not knowing that the work he was to do was dangerous. The rule with regard to dangerous employments imposing its consequences upon the workman who braves them rests upon the knowledge of its existence. *Marsh v. Chickering*, 101 N. Y. 399, 5 N. E. Rep. 56; *Sweeney v. Envelope Co.*, 101 N. Y. 524, 5 N. E. Rep. 358. And therefore, where he does not know of it, it should not be rigorously or despotically applied. The jury should be called upon, at least, to say whether, if he did not know it, he was chargeable with notice. There are many cases involving an exposition of the duties and obligations of the employer and the employed in the books, and in them can be found phrases covering multitudes of propositions, in the effort to formulate a precise rule of government on trials embracing them; but the facts are so diverse that principles only can be employed for each case, however deftly the facts may be handled. The cases cited, it is thought, establish the principle that, when a fellow-servant is called upon to do dangerous

work, the help should be abundant, and, if he have no knowledge of the hazard to which he is exposed, he should be advised of it, if the employer wish to secure himself from liabilities sustained on account of his omission of duty. A different rule would encourage a disregard of personal safety, which is sufficiently reckless now, in the dispatch with which all enterprises are marked, and which tend to make us, if not too progressive, at least too precipitate in the consummation of progressive results. It may be said here, also, that when the master urged the plaintiff to the work in which he was injured by sending him back, as stated, he relieved him from the responsibility of voluntary action on his part, if that principle can be invoked against him, and contributed to the injury, or assumed the risk. *Sweeney v. Envelope Co.*, above cited; *Kain v. Smith*, 89 N. Y. 375; *Hawley v. Railway Co.*, 82 N. Y. 370. For these reasons the judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event. All concur.

MING *et al.* v. CORBIN.

(Supreme Court, General Term, First Department. July 18, 1890.)

CONTRACTS—PERFORMANCE.

Defendant entered into a single contract for the purchase of bonds and warrants from plaintiffs. The bonds only were delivered, though defendant told plaintiffs to send the warrants, and insisted on their delivery, as he had sold them. *Held*, that the fact that defendant paid a portion of the purchase price of the bonds did not amount to a severance of the contract, and plaintiffs could not recover the balance of such purchase money without a delivery of the warrants.

Appeal from circuit court, New York county.

Action by John H. Ming and Charles K. Wells against Austin Corbin. There was a judgment on a verdict for plaintiffs, and an order denying a motion for a new trial, and defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

William J. Kelly, for appellant. *Morgan & Worthington*, for respondent.

BRADY, J. This action was brought to recover a balance due upon the sale and delivery of certain bonds issued by the county of Lewis and Clark in the territory of Montana. The defense was that the plaintiff sold and agreed to deliver to the defendant not only the bonds, but certain "convertible warrants," so called, of the treasury of Montana; that the contract was entire, including the sale and purchase of both classes of securities, and not for the purchase of either separately; and that the plaintiffs, having only delivered the bonds, were not entitled to recover. The defendant also set up as a counter-claim the alleged damage sustained by the non-delivery of the territorial warrants. The sale to the defendant was effected through the instrumentality of one Sherwood, who was the agent of the plaintiffs for that purpose, and after the sale instructed the plaintiffs by telegraph to ship the bonds, but that the warrants could not be used unless they could be bonded in June. The plaintiffs thereupon shipped the defendant the bonds, and wrote to Sherwood, describing the warrants held by them, and saying, "If you want the warrants you must let us know." It appears that the defendant supposed that the bonds bore 15 per cent. interest, but upon the receipt of the bonds sent him, finding upon examination that they only bore 12 per cent. interest he wrote to plaintiffs, referring to his understanding on the subject, but offered to accept the bonds tendered at a price much less than 85 per cent. of principal and accrued interest, which amount he placed to the plaintiff's credit, subject to their check on him at sight. The offer was accepted by the plaintiffs, and they drew \$3,500 of the amount, leaving still due them \$841.77, which they sought to recover in this action.

The learned justice presiding arrived at the conclusion, and so ruled, that the receipt of the bonds was a severance of the contract, and that the defend-

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ant had no cause of action for the warrants. In this it is thought he was mistaken. There was no reason why the bonds should not be accepted with a reservation of the right to the warrants to be subsequently delivered, provided that arrangement was acceptable to the plaintiff. The correspondence between the parties shows conclusively that it was understood that the warrants were not abandoned, and that no arrangement had been made to that effect. We find, for example, that in a telegram sent by defendant to the plaintiffs, dated, New York, April 9, 1872, he says: "Send the 51 territorial warrants. County bonds not yet arrived." Again, upon the 22d of April, he says, "I have sold the territorial warrants, and must insist upon delivery." The same proposition is contained in the letter of April 23, 1872, written by the defendant to the plaintiff; and when the plaintiff sent a draft covering the balance due, the defendant declined to pay, for the reason that he considered the bonds and warrants as one, and was entitled to a delivery of both. This was followed by other letters, containing the same statements, and this was substantially reiterated by the defendant on his examination. Mr. Sherwood, the plaintiff's agent, who negotiated the sale, confirms the statement so far as he was permitted to express himself on the subject; and, the sale having been made, the defendant was not bound by telegrams emanating from Sherwood on the subject of the purchase, which he had not authorized to be sent. It appears that two classes of warrants were in the hands of the plaintiffs for sale, and which Sherwood was authorized to sell, some of which were fundable in June and some not; and there seems to have been a misunderstanding with regard to them on the part of the plaintiffs, but not on the part of the defendant, who seems to have understood clearly and distinctly what his purchase comprehended, and in which respect he is sustained by the evidence of Sherwood. The proposition that a joint purchase is consummated by a part performance, unless the rest to be done has been waived, is not sustained by the authorities. On the contrary, if a party engages to do two things, one is cumulative upon the other, and he must perform both the things agreed to be done. 3 Add. Cont. 1186. "The rule is well settled in this state," said CHURCH, C. J., in *Kein v. Tupper*, 52 N. Y. 550-555, "that upon a contract for the delivery of a specified quantity of property no action will lie until the whole is delivered." And the same principle is recognized in *Butler v. Butler*, 77 N. Y. 472, and in *Champlin v. Rowley*, 18 Wend. 187; and the rule is recognized and reiterated in one of the cases cited on behalf of the respondent, namely, *Avery v. Willson*, 81 N. Y. 341, and which is selected for illustration, where it is held that the receipt of the goods must be characterized by acts evincing that the receptor waives the precedent condition of a complete delivery in order to entitle the plaintiff to recover for those delivered. This error strikes at the very foundation of the plaintiff's cause of action, and, if the rule thus arrayed against the plaintiff as the result of adjudications in this state be correctly stated, the action was premature, notwithstanding that the bonds were delivered. It would be otherwise, perhaps, if the bonds had been received unconditionally, and without any expectation of a further performance by the delivery of the rest of the purchase, viz., the warrants. For these reasons the judgment is believed to be erroneous, and it must be reversed and a new trial ordered, with costs to the appellant to abide the event. All concur.

In re PELTON'S ESTATE.

(Supreme Court, General Term, Second Department. July 18, 1890.)

CONTEMPT—WHAT CONSTITUTES.

The refusal of defendant, executor of an estate, to obey an order of the surrogate to appear and show cause why he should not pay a collateral inheritance tax, constitutes a contempt.

Appeal from surrogate's court, Orange county.

In the matter of enforcing the collateral inheritance tax upon the estate of Sarah Pelton, deceased. The surrogate made an order citing James H. Pelton, executor and sole legatee and devisee under the will of Sarah Pelton, to appear and show cause why the tax imposed on the estate under the law relating to collateral inheritance taxes should not be ascertained and paid. From an order adjudging him in contempt for refusal to obey such order, the executor appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

John Brice, for appellant. *Russell Headley*, for respondent.

PRATT, J. The defendant in this proceeding was adjudged guilty of contempt for refusing to obey an order of the surrogate of Orange county, citing him to appear and show cause, etc. No appearance was made in person before the surrogate, and no defense suggested to the charge of contempt. It was not for not paying the collateral inheritance tax, or not taking proceedings for ascertaining the same, but for failing to appear before the surrogate and showing cause, as required by the surrogate's order. It was the duty of the defendant to obey the surrogate when cited to appear, and a refusal to do so was a contempt; in fact, his whole conduct is characterized by a total disregard of the surrogate's orders, and a lack of good faith. No question seems to be raised as to the power of the surrogate to punish for contempt. Order affirmed, with costs and disbursements.

BARNARD, P. J. The district attorney of Orange county had jurisdiction to enforce the payment of any tax which he had reason to believe to be payable under the Collateral Inheritance Act, c. 713, (Laws 1887, § 17.) Proceedings were commenced by him to enforce the payment of a tax due from the estate of Sarah Pelton. James H. Pelton was the executor and the sole legatee. The citation to James H. Pelton, executor, was issued 25th of July, 1889, and it was returnable 5th of September, 1889. The executor appeared by his attorney, and disputed the liability to pay any tax, and asked for a time in the future to be fixed for an adjournment to prepare his answer. The adjournment was to the 19th day of September, 1889. No answer was put in, but another adjournment was had to October 12, to October 24, to November 7, 14, and 21, 1889. Then the executor failed to appear. A motion was then served on the executor to appear on the 5th of December, 1889, to show cause as to the proceedings taken for the collection of the tax. The executor did not appear, and a citation was issued on the 10th of December, 1889, returnable December 12, 1889, why the district attorney should not have such order as he was entitled to in the premises, and the executor be punished for a contempt. The executor was served. On the 12th December, 1889, the executor appeared by counsel, and made no excuse for his refusal to pay the tax. The surrogate adjudged him guilty of contempt, and fined him \$15, which the executor paid subsequently. The executor was bound to pay the tax without approvement, if the facts were admitted. Whether an approval was made depended upon extrinsic facts. If a gift of money was made by deceased to the executor, and he was outside of the degree of kin not subject to tax, his duty was to pay the money due the state, without further order. It was to that end—that proceedings might be taken to compel payment of the tax—that the executor was cited. He owed obedience to the surrogate as executor, and a failure to appear and answer was properly punishable as for contempt. Code Civil Proc., § 2481. The order should therefore be affirmed, with costs and disbursements.

BOZZONI v. WOODWARD.*(Supreme Court, General Term, Second Department. July 18, 1890.)***1. SALE—ACCEPTANCE.**

Defendant looked at a book of cuts of carriages sold by plaintiff, and selected one to be sent to her. In an action for the price of the carriage, plaintiff testified that he showed to defendant a carriage which she said was just what she wanted, and that she directed certain alterations to be made, and that the carriage be delivered on board a steamer for shipment to her. The alterations were to be paid for in addition to the price originally fixed for the carriage. *Held*, that a finding of the jury that the carriage was accepted by defendant was justified.

2. SAME—DELIVERY.

Plaintiff testified that he delivered the carriage on board the steamer designated by defendant, directed to her address, and that he afterwards saw the same carriage in possession of defendant's counsel. Defendant claimed that the carriage which she received was not the one ordered by her. *Held*, that there was sufficient proof of a delivery.

Appeal from Orange county court.

Action by Lewis J. Bozzoni against Frances M. Woodward to recover the price of a carriage sold to defendant. The latter went to plaintiff's carriage manufactory, looked at a book of cuts of carriages, and selected one to be sent to her. Plaintiff testified that afterwards defendant went to his shop, and was shown a carriage, and that she said "it was just the article she wanted, and she would take it. Defendant ordered the steps of the carriage to be padded, and told plaintiff to deliver it to a certain line of steamers, directed to her at her residence. The expense of the padding was to be paid for, in addition to the price originally agreed upon for the carriage. Plaintiff testified that he shipped the carriage in question as directed, and that he afterwards saw it in the possession of defendant's counsel. Defendant claimed that she never received the particular wagon which she approved at the shop. Judgment was given for plaintiff, and defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

John Miller, for appellant. *William D. Dickey*, for respondent.

PRATT, J. The testimony was sufficient to authorize the jury to find that the carriage was accepted when defendant saw it at Newburgh. Directing alterations to be made did not necessarily disprove acceptance. On the contrary, the jury might well consider it to be further evidence in that direction. The delivery in pursuance to defendant's direction was also proved. Judgment affirmed, with costs.

TAYLOR v. WYNNE et al.*(Supreme Court, General Term, Second Department. July 18, 1890.)***JUDGMENT—LIEN—LEASEHOLD.**

Under Code Civil Proc. N. Y. § 1490, providing that the term "real property," as used in chapter 18, arts. 3, 4, relating to the execution sale of land, shall apply to leasehold property where the lessee or his assignee, at the time of sale, is possessed of "at least five years' unexpired term of lease," a judgment, though duly docketed, is not a lien on the judgment debtor's interest in the unexpired term of a lease having but two years to run.

Motion for reargument. For former report, see 8 N. Y. Supp. 759.

Summary proceedings by Grant B. Taylor against Frank Wynne, Hannah Wynne, and others, to dispossess defendants, as tenants, of the possession of real property which had been sold to Taylor on an execution issued against Frank Wynne. The petition stated that Wynne had leased the premises in question for a term of five years, beginning April 1, 1885; that on March 26, 1888, the judgment was docketed on which the execution was issued; that on April 4, 1888, Wynne assigned the lease to his wife, and that afterwards the execution was issued. Code Civil Proc. N. Y. § 1490, provides that the

expression "real property," as used in chapter 13, arts. 3, 4, relating to execution sales of land, includes leasehold property where, at the time of sale, the lessee or his assignee is possessed of at least five years' unexpired term of lease. The petition was dismissed, and the petitioner appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Grant B. Taylor, in pro. per. Francis Larkin, for respondents.

PRATT, J. By section 1480 of the Code, "real property" is said to include leasehold property where there is at least five years unexpired of the lease. In the present case there was but two years unexpired of the lease when the judgment was docketed. The lease not being "real property," the judgment was not a lien upon it. The assignment to the wife conveyed it free from the lien of the judgment, and when the execution was afterwards issued against the husband the lease was no longer his property, and a sale upon an execution against him carried no title to the purchaser. Another defect upon the face of the petition was that the judgment was not stated to be for \$25, exclusive of costs.

We are still of the opinion expressed on the former appeal. Motion for re-argument denied, with \$10 costs and disbursements.

HARVEY v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, General Term, Fourth Department. July 1, 1890.)

1. FELLOW-SERVANTS—DEFECTIVE BRAKES—CAUSE OF INJURY.

A conductor was hurt by a collision between his train and a fugitive freight-car. That car and another were on a side track. The train was made up on another siding, and, as it was leaving the yard, the two cars ran down and struck the caboose. What started them does not appear. The brakes were out of order; but the yardmen had put the cars on the siding without setting, or attempting to set, the brakes, or blocking the wheels. The rules required them to do one or the other. *Held*, that the failure to set the brakes or block the wheels was the neglect of fellow-servants, that there is no evidence that the defect in the brakes contributed to the collision, and that a verdict for the conductor was properly set aside.

2. MASTER'S DUTIES—SUFFICIENT FORCE FOR WORK.

In such case the assistant yard-master was not on duty the night of the collision. There was no lack of men to attend the making up of trains and shifting cars. The gangs were full, and the men all there, and they were able and competent to do the work. It was unusual for the yard-master or his assistant to take any part in it. *Held*, that the verdict cannot be sustained on the ground that the jury had a right to say that the absence of the assistant contributed to the collision.

Appeal from circuit court, Onondaga county.

Appeal from an order granting a motion on the minutes for a new trial. Action by a conductor for injuries in a collision between his train and a fugitive freight-car. The case was tried at circuit, and a verdict rendered for plaintiff for \$10,000. A motion was made by the defendant on the minutes for a new trial, and the order appealed from was granted.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

William Kennedy and George F. Hine, for appellant. Hiscock, Doheny & Hiscock, for respondent.

MERWIN, J. There is in this case evidence tending to show that the car that collided with the train upon which plaintiff was conductor belonged to defendant, and that the brake upon it was in defective condition. The main question upon this appeal is whether such defective condition was the cause, or one of the producing causes, of the accident. This car, and another one with it, had been standing in the defendant's yard for some hours upon a side track where the grade descended eastward. The train of plaintiff was being made up upon another side track. After the plaintiff's train was completed, and as it was proceeding out of the yard soon after midnight upon

its trip eastward, the two cars came down upon their track, and the first one collided with the caboose of plaintiff's train at the point of intersection of the two tracks. What started the two cars does not appear. On the part of the plaintiff there was evidence that the brakes were out of order, but no evidence whether or not they were set, or whether there had been any attempt to set them. On the part of the defendant, there was evidence that these cars were brought into the yard the evening before, and had been placed on the track where they were by the employees of the defendant who there had the management of such cars, and had been left without setting, or attempting to set, the brakes, or blocking the wheels. It was the duty of these employees, under the rules of the company, to have done one or the other. If they had performed their duty, the accident would probably not have happened. They were co-employees of plaintiff, and their neglect is not chargeable to the defendant. It was concerning an act pertaining only to the duty of an operative, and the master is not liable to a fellow-servant for the improper performance of such an act. *Crispin v. Babbitt*, 81 N. Y. 516. It seems difficult to avoid the conclusion that the accident was occasioned solely by the fault of the co-employees. This subject is quite fully and satisfactorily discussed by Mr. Justice KENNEDY, in the opinion delivered by him on granting the order appealed from, and it need not be further considered here.

But it is argued on behalf of the plaintiff that the jury had the right to assume that, if the brake had been in order, the employe would have set it, and thus prevented the accident. This is only on the basis that it might be presumed that the employe would do his duty. The duty was to set the brake or block the wheel. The presumption would be as strong for the one as for the other. If either had been done, the accident would probably have been averted. The fact that the car was in motion rebuts the presumption in both aspects, and serves to corroborate the testimony on the part of the defendant from the employees themselves that they left the cars without attempting to set the brake or block the wheels. They thought it was not necessary. There is therefore no room for the inference that the accident would not have happened had the brake been in order. That being so, the condition of the brake cannot be said to be a contributing cause. The case of *Lilly v. Railroad Co.*, 107 N. Y. 566, 14 N. E. Rep. 508, is pressed upon our attention. There the presumption was indulged in that the brakes, if in order, would have been set, and so the accident have been averted. This, however, was for the reason that there was evidence that it was usual and customary to set brakes upon a car situated as the one there in question was. The evidence in this case is different. Here it is shown to have been the custom sometimes to use blocks, and this was known to the plaintiff. The rule of the company permitted either, and either was effective.

It is suggested by the plaintiff that the verdict can be supported upon the ground that defendant was negligent, in that the assistant yard-master was not at the yard the night of this occurrence, and that the jury had a right to say that his absence contributed to the injury. The evidence was not sufficient to warrant such conclusion. There was no lack of men to perform the duties attending the making up of trains and shifting cars. The evidence is that, unless there was something unusual, the yard-master or his assistant did not take any part in that matter. The gangs that were moving the cars and making up the trains were full, and the men all there, and they were fully able and competent to perform the duties assigned to them. See *Harvey v. Railroad Co.*, 88 N. Y. 481; *Williams v. Railway Co.*, 39 Hun, 490. It follows that the order appealed from should be affirmed. Order affirmed, with costs.

HARDIN, P. J., and MARTIN, J., concur.

CARTER v. GOOD *et al.**(Supreme Court, General Term, First Department. June 6, 1890.)***DISCOVERY—EXAMINATION OF PARTY BEFORE TRIAL.**

An heir who, on attaining majority, brings action against the administrator of her father's estate, who is also her guardian, to set aside a collusive sale to himself of shares of stock belonging to the estate, is entitled to an examination of defendant before trial as to the relations existing between himself and the persons to whom he ostensibly sold the stock, and as to who received the dividends thereon.

Appeal from special term, New York county.

Action of Clara Carter against Brent S. H. Good and the Carter Medicine Company to set aside a sale of stock of the defendant corporation. Plaintiff's father, Samuel Carter, the originator of "Carter's Little Liver Pills," united with a few other persons, among them the defendant Good, in forming the defendant corporation. In 1884, Carter died, owning one-half of the stock of the corporation, and leaving plaintiff his only heir,—then 17 years old. Shortly after Carter's death, defendant Good was appointed administrator of his estate, and also guardian of plaintiff. On November 18, 1884, defendant Good sold 60 shares of stock belonging to the estate to one Chichester for \$9,180. A month later, Chichester sold to McIntosh, who four years thereafter sold them to defendant Good. The dividends on these 60 shares since their sale alone amount to \$86,140; and plaintiff, on ascertaining the fact, instituted this action, alleging that the sale had in fact been made to defendant Good himself, and that Chichester and McIntosh were merely dummies. To ascertain who received the dividends, and what were the relations existing between defendant Good and Chichester and McIntosh, plaintiff moved for an examination of defendant Good before trial. From an order denying this motion, plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

William W. Cook, (*Robert G. Ingersoll*, of counsel,) for appellant. *Robert Hunter McGrath, Jr.*, and *John H. Bird*, for respondents.

BRADY, J. The defendant occupies towards the plaintiff a fiduciary relation. He is the administrator of her father's estate, and her guardian. In the former capacity, he came into possession of 100 shares of stock of the Carter Medicine Company, 60 shares of which were improperly disposed of by him with the ultimate design of owning them himself; a result existing and accomplished, as suggested. The price received for them was trifling, it is alleged, in view of their real value; the dividends having enormously increased year after year. The affidavit on which the order was obtained for the examination of the defendant Good is not a fulfillment of the essential requisites in ordinary cases, under the decisions bearing upon the subject. *Williams v. Folsom*, 5 N. Y. Supp. 211, 7 N. Y. Supp. 568; *Jenkins v. Putnam*, 106 N. Y. 272, 12 N. E. Rep. 613. But it is insisted that in view of the relations existing between the defendant and the plaintiff, who is her *cestui que trust*, and entitled to a full and truthful disclosure affecting the *corpus* of the estate, the general rule does not apply. It is enough that such relation is shown to call into being the inquisitorial power of the court, in order to determine whether the act complained of, namely, the sale of 60 shares of stock, was made in fraud of the plaintiff's rights, and in violation, if so, of the double duties incumbent upon him by reason of the dual capacities in which he stood, as administrator and guardian. The learned justice in the court below gave no heed to this contention, for aught that appears in his opinion; but it was worthy of serious consideration, and must receive it here. The rule with regard to the examination of a party before trial is one of discretion. *Herbage v. City of Utica*, 109 N. Y. 81, 16 N. E. Rep. 62. The application for the order has become one addressed to that

legal element. It is therefore flexible, and must be adapted to and controlled by the facts and circumstances of each case, considered with reference to the relations existing between the parties; and therefore a strictness which would be applied between ordinary suitors would necessarily yield when the relation of trust and confidence exists between the parties, especially if one were an infant, and therefore, to a certain, extent, helpless when the transactions to be investigated occurred. Persons in a fiduciary character are equitably liable to discover. *Bray*, Disc. 30; *Sichel & C. Disc.* 37. If it appear, therefore, from the nature of the transactions set forth, coupled with the allegations in the complaint relating thereto, and making them apparent, that the information desired is seemingly important for the proper presentation of the cause of action asserted, and necessarily wholly within or more within the knowledge of the defendant than the plaintiff, the order should be granted and maintained. This would not be recognizing a procedure in the nature of a fishing expedition, or suggest such a forbidden performance, but a meritorious application founded in justice, and due to its proper administration. This view is sustained by the case of *Dyett v. Seymour*, 2 N. Y. Supp. 841, in which VAN BRUNT, P. J., said: "The defendants were Eno's agents. He had no personal knowledge as to these transactions, and necessarily relied upon the good faith and honesty of such agents; and, where he has good ground to suspect such good faith, he should be afforded an ample opportunity for investigation."

The record discloses the following statement as to the necessity of the examination sought: "(7) That the testimony of said Brent S. H. Good personally, and also as said trustee, is material and necessary, for the following reasons: The plaintiff, in order to prove that said Brent S. H. Good has owned and controlled said sixty shares of stock ever since the latter part of the year 1884, up to the present time, must have the testimony of said Brent S. H. Good as to who received and retained the \$86,140 dividends, or any part thereof, declared on said stock during that time; also, what price was paid by said Brent Good to said McIntosh for said stock, or any part thereof, on July 8, 1889; also, what relations, financial and otherwise, existed between said Brent Good and said McIntosh; also, what banks were the depositories of the moneys of said McIntosh; also, who advanced to said James W. Good the money with which he purchased twenty of said shares of stock, if so purchased by him, and what relations exist between said Brent Good and said James Good in regard thereto, and in regard to money matters generally, and who receives the dividends thereon; also, as to the business relations that have existed or now exist between said Brent Good and one George M. Hard, who has made affidavit in this case that said Chichester purchased said stock for said Hard; also, the date when said stock was transferred to said Brent Good, and as to whether said stock now stands in the name of said Good on the books of said company, and to whom the last dividend on said sixty shares of stock was paid. Neither the plaintiff nor deponent knows, nor has any means of ascertaining, the facts referred to in the preceding sentence. Said facts are within the knowledge of said Brent Good personally, and as said trustee. The plaintiff has no way of ascertaining and proving said facts except by the testimony of said Brent Good personally and as trustee. The plaintiff cannot safely proceed to trial until she has taken the deposition of said Brent Good, personally and as trustee, in regard to said facts, and that said facts are material and necessary to be proved upon the trial herein. The present application for an order to examine the said Brent Good personally and as said trustee is made in good faith, to preserve the testimony of the said Brent Good personally and as the said trustee expected to be taken under the said order; and plaintiff intends to use such testimony upon the trial of the action, and otherwise as may be necessary. Said testimony is material and necessary for the plaintiff for use on the trial of this action. Deponent does not

know whether the said Brent Good will be within the jurisdiction at the time of said trial, and whether, if said Brent Good is then within the jurisdiction, his attendance at the trial can be obtained." This seems to be sufficient to justify the order asked for, under the circumstances of this case, in the exercise of a sound discretion. Order reversed, with \$10 costs and disbursements of the appeal. All concur.

WILSON v. TOWN OF SPAFFORD.

(*Supreme Court, General Term, Fourth Department. July 1, 1890.*)

1. PLEADING—AMENDMENT—CHANGING CAUSE OF ACTION.

In an action against a town for personal injuries resulting from a highway alleged to have been negligently obstructed by the town, plaintiff, at the close of his evidence, may amend his complaint so as to conform to the proof, which shows the negligence to have been that of the commissioner of highways, as such amendment does not change his cause of action.

2. HIGHWAYS—OBSTRUCTIONS—INJURIES RESULTING—INSTRUCTIONS.

Where the alleged negligence consists in obstructing the highway with a pile of stones calculated to frighten horses, and to render driving on the highway dangerous, an instruction that, to warrant a finding of negligence, the stones must have been so placed as "necessarily" to frighten horses, is properly refused, as the town is liable if that result would naturally and probably follow from the commissioner's neglect to remove them.

3. SAME—EVIDENCE.

Evidence that other horses had been frightened by the same stones at about the time of the accident is admissible as bearing on the question whether or not the stones were calculated to frighten horses.

4. SAME.

Evidence that plaintiff's horse shied on being driven past the stones the day following the accident is admissible in rebuttal of defendant's evidence that the accident occurred by reason of the horse's having been frightened by something else, after having passed the stones.

Appeal from Onondaga county court.

Action by Samuel Wilson against the town of Spafford for personal injuries resulting from an obstruction in the highway. There was a verdict for plaintiff for \$646.69 damages and costs. From a judgment thereon, and from an order denying defendant's motion for a new trial on the judge's minutes, as well as an order denying its motion for a new trial on the ground of newly-discovered evidence, defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

William G. Tracy, for appellant. *Baldwin & Kennedy*, for respondent.

MARTIN, J. While the plaintiff was driving on one of the highways of the town against which this action was brought, his horse backed off a bank at the side, and the plaintiff was injured. This action was tried upon the theory that the horse became frightened at a row of stones that had been placed in the highway, which were negligently permitted to remain there by the commissioner of highways of the defendant after he had notice that they were there, and of their liability to occasion injury to travelers by frightening their horses. The plaintiff's action was based on the negligence of the commissioner. The evidence given by the plaintiff tended to show that the commissioner was negligent in not removing the stones from the highway after being notified that they were there, and that they would naturally and probably frighten passing teams, and that by reason of such negligence the plaintiff was injured. The defendant's proof tended to show that the stones were not such as would probably or naturally frighten horses, and that the plaintiff's horse was not frightened at them, but backed off the highway from some other cause. The defendant also claimed that the plaintiff was guilty of contributory negligence. The jury found for the plaintiff, thus, in effect, deciding that the commissioner of highways was negligent, that such negligence caused the plaintiff's injury, and that the plaintiff was free from contributory

negligence. We think the evidence upon those questions was sufficient to require their submission to the jury, and to sustain its verdict; and hence we find no error in the denial of the plaintiff's motion for a nonsuit, so far as it was based upon the ground of the insufficiency of the plaintiff's evidence to establish negligence on the part of the commissioner, or absence of contributory negligence by plaintiff.

In his complaint the plaintiff, in substance, alleged that the defendant, by its officers, obstructed the highway in question, and permitted and suffered it to be obstructed, by stones which were calculated to frighten horses, and render driving with horses thereon dangerous. When the plaintiff rested the defendant moved for a nonsuit on the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action; that the negligence alleged was that of the town, while the negligence proved, and the only negligence which could sustain a recovery against the town, was the negligence of the commissioner. The court thereupon permitted the plaintiff to amend his complaint by specifically alleging the negligence of the commissioner, and the defendant excepted. We do not think this exception well taken. The power of the court to allow the amendment was unlimited, except it could not permit the plaintiff to bring a new cause of action. We do not think the amendment allowed had that effect. It in no way changed the cause of action. The original action was negligence. It was against the town for the negligence of its officers. The amendment merely allowed the plaintiff to allege the negligence of the commissioner, instead of resting upon the general allegation of negligence in the officers of the defendant. We think the court had power to allow this amendment, and that it was properly allowed. *Woolsey v. Village of Rondout*, 4 Abb. Dec. 639; *Reeder v. Sayre*, 70 N. Y. 180; *Harris v. Tumbidge*, 83 N. Y. 92; *Price v. Brown*, 98 N. Y. 388; *Benson v. McNamee*, 46 Hun, 681; *Avery v. Railroad Co.*, 106 N. Y. 142, 12 N. E. Rep. 619; *Davis v. Railroad Co.*, 110 N. Y. 646, 17 N. E. Rep. 733.

We find no error in the refusal of the court to charge "that, in order to find the commissioner guilty of negligence, they must find that the stones as placed would necessarily frighten horses to such an extent that it would make the road dangerous and unsafe to travel." If the natural and probable consequence of the omission of the commissioner to remove these stones was that horses would become frightened, and injury would follow as a result, it was negligence in the commissioner not to remove them. We think the request was too broad, and that it was not error for the court to decline to charge as requested.

On the day following the plaintiff's injury, Dr. Bliss passed the place where the injury occurred. He was called as a witness in the case by the plaintiff, and asked the following question: "In driving down did your horse notice the stone?" This question was objected to as incompetent and immaterial. The objection was overruled, and the defendant excepted. The witness then answered: "Yes, sir; my horse was frightened." The court also permitted the plaintiff to prove by the witness Hart that he drove the horse, which the plaintiff was driving when injured, past these stones on the next day, and that it shied. This was objected to as incompetent and immaterial. The objection was overruled, and the defendant excepted. The appellant claims that these rulings were erroneous. Proof that other horses were frightened there at about the same time, while the stones were in the same condition as when the plaintiff's horse was frightened, seems to be justified by the doctrine of the cases of *Quinlan v. Utica*, 74 N. Y. 603; *Pomfroy v. Saratoga Springs*, 104 N. Y. 469, 11 N. E. Rep. 43; and *Masters v. City of Troy*, 3 N. Y. Supp. 450. In the cases cited, it was held that proof that other persons had fallen on the walk at the place where the plaintiff was injured was admissible to show the condition of the walk. In the case at bar, there were stones in the highway,

which the plaintiff claimed had frightened his horse. Proof that other horses were frightened at them at about the same time was evidence as to the character of the stones, and whether they were calculated to frighten horses. In *Stewart v. Manufacturing Co.*, 13 N. Y. St. Rep. 221, it was said by FOLLETT, J., in delivering the opinion of this court, that "the fact that, within a month prior to the time when the plaintiff's horses were frightened, other horses were frightened by bollers lying in the same place, was relevant." We think the court committed no error in admitting this evidence. Moreover, the evidence of the witness Hart as to the horse having shied the next day was also admissible upon another ground. The defendant's evidence tended to show that the plaintiff's horse was not afraid of the stones, but that the accident was caused by its backing off of the bank after it had passed them. The plaintiff had the right, we think, to rebut this evidence, and corroborate the evidence of his witnesses, by showing that the horse was afraid of them. While the evidence was not relevant upon that theory when offered, yet, it having become so by the subsequent course of the defense, the defendant cannot complain. *Stewart v. Manufacturing Co.*, *supra*.

We have examined the other exceptions of the defendant in the case, but have found none requiring special discussion. We think the verdict was sustained by the evidence, and that there were no errors committed on the trial that would justify a reversal of the judgment. The judgment and order denying the motion for a new trial on the minutes should be affirmed, with costs. An examination of the papers and affidavits read on the motion for a new trial on the ground of newly-discovered evidence has led us to the conclusion that the court committed no error in denying the motion for a new trial on that ground, and that the order should be affirmed. Judgment and orders affirmed, with costs. All concur.

MOORE et al. v. KING et al.

(Supreme Court, General Term, Fourth Department. July 1, 1890.)

1. SALE—WARRANTY.

A manufacturer and dealer in painters' materials stated to a customer that all goods he sold thereafter would be warranted as represented, and that he had a varnish made from pure gum shellac and pure wood alcohol, which would dry and was quick in hardening, and was suitable for use on mouldings. A sample cask was ordered, and the customer told that future sales would be warranted equal to that. Six months after, a barrel was ordered "same as the cask," and, two months later, another "same as the last." *Held*, that the varnish sent to fill this order was warranted made of pure gum shellac and pure wood alcohol, suitable for use on mouldings, and equal to the sample.

2. SAME—MEASURE OF DAMAGES.

It was shown that the mouldings on which the varnish was used would have been worth 10 cents a foot if it had been as warranted, but were in fact worth only 5 cents. This evidence was not objected to as not furnishing the proper measure of damages. It was also shown that the difference of 5 cents a foot would be the expense of taking off the old finish and putting on a new one. The defendant knew that the varnish was to be used on mouldings, and warranted it suitable. The defect could not have been discovered before it was applied. *Held*, that a finding allowing as damages 5 cents a foot will not be disturbed.

Appeal from judgment on report of referee.

Action for damages for a breach of warranty on a sale of a barrel of shellac varnish. Judgment was entered on the report of a referee in favor of the plaintiffs for \$700 damages, and costs. The defendants appeal.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

L. A. Gould, for appellants. Thomas Hogan, for respondents.

MERWIN, J. The plaintiffs, in 1885 and 1886, were engaged at Syracuse in the manufacture and sale of picture frames, mouldings, and ornamental woods, and the defendants were engaged in New York city in the manu-

facture and sale of varnishes, shellac, and painters' materials. In the latter part of September or 1st October, 1885, one Snyder, a selling agent of the defendants, called on the plaintiffs for the purpose of soliciting their trade. As to this interview the referee finds as follows: "Snyder stated to them that the defendants had an article of shellac varnish equal, if not superior, to anything in the market; that they would find it to their advantage to use it; that it had a better body than anything that was in the market at that time; that it would dry, and was very quick in hardening, and that if the plaintiffs would patronize the defendants they would warrant the article to be as had been represented, and that they would warrant all goods sold in the future to be as had been represented; that the plaintiffs suggested that a sample of the shellac varnish of the defendant be sent, and gave an order to the defendants for a 10-gallon cask of shellac varnish, which order was received by them, and known to be a sample order, which was, on or about the 4th day of October, 1885, delivered to the plaintiffs; that said Frank Snyder also stated that the defendants would warrant all goods purchased of them by the plaintiffs in the future to be equal to said sample cask; that the plaintiffs stated to said Frank Snyder that the shellac varnish would be used by them upon mouldings, and said Frank Snyder stated that the shellac varnish of the defendants was suitable for that purpose." The referee further finds that Snyder was expressly authorized by the defendants to warrant the article of shellac varnish sold by them to be made from fine gum shellac and wood alcohol, and that it was the usage of the business of the defendants for a selling agent to warrant the quality of the articles sold. On the 26th April, 1886, the plaintiffs ordered of defendants one barrel of pure white shellac varnish, "same as you sent us October 4, 1885," reference being made to the sample cask delivered at that date, and thereupon a barrel of such varnish was delivered by defendants to plaintiffs on the 8th May, 1886. This barrel and the sample cask were used in the business of plaintiffs, and applied to mouldings, and corresponded to the warranties in every respect, and were made from pure shellac gum and pure wood alcohol. On the 9th June, 1886, the plaintiffs, relying, as the referee finds, on said warranties, ordered of the defendants a second barrel "white shellac, same as sent on May, 8, '86," reference being made to the barrel delivered at that date, and thereupon, on the 17th June, 1886, the defendants delivered to plaintiffs a barrel of shellac varnish purporting to be the same. This is the barrel of varnish in controversy. The referee finds that about one-half of it was properly applied and used in the business of plaintiffs upon 20,000 feet of mouldings; that it did not contain an article made from pure gum shellac and pure wood alcohol, and contained an article which did not dry or harden, and was not suitable for application upon mouldings, and which became soft, sticky, and gummy after application upon said mouldings; that the mouldings would have been worth 10 cents a foot if the article applied thereupon had been made from pure gum shellac and pure wood alcohol, and had been suitable for the purpose of finishing mouldings; that 14,000 feet of the 20,000 were of the value of 5 cents per foot; that the article in the barrel in question had no visible defect, and appeared in all respects similar to and identical in quality with the previous barrel, and that no defect could have been discovered from an examination of the same, or until some time after its application to the mouldings; that by reason of the failure of the article to correspond with the warranties, the plaintiffs were damaged in the sum of \$700, for which judgment was ordered.

It is claimed on the part of the defendants—*First*, that the sale of the goods in question was without warranty; and, *secondly*, that the findings setting forth defects are against the weight of evidence. The main argument as to the first proposition is based on the circumstance that at the time of that particular sale no representation was made by the defendants, and that what

occurred at the first sale did not apply to the last. There was conflicting evidence as to what occurred on the occasion of the first or sample order, and the finding of the referee on that subject must be assumed to be correct. That being so, it is very clear that the parties contemplated future orders, and that whatever was then said as to the quality or adaptability of the goods was intended and understood to apply to subsequent sales, so that when the plaintiffs, on the second occasion, ordered goods the same as the first, and upon the last occasion ordered goods the same as the second, there was no room for defendants to doubt as to what was ordered, and when they filled the order they must be presumed to have done so under the arrangement as first made, and as a part of that transaction, and whatever representations were then made must be deemed to apply. *Watt v. Borne*, 5 N. Y. Supp. 168. They knew the first was a sample order. There is no doubt about the authority of the agent to make the warranty. An agent authorized to sell property, in the absence of any express limitation of his powers, is authorized to do any act or to make any declaration in regard to the property found necessary to make a sale, and usually incidental thereto. *Ahern v. Goodspeed*, 72 N. Y. 108; *Mayer v. Dean*, 115 N. Y. 560, 22 N. E. Rep. 261.

The warranty, we think, was sufficiently established. Was there a breach shown? A large amount of evidence on this subject was presented by each party. On the part of plaintiffs it was shown that after the application of the varnish to mouldings unsatisfactory results were developed. The vital question was whether these results were attributable to a poor quality of shellac. In determining this question, the reliability of the witnesses upon either side was, to a certain extent, involved. Inferences were to be drawn, and this was peculiarly within the province of the court below. It is argued that it was incumbent on the plaintiffs to show that all of the mouldings upon which this varnish was applied showed defective results. The finding of the referee is that as to 6,000 feet such results were not shown. It is not found that they were not defective, but that they were not shown to be so. There is evidence that that 6,000 feet had been sold by plaintiffs, and claims for damages in some instances made, but no proof sufficient to satisfy the referee of the condition or value in fact of such mouldings. No damages were allowed on that amount. The apparent inability of the plaintiffs to show the condition of this amount of the mouldings should not bar their claim. If there was any ground to believe that such part was not defective, though treated the same as the rest, it might be troublesome to plaintiffs' theory. This, however, is not shown or found. The finding of the referee on this subject should not be disturbed.

No point is made by the defendants as to any ruling upon evidence. As to damages, they claim that they are excessive, and that the measure is erroneous. In support of this the only statement in defendants' points is that it sufficiently appears from the plaintiffs' verified bill of particulars, which was offered in evidence. The record shows that after this bill was offered, and after the plaintiffs rested their case, they were allowed, upon terms which were complied with, to amend the complaint to conform to the proof. This being so, the bill of particulars, served a long time before, ceased to limit the recovery. The question, then, is whether the proof sustains the findings as to damages. It was shown by the plaintiffs that the mouldings would have been worth 10 cents per foot if the article applied thereon had been as warranted, but were in fact worth only 5 cents per foot. This evidence was not objected to as not furnishing the proper measure of damages, but objection was made on other grounds, which were properly overruled. It seems to have been assumed that that was the proper measure. *Parks v. Tool Co.*, 54 N. Y. 586. No evidence was given by the defendants to contradict this valuation, and no request was made for finding on that subject. It was shown by plaintiffs that the difference of 5 cents would be the expense of taking off the

old finish and putting on the new, so that this difference represents the actual damages. The defendants knew the purpose for which the varnish was to be applied, and represented it suitable, and it is found upon sufficient evidence that the defect could not have been discovered before it was applied. As the case stands, we think the finding as to damages must be sustained. Judgment affirmed, with costs.

HARDIN, P. J., and MARTIN, J., concur.

WOODS v. KERNAN.

(*Supreme Court, General Term, Fourth Department. July 1, 1890.*)

1. FORCIBLE DETAINER—REVERSAL—ACTION BY TENANT FOR DAMAGES.

A tenant was dispossessed in a summary proceeding, in which he made default; and, on appeal to the county court, it was decided that there was no error of law for which the judgment could be reversed, but that the default might be opened, and judgment was entered that on payment of costs the final order awarding possession be reversed, and a new trial directed, which resulted in favor of the tenant. *Held*, that he has an action for damages under Code Civil Proc. N. Y. § 2963, providing that, if the final order is reversed on appeal, the one dispossessed may sue for the damages he has sustained.

2. SAME—FAILURE TO RE-ENTER.

In such case the failure of the tenant to re-enter after restitution was ordered, does not bar his action for any loss he had suffered to that time.

3. SAME—MEASURE OF DAMAGES.

In an action by a tenant for being unlawfully dispossessed by a summary proceeding, the final order in which has been reversed on appeal, he may recover the value, over and above the rent, of the use of the premises, including the crops and fruit he might have gathered, up to the time restitution was ordered.

Appeal from circuit court, Onondaga county.

Action by a tenant for having been unlawfully dispossessed by a summary proceeding, which was reversed on appeal. Judgment was entered on a verdict of \$15 for the plaintiff, who moved for a new trial on the minutes. The verdict being less than \$50, the defendant recovered costs. The plaintiff appeals.

Argued before HARDIN, C. J., and MARTIN and MERWIN, JJ.

W. Gilbert, for appellant. Goodelle & Nottingham, for respondent.

MERWIN, J. This action was brought by the plaintiff to recover damages for being unlawfully dispossessed from certain premises in the city of Syracuse, rented by plaintiff from defendant. On the 2d August, 1888, this defendant, claiming that the tenancy expired on the 1st August, 1888, instituted summary proceedings for the removal of the plaintiff. A precept was obtained from a justice of the peace, returnable at 4 P. M. of the same day. This was duly served at 1:30 P. M. The present plaintiff, being the defendant in that proceeding, did not appear; and judgment by default was rendered against him, and a warrant issued to dispossess him. Under this warrant the defendant therein was dispossessed on the 7th August. He appealed to the county court, his appeal being based—*First*, upon errors of law; and, *secondly*, upon affidavits presented for excusing his default, and showing a defense, and asking for a new trial before the same or another justice. The matter was duly heard in the county court, and it was there decided that no error of law existed for the reversal of the judgment, but that the default might be opened upon the payment of \$10 costs. Accordingly, on the 15th January, 1889, judgment was entered providing that, upon payment of said costs, "then the final order awarding possession of said premises to the plaintiff be, and the same is hereby, in all things reversed, and a new trial directed before S. P. BELKNAP, a justice of the peace in Syracuse, at his office, on 22d January, 1889, at 2 o'clock in the afternoon, and restitution of the premises described

in the petition is hereby ordered and awarded to appellant." The costs were paid, and the case came to trial as directed; and on the 28th January judgment was given in favor of the defendant therein, dismissing the petition, with costs, thus determining that at the time of the commencement of the proceedings, on 2d August, 1888, the landlord was not entitled to possession. The claim of the tenant was that his tenancy did not expire until May 1, 1889. The tenant did not re-enter, but commenced this action on March 1, 1889.

In the trial under review, it was shown on the part of the plaintiff that his household goods were considerably damaged at the time of their removal by the officer with the aid of the defendant or her agent. It was also shown that there was then in the garden on the premises a crop of potatoes and of corn of some value, and also pear trees upon which there was fruit in considerable quantity, and evidence was given as to their value. At the close of the plaintiff's case, it was held by the court that the recovery must be limited to the actual injury by the acts of the defendant to the personal property of the plaintiff, and that plaintiff could not recover damages occasioned by the removal, nor for the loss of the possession, of the property, nor for any fruit growing on the premises, nor any of the garden crops. The plaintiff duly excepted. It was assumed that, before the order was made for restitution, the crops and the fruit had been used or disposed of by the defendant. The theory of the court seems to have been that the plaintiff, by reason of his default, was estopped from claiming any damages occasioned by the removal. Assuming that this may be so, so far as any inconvenience may have arisen by the act of removal, or any expense may have been incurred in the removal, of his goods, after the dispossession or in obtaining another dwelling, I fail to see how it should apply to any loss the plaintiff may have sustained in being deprived unlawfully of the use of the property, and in being prevented from gathering crops that he was entitled to have. If the use of the premises, including the crops and fruit that he might have gathered, from the time he was put out to the time restitution was ordered, was of material value over and above the rent he would have been obliged to pay, I see no good reason why the defendant should have the benefit of it. No point was made as to the rule of damages in such a case. The ruling denied any right of recovery at all on that basis. It was not claimed that the plaintiff was in default in the payment of rent.

But it is suggested that there was no reversal, within the meaning of section 2263 of the Code of Civil Procedure, which provides for the recovery of damages by the person dispossessed. There was, in form, a reversal. The adjudication was wiped out, and it was afterwards, in fact, finally determined that the landlord was wrong. In *Hayden v. Sewing-Machine Co.*, 54 N. Y. 221, it was held that the ground of reversal in such a proceeding was immaterial. Nor did the failure of the plaintiff to re-enter deprive him of the right to recover for any loss that he had suffered up to the time that restitution was ordered.

I think the court erred in restricting the right of recovery to the injuries to the goods in the removal. The plaintiff was also entitled to recover for his loss in the use of the premises from the time he was dispossessed to the time restitution was ordered, and, as elements in the loss, the value of the crops and fruit should have been considered. By reason of the error above stated, there should be a new trial. Judgment and order reversed on the exceptions, and new trial ordered; costs to abide the event.

HARDIN, P. J., and MARTIN, J., concur.

WEEKS v. MARTIN.

*(Supreme Court, General Term, Fourth Department. July 1, 1890.)***1. DEED—DESCRIPTION—INDEFINITENESS.**

A deed describing the granted premises as "subdivision of lot No. 4 of division No. 16," etc., followed by the total number of acres contained in lot 4, and then excepting land previously sold, is not void for indefiniteness, though lot 4 was never subdivided, as it evinces a clear intent to convey the balance of whatever land the grantor owned in lot 4; and the deed will be construed as though the word "of" after the word "subdivision" had been omitted.

2. STATUTE OF FRAUDS—LOCATION OF BOUNDARY LINE.

Where a vendee of land in possession under his contract of sale becomes dissatisfied with the quantity of land embraced in his contract, a readjustment of the boundary line between himself and his vendor, whereby he is to become the owner of an additional six acres, and a parol agreement that the line so fixed shall be considered as the true boundary, is not a location of a disputed boundary line, but a parol agreement to sell additional land, and is void under the statute of frauds.

3. ADVERSE POSSESSION—TITLE FOUNDED ON WRITTEN INSTRUMENT—WILD LANDS.

The fact that the vendee occasionally cut timber on the additional six acres, which were uninclosed and unimproved, does not give him title by adverse possession, under Code Civil Proc. N. Y. § 370, which provides that the use of uninclosed land for the supply of fuel or of fencing timber is sufficient to constitute adverse possession by one claiming title "founded on a written instrument;" the vendee's written contract not covering the six acres.

4. REPLEVIN—WHEN LIES—CONSTRUCTIVE POSSESSION.

The owner of the legal title to uninclosed and unimproved land is in constructive possession, and may maintain replevin for timber wrongfully cut thereon.

Appeal from circuit court, Delaware county.

Replevin by Samuel H. Weeks against William Martin, for a lot of logs. The court directed a verdict in plaintiff's favor for the possession of 40,000 feet of logs valued at \$240, and for \$22.40 damages for detention. From a judgment thereon defendant appeals.

Code Civil Proc. N. Y. § 370, provides: "For the purpose of constituting an adverse possession, by a person claiming a title, founded upon a written instrument, * * * land is deemed to have been possessed and occupied in either of the following cases: * * * (3) Where, although not inclosed, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry, or for the ordinary use of the occupant."

Argued before HARDIN, P. J., and MERWIN, J.

W. H. Johnson, for appellant. *W. F. White*, for respondent.

MERWIN, J. The litigation in this case is over the ownership of the real estate upon which the logs in controversy were cut. Both parties claim under Micah White, who, by deed dated April 10, 1846, acquired title to about 1,775 acres in the town of Hancock, Delaware county, being all of subdivision lot No. 4 of division No. 16, in great lot No. 35, of the Hardenburgh patent, except a piece previously sold from the westerly end and a piece of about 25 acres on the easterly end. On the 3d September, 1851, White deeded to Ira and Hiram Gregory about 200 acres off from the easterly side of his purchase, and running through from the southerly line of lot No. 4 to its northerly line. On the 18th December, 1846, White gave to James H. Sutton a written contract for about 400 acres. This lay westerly of the Gregory purchase, and extended from the southerly to the northerly line of the lot. The easterly boundary of the Sutton purchase, as described in the contract, and the westerly boundary of the Gregory purchase, as described in the deed, were identical for about half the way across the lot commencing at the southern line. The lines then diverged, the Gregory line going north, and the Sutton line going north, 25 degrees west, and each running to the north line of the lot. This left a gore bounded on the north by the lot line, on the easterly by the Gregory line, and on the westerly by the Sutton line, and containing about 35 acres. Upon the westerly part of this gore the logs in question were cut.

The deed under the Sutton contract was given by White to Sutton on August 9, 1878, and the easterly line is there described the same as in the contract. Sutton, on the 18th August, 1878, gave to Polly Martin a mortgage on the premises conveyed to him, and this was afterwards foreclosed, and the defendant became the purchaser on the 25th November, 1878. On the 18th November, 1855, Micah White executed to Daniel S. Weeks, Samuel H. Weeks, and George Weeks a warranty deed of premises, described as follows: "All that piece or parcel of land bounded and described as follows: Subdivision of lot No. 4 of div. No. 16, in great lot No. 35, of Hardenburgh patent, said lot No. 4 formerly containing about nineteen hundred acres, excepting therefrom piece of land sold from westerly end, and about 25 acres sold from easterly end, and 50 acres heretofore in possession of Stephen Husted, and 400 acres, more or less, deeded to James H. Sutton and Charles G. Sutton, formerly contracted to James H. Sutton, and 200 acres, more or less, deeded to Ira B. Gregory and Hiram H. Gregory, which was contracted to Abel Gregory." Under this deed the plaintiff, having duly acquired the rights of the other grantees, now claims to be the owner of the gore referred to. Upon the trial the cutting of the logs by the defendant, and the value, were admitted. At the close of the evidence the defendant asked for a nonsuit upon the grounds (1) that the plaintiff had shown no title to the lands upon which the timber was cut; and (2) that he had shown no possession in himself, and that an action in replevin could not be maintained unless the plaintiff was in possession. This motion was denied, and the defendant excepted. The defendant then requested to go to the jury on the question as to whether, between Micah White and James H. Sutton, there was not a practical location of the boundary line at a certain locality which would make the *locus in quo* a part of the Sutton purchase. This request was denied, and an exception taken.

It was conceded at the trial that if the descriptions in the deeds to Gregory and to Sutton were followed, the premises in dispute would not be included in either. That being so, the paper title of the plaintiff, under the subsequent deeds, became complete, unless there is some force in the point now made by the defendant that the deed to Weeks in 1855 was so indefinite in its description as not to operate to convey what had not been previously deeded or contracted as therein specified. Whatever indefiniteness there is arises from the use of the word "or" after the word "subdivision." The same form of expression is used in the deed to White in 1846; that deed, however, containing further provisions, which placed the intent beyond question to convey the whole lot except as therein stated. There were no subdivisions of No. 4, except as made in the sales, that are expressly excepted in the deed. The total amount in No. 4 is stated, and then the exceptions are stated. Taking the whole description together, the intent is clear to convey the balance of whatever the grantor owned in that lot. The deed should be construed the same as if the word "or" after "subdivision" was omitted. The extraneous circumstances were admissible on the question of construction. *Thayer v. Pin-ton*, 108 N. Y. 399, 15 N. E. Rep. 615.

It is further claimed by the defendant that he had the right to go to the jury on the question of practical location. It appears that prior to the making of the Sutton contract in 1846 the parties went upon the premises with a surveyor, and made a survey as incorporated in the contract. There is evidence from which it might be found that in August, 1851, and before the deed to Gregory, White, Sutton, and Gregory went upon the premises, and marked out a line which, instead of following the last course in the contract to the north line of lot No. 4, followed the high lands in a more direct and northerly course to the north line, and that it was there verbally agreed that Sutton's easterly line should be such new line; that afterwards Sutton occasionally cut timber upon his side up to this new line until his death, about 1878. The deed in 1878, to Sutton, did not follow the new line, but followed v.10N.Y.&no.6—42

the contract. The defendant testifies that after he purchased in 1878 he did nothing upon this part of the premises until 1880, when he cut some timber that had blown down, and after that he cut nothing until the logs in question were cut. These were cut westerly of the line as run in 1851, so that if that is to be deemed the correct easterly line of Sutton and the defendant, then the plaintiff is not the owner of the logs. It is quite apparent from the record before us that the parties, in 1851, were not in the act of locating the line as run in the contract. There was no doubt where that went. But Sutton claimed that the line in the contract did not give him all the land he wanted; did not take him far enough up on the hill. Thereupon a change was made by parol which, if carried out, would give Sutton about six acres more, and place his line at or near the top of the hill. It was not, therefore, a case of locating a disputed boundary, but a parol agreement to sell further land, and designating the line. It was void by the statute of frauds. *Vosburgh v. Teator*, 32 N. Y. 568. In that case it is said "that parol agreements to change or establish boundary lines, where there is no dispute or uncertainty, are within the statute of frauds, which require a writing to pass title, thus distinguishing between cases where the line is disputed or uncertain, and those which are not so, the former being binding upon the parties, the latter not."

In the present case no such possession was taken as would furnish a basis for adverse possession. Code Civil Proc. § 370 *et seq.* It was not inclosed or improved or cultivated, and was not founded on a written instrument, as the contract did not cover it. *Pope v. Hanmer*, 74 N. Y. 240. When the deed came to be given and accepted, in 1873, the description in the contract was followed, thus apparently disregarding and abandoning any parol agreement that may have been made to the contrary. We think the court did not err in declining to submit the question of practical location to the jury. Assuming it was so located, it did not give title to Sutton or the defendant. There is no question of estoppel in the case. The defendant offered to show by a witness that in the year 1847 he heard a conversation between Micah White and Sutton, whereby it was agreed that the boundary line between the lot occupied by Sutton and the lot known as the "Gregory lot" should be on the height of ground as it was run up to the north line of lot No. 4. This, being objected to, was excluded. If the views above stated in regard to similar and stronger evidence on the subject of practical location are correct, then it follows that this ruling was correct. It is further suggested that the plaintiff had not such a possession of the real estate as would authorize him to maintain replevin for the logs. Having the title, he had constructive possession, and that was sufficient, (*Johnson v. Elwood*, 58 N. Y. 433,) in view of the fact that the acts of defendant were not of such a character as to furnish a basis for adverse possession. There is no other question that calls for consideration. It follows that the judgment should be affirmed. Judgment affirmed, with costs.

COLLINS v. MANNING *et al.*

(*Supreme Court, General Term, First Department. July 13, 1890.*)

MALICIOUS PROSECUTION—PROBABLE CAUSE—PROVINCE OF JURY.

In an action for malicious prosecution and arrest, where different inferences might fairly be drawn from the facts in proof as to the existence or want of probable cause for the arrest and prosecution, that question should be left to the jury.

Appeal from circuit court, New York county.

Action by Michael Collins against Thomas Manning and Orvain Hughes for malicious prosecution and arrest. Judgment for plaintiff, and defendants appeal.

Argued before VAN BRUNT, P. J., and BARTLETT, J.

William C. Beecher, for appellants. *William M. Mullen*, for respondent.

BARTLETT, J. This is the second appeal in this case. The facts are sufficiently stated in the opinion of the general term delivered in deciding the previous appeal, (1 N. Y. St. Rep. 193.) On the first trial the complaint was dismissed, and the plaintiff appealed, and procured a reversal of the judgment. On the second trial, which now comes up for review, the plaintiff recovered a judgment of \$1,000 damages, and the defendants have appealed. I think their appeal must prevail, because the trial judge took the question of probable cause away from the jury, and decided it himself as a question of law. In a suit for malicious prosecution, where the facts are undisputed, and admit of only one inference as to the existence of probable cause for the action of the prosecutor, the question is a question of law, to be determined by the court; but it becomes a question of fact, to be passed upon by the jury, when the facts are in dispute, or when, even though there may be no dispute as to the facts, they will reasonably sustain different inferences, leading some minds to the conclusion that there was, and others to the conclusion that there was not, probable cause for instituting the prosecution which is the subject of complaint. *Heyne v. Blair*, 62 N. Y. 19. In the case cited it is declared to be "pre-eminently a question for the judgment of 12 men to determine what, upon a doubtful state of facts, or upon facts from which different men would draw different conclusions,—that is, upon facts capable of different inferences,—would be the belief and action of men of ordinary caution and prudence." In the case at bar, an examination of the evidence leaves no doubt that different inferences as to the existence or want of probable cause might fairly be drawn from the facts in proof, and hence that question as well as the question of malice should have been left to the jury. And such was the view taken by this court upon the first appeal. Complaint is made of three separate arrests. It is unnecessary to consider the first arrest, as the court held that there could be no recovery so far as that was concerned. As to the second arrest, it is true that Mr. Justice DANIELS said on the former appeal that the arrest and detention of the plaintiff were without any legal foundation; but he added that there was sufficient evidence in regard thereto to require the case to be submitted to the jury, thereby indicating that he did not mean to hold that the question of probable cause was to be decided as matter of law. And in reference to the third arrest he said: "Upon this part of the case the evidence was such as to require that it should be submitted to the jury, for, if they should find that this arrest and prosecution of the plaintiff was without reasonable or probable cause and maliciously made, he would be entitled to recover the damages thereby sustained by him." 1 N. Y. St. Rep. 193. Here was the clearest declaration that the question of probable cause in this very case was a question for the jury. Because it was not left to the jury the judgment must be reversed and a new trial ordered, with costs to the appellants to abide the event.

EQUITABLE LIFE ASSUR. SOC. OF THE U. S. v. OLYPHANT et al.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

MORTGAGES—FORECLOSURE—TAXABLE COSTS.

The sum paid to a lawyers' title insurance company by plaintiff, for searches made in action for the foreclosure of a mortgage, is not a legal disbursement, taxable as costs in the suit.

Appeal from special term, Westchester county.

Action for the foreclosure of a mortgage by the Equitable Life Assurance Society of the United States against Robert M. Olyphant and others. Plaintiff's motion, to require the county clerk of Westchester county to tax as costs the sum paid to the Lawyers' Title Insurance Company for searches in the action, was denied. Plaintiff appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Henry Day, (George Waddington, of counsel,) for appellant. *Martin J. Keogh*, for respondent, the county clerk.

DYKMAN, J. This is an appeal from an order denying the motion of the plaintiff to require the county clerk of Westchester county to allow the sum of \$23.40 paid to the Lawyers' Title Insurance Company for searches in this action. The action is for the foreclosure of a mortgage, and the clerk refused to tax the sum paid for searches because they were not official, and the special term affirmed the taxation. No charges can be taxed for disbursements, except such as are legal and necessary. If a lawyer hires a private individual to make a search for him, the amount paid him would not be a legal disbursement. But if the lawyer obtains an official search the case is different. This Lawyers' Title Insurance Company seems to be organized for the purpose of making searches respecting the title to real property, and holds itself out for employment by all persons, but it sustains no official position, and its searches have no official force or effect. So the money paid to such company for search stands in the same light as money paid to a private individual. We concur in the view taken at the special term, and the order appealed from should be affirmed, with \$10 costs and disbursements.

EBERLIN v. PALMER.

(*Supreme Court, General Term, First Department. July 18, 1890.*)

PAYMENT—APPLICATION.

Plaintiff's assignor was a stock-broker, and indebted to defendant, his mother, to whom he had given a policy of life insurance as collateral security. In an action to recover the policy, the question involved was the amount of the indebtedness still unpaid. Assignor's books contained two accounts, with entries in reference to his indebtedness to defendant,—one an account of the principal; the other an interest account, in which were entered every month the amounts of interest paid or credited to his creditors. The interest account showed, and defendant admitted, that assignor paid defendant a certain amount every month, for several years, which was in excess of the interest due her. These payments were not referred to in the account of the principal debt. Held, that the payments were not intended to and did not apply to any extent on the principal debt.

Appeal from special term, New York county.

Action by Charles Eberlin, as assignee of George H. Palmer, against Ann Palmer. From a judgment for defendant, plaintiff appeals.

Argued before VAN BRUNT, P. J., and BARTLETT, J.

James L. Bishop, for appellant. *Maclay & Forrest*, for respondent.

BARTLETT, J. This action arose out of an indebtedness from George H. Palmer, the plaintiff's assignor, to the respondent, Ann Palmer, his mother; and the question litigated upon the trial was whether the amount of such indebtedness, for which the defendant was entitled to hold a certain life insurance policy as collateral security, was \$16,500, as the defendant claimed, or only \$12,500, as claimed by the plaintiff. The determination of this question depended upon the view which should be taken of the proof in regard to certain payments made by George H. Palmer, during his life-time, to his mother. Mr. Palmer was a stock-broker. In his books there were two accounts, containing entries in reference to his indebtedness to the defendant. One of them was an account of the principal. The other was a monthly interest account in which there was entered every month the amount of interest paid or credited to any person whose money he had. From 1881 to 1885 he paid by check to the order of his mother about \$162 a month, and caused these payments to be entered in the interest account. They are not referred to, however, in any manner in the account of the principal. After September, 1885, down to the time of Mr. Palmer's assignment in August, 1886, these payments were

reduced to \$100 a month. The claim of the plaintiff is that the monthly payments of \$162 were payments in excess of interest, and that the excess should be applied to reduce the amount of defendant's claim for principal. The trial court held that these payments were not established by competent or sufficient evidence, and that, even if they were, the excess was intended, not as a payment of interest, but as a filial contribution to the mother's comfort. So far as proof of the payments is concerned, we think the learned judge must have overlooked the testimony of the defendant herself, who, when examined in her own behalf, expressly admitted that her son paid her \$162 a month, from September, 1880, until 1885, saying: "Yes, sir; he paid that. That amount was a little more, of course, than the interest due me would have amounted to." We agree with the court below, however, that there is a preponderance of evidence against the proposition that these payments were made to any extent on account of the principal debt due to the defendant from her son. The learned counsel for the appellant argues that the presumption is against the view that the excess was a mere gratuity, inasmuch as the law will not suffer one to be generous before he is just, and where there is an indebtedness will presume that a payment is made in discharge of such indebtedness, rather than as a gift. But, even if we start with these presumptions in the present case, they are overcome by the evidence, which is clear and distinct, to the effect that Mr. Palmer did not intend to pay, or suppose he was paying, anything more on account of the debt to his mother than the interest thereon. It would be unreasonable to hold that he would have omitted all reference in his books to any payment tending to reduce the principal, if the payment was made for that purpose, when his books contained an account especially devoted to the transactions relating to that principal. Indeed, it seems to us that the books of the assignor, upon which the plaintiff relies, furnish the most cogent proof against him. They really afford the only light we have as to the intention of the plaintiff's assignor in making the payments in question, and by expressing such payments to be made for interest they negative the idea that he meant by making the same to reduce his mother's claim against him on account of the principal debt. We think the judgment was right, and should be affirmed.

In re GALL.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

MARRIAGE—WHEN CONSUMMATED.

A testator, shortly after his wife's death, commenced cohabitation with his female servant, and subsequently he bought a house, and placed her there, to live with other members of her family. He visited her there, and treated her as his wife in that locality for several years, and for a few months before his death he lived at the house with her as his wife. After the illicit intercourse, but prior to the purchase of the house in which the woman was installed as wife, the testator executed a will, leaving her a legacy as his "servant." In an action for dower after his death, a jury found that he had married the woman at some indefinite time after the commencement of the illicit intercourse. *Held*, that the marriage occurred subsequently to the execution of the will, which was consequently revoked.

Appeal from surrogate's court, Kings county.

Petition by James T. Law for the probate of the last will of Joseph Gall. The probate was resisted by Amelia Gall and others, and the surrogate refused to probate the will. Petitioner appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Geo. B. Morris, (*Edwin More*, of counsel,) for appellant. *A. Sims, Jr.*, for respondents.

DYKMAN, J. This is an appeal from a decree of the surrogate of Kings county refusing probate to the last will and testament of Joseph Gall, deceased, because he was married, and had issue of such marriage, subsequent to the

making of his will. There is not a disputed fact in the case, and the statute accomplishes the revocation and nullification of the will, if the marriage and birth of a child were subsequent to its execution. The time of birth of the child is undisputed, and therefore the only thing for our determination is the time of the marriage of the testator, and that question depends upon inferences to be drawn from undisputed facts, which are substantially as follows: Joseph Gall, the testator, lived in Rutherford park, in the city of New York, and his wife died there on the 16th day of February, 1883. At that time he had a domestic servant, who lived in his family, by the name of Amelia Steeb, and after that she became his housekeeper. He commenced cohabitation with her soon after the death of his wife, and she became pregnant in May, 1883. When her condition was ascertained, he broke up his household in Rutherford park, and hired rooms for Amelia in Tenth street, in New York city, and went himself to reside at the Westminster Hotel. That was in January, 1884, and he never lived in Tenth street. Amelia's child was born on the 29th day of February, 1884, and Gall employed the physician to attend her, and paid him for his services. In April, 1884, Gall bought a house and lot in Lafayette avenue, Brooklyn, and Amelia, with some members of her family and her child, left Tenth street, and went there to reside the last of April, 1884. Gall sailed for Europe on the 1st day of May, 1884, and returned in July following, and went to the Westminster Hotel to reside, and remained there until March, 1886, when he went to Brooklyn, and lived with Amelia as her husband until his death, in the month of May, following. About two months after his death, on the 8th day of July, 1886, Amelia gave birth to another child. From July, 1884, to the time of his removal from the Westminster Hotel, in March, 1886, Gall visited Amelia in Brooklyn several times a week, and in the locality where she lived he treated her as his wife. In his codicil, which was executed April 28, 1884, after the birth of the first child, he uses this language: "(2) I give and bequeath to Amelia Steeb, a former servant of my late wife, the sum of one thousand dollars. (3) I give and bequeath to the child of said Amelia, Betsey A. Gall, now of the age of two months, the sum of five thousand dollars." About a week before Gall sailed for Europe, the 1st day of May, 1884, his partner, Charles Lambkie, importuned him to make some provision for Amelia and her child, and he simply said he would do something. This is an extract from his testimony: "*Question.* Now, at the time when the codicil was spoken about, did he give you any reason why he wouldn't marry Amelia? *Answer.* Well, of course, he related to her social standing, and his social standing. This was on the 23d or 24th of April, when I went down with him about the codicil. He mentioned the ignorance of the person; he said his social standing would not admit of a marriage; that is, contracting a marriage at that time." After the death of Gall, Amelia commenced an action for the recovery of dower in his estate, and obtained a judgment, which was affirmed in the supreme court and court of appeals. 114 N. Y. 109, 21 N. E. Rep. 106. The jury in that action found that Gall and Amelia intermarried between the month of February, 1883, and the death of Gall, and found a general verdict in favor of the plaintiff, but the time of such marriage was not fixed. The facts already recited are sufficient to enable us to determine the character of the association of these parties at both ends of the line of their intercourse. At the first their relations were licentious, and at the last they were matrimonial; and we are required to find the time when the latter commenced, or, rather, to find whether they were married when the codicil was executed; for, if we find their relations illicit at that time, then the marriage was consummated later, and the codicil and the will fall together before the statute, which executes itself and revokes them both. There was no proof in the case either of a ceremonial marriage or an actual marriage contract between these parties, and such a contract can only be implied from the facts and circumstances disclosed by

the evidence; and the presumption furnished by the licentious character of the intercourse between these parties in its commencement, supplemented by the natural and legitimate deduction from the evidence already recited, renders it impossible to infer a marriage contract between them earlier than July, 1884, after the return of Gall from Europe. Prior to that time there was nothing in his conduct or conversation to indicate anything but the existence of concubinage between him and Amelia. His conversations with his physician, his designation of Amelia in his codicil as a former servant of his wife, his declaration to his partner at the same time that the difference between the social position of himself and Amelia was too wide to admit of a marriage between them, are all absolutely inconsistent with the existence of a matrimonial contract between them at the time of the execution of his codicil and his departure for Europe. The testimony of the mother of Amelia has not been overlooked, but if Gall ever had such a conversation with her in 1883, as she details, it was the language of pacification, and not of truth, and her evidence is so at war with all the conceded facts that it is entitled to no weight in the case. There is sufficient evidence to justify the inference of a marriage contract between the parties after July, 1884, but not before that time; and our conclusion is that the marriage and birth of the last child were subsequent to the execution of the will and codicil, and that both stand revoked by virtue of the statute. The decree of the surrogate should therefore be affirmed, with costs to be paid from the estate.

UNITED STATES LIFE INS. CO. v. OSWEGO CANAL CO.

(*Supreme Court, General Term, Fourth Department. July 1, 1890.*)

1. **ESTOPPEL—IN PAIS—LACHES.**

A land-owner, whose building was erected over and partially supported by stone piers placed in a canal used for hydraulic purposes, entered into a written contract with the canal company, wherein he agreed to remove the piers within a year and substitute iron columns, so as not materially to obstruct the flow of the water. The canal company, in return, agreed that these iron columns should remain in the canal as long as the building stood. *Held*, that the land-owner's violation of his agreement in permitting the piers to remain for several years, until they had become so dilapidated as to render his building insecure, did not justify the canal company, which had acquiesced in the delay, in its refusal to shut off the water from the canal for a sufficient time to enable the land-owner to make the alterations provided for in the agreement; the removal of the water being necessary to make the repairs.

2. **SAME.**

The fact that the water had all been drawn from the canal some months previous to the land-owner's discovery of the dilapidated condition of the piers, and that he had then failed to examine them, and repair the defect, will not justify the company's refusal to turn off the water so as to enable him to make the repairs.

3. **CONTRIBUTORY NEGLIGENCE—LOSS OF RENTS.**

The land-owner will not be permitted to recover for his inability to rent the building on account of its insecurity resulting from the defective condition of the piers, though he requested the company to turn off the water so as to enable him to make the repairs, and notified it that he would hold it responsible for loss of rents, as his own failure to comply with his agreement, and his neglect to repair the piers when he had the opportunity, contributed to his loss.

4. **EQUITY—NECESSARY PARTIES.**

The lessees of water from the canal company, who have the privilege of drawing a specific quantity of water from the canal at a fixed yearly rent, are not necessary parties to an action brought by the land-owner against the canal company to compel it to turn off the water, as they are represented by the company, which has the title to and control of the canal as a whole.

Appeal from judgment on report of referee.

Action by the United States Life Insurance Company in the city of New York against the Oswego Canal Company to compel defendant to remove the water from its canal so as to enable plaintiff to repair certain stone piers on which rested a building owned by plaintiff. The referee reported in plaintiff's

favor, and from a judgment entered thereon in Oswego county defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Rhodes, Coon & Higgins, for appellant. *O. P. Buel*, for respondent.

MERWIN, J. The plaintiff claims to be the owner of a lot on the south side of Bridge street, in East Oswego, upon which is a building called the "Hungerford Block." Under this building and across the lot the canal of defendant passes. One of the supports of plaintiff's building is a wall along the center of the canal. This wall is becoming dilapidated so as to render the building insecure, and this action is brought to compel the defendant to turn the water out of its canal a sufficient length of time to enable the plaintiff to repair the wall, and to recover damages through loss of rent occasioned, as it is claimed, by the refusal of the defendant, on the 21st December, 1888, to accede to the demand of plaintiff that the water be turned off. The defendant is a corporation, created by chapter 241 of the Laws of 1823, passed April 23, 1823. By section 5 of that act it was provided that the directors of the company "shall have power to explore and designate the route of a canal or mill feeder; and a proportion of the waters of the Oswego river may be taken and conducted out of said river, at or above the Oswego rapid, so called, at such point or place, and in such manner, as may be deemed proper, so that the water can thereby be carried down upon the east side and bank of said river, to such point or place as may be required by those interested therein," the route designated and the manner of making the canal to be determined upon by an engineer who shall be appointed by and be under the direction of the canal commissioners. By section 6 the corporation had power "to enter upon and take possession of such improved or unimproved lands, not exceeding four rods in width, as shall be necessary for the making of the canal or mill feeder aforesaid, and the works thereunto appertaining," and provision was made for payment of damages to the owners of any property that was so taken. Upon the completion of the canal the company was authorized "to sell, let, or grant and convey, for a limited time, the use of the water which shall be conveyed in said canal, for mills or other hydraulic purposes, to any person or persons owning and occupying lands adjoining thereto, at such price or prices as may be agreed upon by the parties interested." By section 10, it was provided that, if any time thereafter it became necessary to adopt the said canal as a part of the contemplated improvement between Lake Ontario and the Erie canal, "the canal commissioners shall at all times have full power, in behalf of the state, to enter upon and make all necessary alterations that by them shall be deemed advisable, to take and make use of the waters therefrom for the use and purposes of filling and supplying all locks that may be constructed to connect the said canal with Lake Ontario; and the said canal shall thereafter become the property of this state, without any payment or compensation whatever to said company: provided, however, that the right to all the surplus waters of said canal shall be vested in the company hereby incorporated, and all persons legally claiming under them; and that they shall be permitted to take, make use of, and enjoy the surplus waters of said canal, not necessary for filling or supplying the locks that may be erected by the said canal commissioners." The defendant, under this act, commenced in 1824 the construction of its canal along the easterly bank of the Oswego river, but before its completion across the plaintiff's lot, and in the same year, the state adopted and took possession of it as a part of the canal system of the state, and thereupon it became the property of the state, except the rights to surplus water as reserved in the act. The state made some alterations, and continued to use it as a canal for the passage of boats from its completion in or about the year 1825 until the completion by the state of a new and enlarged canal in or about the year 1858, when its use as a canal was discontinued. In the

mean time the defendant had made use of the surplus water, giving leases to various parties, and resumed the full control of the canal when it was abandoned by the state. On the 25th February, 1823, the surveyor general of the state gave a certificate of sale to Theophilus S. Morgan of lot 19, in the village of East Oswego, block 99. The lot of plaintiff is part of lot 19. On the 22d December, 1828, letters patent were issued to Morgan of lot 19, which were recorded March 26, 1834. Lucius B. Crocker became the owner prior to May 1, 1849, and he, at that date, conveyed to Jesse Bennett, and Bennett, on the 4th December, 1852, conveyed to Hiram Allen. Each of their deeds contained the clause "subject to the rights of the Oswego Canal Company, and the rights of the state." In 1854 Allen erected the building in question. The canal runs in a northerly direction through and across the lot and under the building, and extends nearly the entire width of the lot, the east foundation wall of the building being on the east line of the canal, and the west foundation wall of the building being at the south end, substantially identical with the west wall of the canal, and at the northerly end some feet west of the west wall of the canal. The building is supported partly by the side foundation walls, and partly by a stone wall placed nearly in the center of said canal, and partly by two rows of iron posts, four on each side, resting on stone piers in the canal between the side and central walls. Soon after it was built portions of the central wall were cut out, and four piers formed for the support of the center of the building.

In 1871 William W. Pulver, through whom plaintiff derives his title, made an agreement with the defendant in regard to the matters here in controversy. This agreement was under seal, and was duly acknowledged and recorded, and both parties now claim advantages under it. Prior to the execution of this agreement, Pulver had become the owner of the title of Allen. On the 28th February, 1871, the canal board, by resolution passed pursuant to chapter 267 of the Laws of 1857, determined and declared the canal lands in question abandoned, and afterwards, in the same year, and before the agreement above referred to, all the interest of the state in plaintiff's lot was quitclaimed to Pulver's grantor, so far as it could be done consistent with the act of 1857, which provided that, when any of such abandoned canal lands were then used for a hydraulic canal, the conveyance should not prevent the future use of the land for the same purpose, but should expressly reserve the right to continue such hydraulic canal. This agreement bears date July 31, 1871, and, after describing the defendant as party of the first part, and Pulver as party of the second part, proceeded as follows: "Whereas the party of the first part have and own a hydraulic canal on the easterly side of the Oswego river which crosses lot number nineteen, in block ninety-nine, in the Fourth ward of said city, and whereas the party of the second part is the owner of a building known as 'Hungerford Block,' which is erected over the said canal where it crosses said lot, which building is supported by stone walls on the easterly and westerly sides of said canal, and by stone piers or central walls and iron columns placed in said canal, and whereas the parties hereto desire that their respective rights be clearly and specifically defined, to the end that all contention and controversy may be avoided: Therefore it is hereby mutually agreed by and between the parties hereto, their successors, heirs, and assigns, that the said party of the second part is or claims to be the owner of the fee-simple of that portion of said lot crossed by said building, and that the party of the first part has a right of easement across said lot for the purposes and uses specified in its charter, and to have and maintain its canal free from obstruction, and has the right to enter into and upon the same for the purpose of improving or repairing said canal so as to render it most available for hydraulic purposes during its legal existence, and that the party of the second part has the right to keep and maintain the building aforesaid over the said canal, and to erect another building in its stead in case of the destruction or removal of the one

now standing, and the said company consents, so far as its own rights are concerned, that the said iron columns and any others that may be substituted to replace the piers and central walls aforesaid may remain as supports to said building so long as it stands, and that the said piers and central walls may remain until they are replaced by iron columns, not to exceed one year from the second day of October, one thousand eight hundred and seventy-one; and that, whenever another building is erected in its place and stead, it shall be supported by a stone wall on the easterly and westerly sides of said canal, and the present iron columns, and the iron columns replacing the central stone wall in said canal shall be removed, and the building shall be supported by iron or other trusses extending from the said walls over the canal so as to sustain and support said building, and that the said iron trusses shall be so erected, placed, and situated as to cause no material obstructions to the flow or passage of water through said canal. And the party of the second part, for himself, his heirs, and assigns, covenants and agrees that they will remove all rubbish, debris, and obstructions from said canal, caused by the falling or burning of said building over said canal, or by any materials falling or thrown from said building, without any unnecessary delay; to pay to said party of the first part the expenses of such removal if done by said company; and that they will suffer no unnecessary obstructions to be occasioned by said building, except said columns, central walls, and piers to remain in said canal as aforesaid." After the execution of the agreement the matter, as between the parties, seems to have rested until 1888. The plaintiff became owner August 31, 1878, and its title from Pulver through intermediate deeds is in terms made subject to the rights of the Oswego Canal Company. On the 21st December, 1888, the plaintiff served on the defendant a written notice stating that the building was in a dangerous condition, "owing to the weakening and partial removal of the supports of said building, due to the action of the water of your canal," and that it desired "to make the necessary repairs to the supports of said buildings;" and requesting that the water be emptied from the canal so that such repairs might be made, notifying the company that if it was not done the plaintiff would hold it responsible for all damages caused to the plaintiff either by reason of its inability to rent the premises on account of the unsafe condition, or by reason of the falling of the building. To this request the defendant did not yield, but in its reply, on December 21, 1888, claimed that the plaintiff's building was wrongfully located over the defendant's canal, and that in case it fell into the canal the plaintiff would be held responsible for all damages. Thereupon this action was commenced on July 27, 1889. It was held in the court below that the plaintiff was entitled to maintain its building, "and to support the same by the present side foundation walls and central supports, or to substitute for the latter a single row of iron columns in the center of the said canal;" that it has the right "to repair the same, or to substitute for said central supports a row of iron columns in the center of the said canal, and, for the purpose of doing such work, the plaintiff has the right and is entitled to have the flow of water in the said canal across from the said plaintiff's premises under said building stopped by the said defendant, and the water removed from the said canal for the period of fifteen days, which time should commence upon ten days' previous notice in writing from the plaintiff to the defendant;" that the defendant, by reason of its refusal to remove the water, was liable to the plaintiff for the damages sustained by it for loss of rents from December 21, 1888, to the date of the report, (December 28, 1889,) being the sum of \$1,880.

The first question to be determined arises over the claim of defendant that its lessees of water are necessary parties to the action. They are affected by the stoppage of the water, and therefore it is urged they should be heard before the right of plaintiff to have the water turned off is determined. There are a large number of leases, and they give the right and privilege of taking

and drawing from the canal a certain defined quantity of water, for a long term of years, at a fixed yearly rent; the water to be drawn in flumes or spouts placed and constructed by the lessees in the manner directed by the company. It is also provided that the company "shall have the right at all times, and from time to time, to stop the water above demised, or draw off the water from said canal, for a sufficient length of time to make any necessary repairs or alterations in the canal." We are of the opinion that the lessees were not necessary parties. The defendant in a certain sense represents them, and it has the title and control of the canal as a whole, and any controversy as to such control is properly with the defendant alone.

Is the plaintiff entitled to have the water turned out of the canal to enable it to make the repairs it claims the right to make? In order to determine this question the agreement of 1871 is to be carefully considered. Pulver then was the owner of the fee, but subject to the rights of the defendant. The claim had apparently been made by the defendant or its lessees that the building or its supports was improperly obstructing the flow of the water. In view of this the agreement was made. It provided, among other things, that the canal company had the right "to have and maintain its canal free from obstruction." It also provided that Pulver had the right to keep and maintain his building over the canal, and to erect another in its stead in case of the destruction or removal of the one then standing; and that the iron columns which were then there upon either side of the central piers or walls, and any others that might be substituted to replace such central piers and walls, might remain as long as that building then there should stand; and that such piers and central walls might remain until replaced by iron columns, not to exceed one year from October 2, 1871. Whenever another building should be erected it should be supported by a stone wall on the easterly and westerly sides of the canal, with iron or other trusses extending from such walls over the canal, the trusses to be so situated as to cause no material obstruction to the flow of water, and Pulver agreed for himself and assigns, "that they will suffer no unnecessary obstruction to be occasioned by said building, except said columns, central walls, and piers to remain in said canal as aforesaid." In other words, the company should have the canal free from obstruction, but the stone piers or central walls might remain for a year; then iron columns should be substituted; and these columns, together with the iron columns already there, might remain as long as that building stood; but when another building was erected all the iron columns should come out, and the building be supported by side walls and trusses extending from one to the other, thus leaving the entire passage-way substantially unobstructed. Very evidently the central piers or walls were deemed to be an obstruction, and it became the duty of Pulver, in order to carry out the meaning and object of the agreement, to remove them within the year, having the right to substitute therefor iron columns. The obstruction would be materially reduced, and when a new building was erected the obstruction should be entirely removed in the use of side walls with trusses. The central walls and piers were not removed within the year. They have been allowed to remain, in violation of the agreement, until by the action of the water they have become insecure. This was a result that might have been reasonably expected. It also appears that in the summer of 1888 the state of New York repaired and reconstructed the bulkhead gates leading the water into defendant's canal, and, in order to do so, cut the water off entirely from defendant's canal, so that it was empty and dry for some four weeks in the summer, during which the plaintiff might have repaired the foundations of its block. No steps, however, were taken in that direction. Does the delay of the plaintiff and its predecessors, from 1871, or the failure of plaintiff to embrace the opportunity furnished in the summer of 1888, affect the right of plaintiff, if ever it had the right, to demand of defendant the removal of the water from the canal for a sufficient

length of time to enable the plaintiff to make the proper change in the central supports? In the agreement nothing is said about the manner in which the work shall be done. There is no agreement by the defendant to turn off the water. It is a matter to be determined upon equitable principles. The plaintiff has not a legal right to have it done. If there was no other way to accomplish the result, it would be inferred that this was in contemplation when the result was required. The delay might induce the court to impose conditions, and, in a proper case, might require the payment of damages to parties that might be injured by the temporary loss of water. In the present case there is evidence showing it to be possible, by means of coffer dams, to perform the necessary repairs. Still the referee has found that the removal of the water from the canal is necessary, and that 15 days is a reasonable time in which to do such work. We are not disposed to interfere with this finding. It is quite clear that better work can be done in this way, and that is the better for all parties. Nor should the delay or the failure of plaintiff to do the work when the canal was empty in the summer of 1888 preclude the plaintiff from having the benefit of this assistance on the part of defendant. The delay was, to a certain extent, acquiesced in by defendant. We therefore conclude that, as matter of equitable relief, the plaintiff was entitled to have the water temporarily removed for the purposes authorized in the agreement of 1871.

Does it follow that plaintiff is also entitled to recover the damages awarded for the loss of rents? Concededly the plaintiff is bound by the Pulver agreement. If Pulver had performed that agreement, and removed the central wall and piers within the time specified, and substituted iron columns, there would have been no loss of rents for the cause here complained of. Had the plaintiff examined the wall in the summer of 1888, and ascertained its condition, as it perhaps should be presumed to have done, and repaired it while the water was out, as the referee finds it might have done, there would have been no loss of rents. The plaintiff now seeks to charge the defendant with this loss, because it did not accede to its demand in December following, while, in fact, if it had performed its own duty there would have been no occasion for the demand. If plaintiff's loss is attributable to its own neglect it should not recover it of defendant. In its notice the plaintiff did not refer to the Pulver agreement, or offer to perform its obligations. It claimed the right generally, to repair the supports of its building, thereby inferentially claiming the right to continue its central walls; and the same claim is made in the complaint, and appears in the judgment. If, in its notice, it claimed more than it had a right to, the defendant was not bound to accede to it. On the part of the defendant, it may be said, with some considerable force, that the plaintiff, by reason of its delay and neglect, should compensate the defendant for any loss that may be sustained by turning off the water. Having in view the situation of both parties, the more equitable course is to allow damages to neither party. It follows that the judgment herein should be modified by providing that the plaintiff is not entitled to maintain the present central wall or piers, but is bound to substitute therefor a row of iron columns; and that, in case another building is erected, it shall be supported in the manner specified in the Pulver agreement. The judgment should also be modified by striking therefrom the award of damages. As modified, the judgment should be affirmed without costs.

Judgment modified as stated in the opinion, and, as modified, affirmed without costs to either party; judgment to be settled upon five days' notice before MERWIN, J. All concur.

NATIONAL HUDSON RIVER BANK v. REYNOLDS.

(Supreme Court, General Term, Third Department. July 7, 1890.)

1. NOTES—DEMAND AND NOTICE—WAIVER.

A mortgage was given to secure the payment of all notes of a firm indorsed by the mortgagor, which a bank then held or might hold thereafter. At the maturity of the last of a series of renewals the bank received from the firm by mail their note indorsed by the mortgagor, with a letter stating that it was to take up the one due that day. This was held for the approval of the directors, which was refused. No notice of non-payment was given. It had been the custom of the bank to accept renewal notes which would be applied by the cashier on the day of their receipt in payment of the maturing one. *Held*, the indorsement of the new note justified the bank in believing that the mortgagor knew that the one last discounted would not be paid at maturity, and was a waiver of notice of non-payment.

2. MORTGAGE—BY INDORSER OF NOTE—DEMAND AND NOTICE.

Under a mortgage to secure the payment of all notes, drafts, or engagements of a firm, indorsed by the mortgagor and held or to be held by a bank, it is not necessary, in order to preserve the lien, that notice of the non-payment of a note secured be given so as to charge him as an indorser.

3. RES JUDICATA.

A complaint for foreclosure asked a judgment for any deficiency against an indorser of the note secured by the mortgage, who answered, denying liability. At the trial the plaintiff waived all claim for a personal judgment against her, and the court stated in its findings that her liability was not tried, and dismissed the complaint as to her for any deficiency. *Held*, no bar to an action on another mortgage given by her to secure the same note.

Appeal from circuit court, Columbia county.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Gaul & Esselstyn, (*Smith & Wellington*, of counsel,) for appellant. *O. P. & F. J. Collier*, (*John Cadman*, of counsel,) for respondent.

LEARNED, P. J. This is an action to foreclose a mortgage given by Lucy A. Reynolds, in 1883, to the plaintiff. It was given as security "for any and all indorsements now made by the said Lucy A. Reynolds, or that she may hereafter make, of note or notes, or other paper of * * * R. Reynolds' Son, * * * and which shall be owned or held by said National Hudson River Bank;" and "to be a lien and security to said amount for the payment of any and all notes, drafts, or engagements, indorsed by said Lucy A. Reynolds, now held by said bank, or which may hereafter be held and owned by said bank." R. Reynolds' Son made a note for \$5,000, to the order of Lucy A. Reynolds, dated November 25, 1887, payable in three months, at the National Hudson River Bank. This note had the following indorsement: "I hereby pledge my separate estate, both real and personal, for the payment of this note. LUCY A. REYNOLDS." This was the last in a series of renewals of a note for the same amount held by plaintiff at the time of the execution of the mortgage, similar in form and indorsement to that above described. The note of November 25, 1887, was discounted before it was payable by plaintiff, and was held by plaintiff at maturity. On the morning of February 18, 1888, the date on which said note became payable, there was sent to plaintiff a similar note of that date, of the same amount, with like signature and indorsement. There was also sent with the same about \$48 in money, and a letter from R. Reynolds' Son, in substance stating that the note and checks were to take up the old note due that day. The cashier of the plaintiff held said note subject to the action of the board of directors at their next meeting, which would regularly have been in a week. The next meeting at which there was a quorum was April 7th; and at that meeting the board decided not to accept the renewal note. No notice of non-payment of the note which came due February 28th was given to Lucy A. Reynolds. It had been the custom between the plaintiff and R. Reynolds' Son for plaintiff to accept renewal notes which would be discounted by the cashier on the day of their receipt, and the amount credited to R. Reynolds' Son. The maturing note

would be paid by a check of R. Reynolds' Son, and the note thus paid would be stamped "Paid" by the bank, and given up.

The principal question is whether under the circumstances there was a waiver by Lucy A. Reynolds of notice of non-payment, and whether she became liable on the note due February 28th. The note being payable at plaintiff's counter, and being held by plaintiff at maturity, was duly presented for payment; but it was not paid, and notice of non-payment was not given to the indorser. There is no doubt that an indorser may waive such notice, and may do this without consideration. It is evident that the defendant indorsed the note of February 28th for the purpose of renewing the note due that day. She therefore must have known that the maker would not pay the old note at its maturity; for she provided him with the means of renewing it; and, if paid, it would of course not need to be renewed. As in the case of *Sheldon v. Horton*, 43 N. Y. 98, where the plaintiff told the indorser that the maker wanted the note to remain another year, and the indorser said he was willing, so here, the indorser's willingness that the debt should be extended, or renewed, removed the necessity of notifying the indorser of non-payment. The object of such notice is that the indorser may protect himself from loss; but when he consents to a renewal he evidently knows that the maker will not pay, and can protect himself if he so desires. It is said by the defendant that the bank refused to accept the proposed renewal, and did not notify her of the refusal. It is not the actual extension or renewal which is relied on as a waiver; but the indorser's knowledge that the note would not be paid, and the communication of such knowledge to the bank. In the case last mentioned it did not appear that there was a valid agreement on any consideration between the maker and the holder that the note should be extended; and the case states that it did not appear whether any time had been given the maker. The waiver, therefore, did not rest on a valid extension, but on the act of the indorser, implying knowledge that the note was not to be paid at maturity. We must take the act of defendant in regard to the note in question in connection with similar acts in regard to former renewals of the same liability, and in connection with the mortgage now in suit; and, as said in *Cady v. Bradshaw*, 116 N. Y. 188, 22 N. E. Rep. 371, "it [the waiver] may result from implication and usage, or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended." That case was one where the indorser, when an extension was proposed, said he would let his name remain on the note. See, also, *Leary v. Miller*, 61 N. Y. 490. It may not be safe to assert that Lucy A. Reynolds had any distinct intention of expressing a waiver of the right to have notice of non-payment; but it may well be said that the bank could understand from her act that she knew that the note was not to be paid, and therefore that the bank need not to give her notices of what she knew.

But there is a further view. There are several clauses in the mortgage stating its object. One is as follows: "This mortgage is given and is to remain a good and continuing security to the said National Hudson River Bank, to the amount of \$5,000, and to be a lien and security to said amount for the payment of any and all notes, drafts, or engagements indorsed by said Lucy A. Reynolds, now held by the said bank, or which may hereafter be held or owned by said bank." Here is a clause making this mortgage security for the payment of any notes indorsed by defendant. The mortgage is not simply to secure her liability as indorser, but it is to secure the payment of any notes indorsed by her; and the language includes not only notes and drafts, but "engagements." Now, the word "engagements" is not descriptive of commercial paper, to which alone the peculiar liability of indorsers applies. It is a word which might describe any contract. And if a contract, other than negotiable paper, were held by the bank, and Lucy A. Reynolds had "indorsed" it, the parties to this mortgage could not have expected that such a

contract would be protested. We must therefore take the words "indorsed by the said Lucy A. Reynolds," as merely descriptive of the "notes, drafts, or engagements," the payment of which was secured by the mortgage; and not as limiting the lien of the mortgage to that commercial paper on which she should be legally charged as indorser. There is another clause which speaks of security for indorsements; but that does not limit the clause above cited. If the mortgage had expressed that it was to secure the payment of the \$5,000 note made by R. Reynolds' Son, and then held by the bank, it would not have been necessary, under the mortgage, to give notice of the non-payment, even if Lucy A. Reynolds had been an indorser thereon. So now, the bank has a note indorsed by Lucy A. Reynolds. This mortgage is security for the payment of that note. Its indorsement simply identifies it as one of the notes which the mortgage secures.

The defendant raises a point that there had been a former adjudication in favor of Lucy A. Reynolds, which was a bar to this action. That was a foreclosure action to which she was a party. The mortgage, like this, was to secure notes of R. Reynolds' Son. There was a demand for judgment of deficiency against several defendants, including her. She answered, and denied that she was liable. On the trial the plaintiff waived all claim for deficiency against any party, except Gordon B. Reynolds; and on such waiver the learned judge who tried the case stated in his findings that the liability, or non-liability, of the other defendants was not tried before him, and dismissed the complaint as to them for any deficiency, and Lucy A. Reynolds recovered costs. The defendant urges that the plaintiff in that action should have amended his complaint; that as he did not amend he might have there tried the question of the liability of Lucy A. Reynolds, and is therefore bound by the decision, and cannot now assert her liability. In the view last taken of this case, that judgment is immaterial. Nor do we think that prior decision is an adjudication on the personal liability of Lucy A. Reynolds. The waiver of the plaintiff, set forth in the judge's decision, was equivalent in effect to the amendment of the complaint. The defendant's counsel quotes a sentence from *Pray v. Hegeman*, 98 N. Y. 358; but the following sentence explains the rule: "Whatever is necessarily implied in the former decision is for the purpose of the estoppel deemed to have been actually decided." Neither Lucy A. Reynolds' personal liability, nor her non-liability, was necessarily implied in the former decision. It was not comprehended or involved therein. The foreclosure could, and did, proceed without any decision on that point. The former decision is no bar here. Whether or not, then, the court below in this case found that the alleged claim for deficiency in the former action was based on the note in question is of no consequence.

Judgment affirmed, with costs.

LONDON, J., concurs. MAYHAM, J., not acting.

HINZ v. STARIN.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

CONTRIBUTORY NEGLIGENCE—INJURIES AT BATHING PLACE.

Plaintiff's intestate, while diving from a trapeze on defendant's beach, struck his head against a rock under the water, and was killed. The deceased had been sitting for about two hours in full view of the bathing place, while the water was filled with bathers, many of whom were wading in the water, which was not more than 8½ feet deep. The trapeze was about 15 feet high. *Held*, that deceased was negligent, and the complaint was properly dismissed. Following 8 N. Y. Supp. 290.

Appeal from special term.

At the conclusion of the testimony the court below dismissed the complaint, from which plaintiff appeals. For former reports, see 8 N. Y. Supp. 290, and 6 N. Y. Supp. 165.

Argued before BARNARD, P. J., and PRATT, J.

Martin J. Keogh, for appellant. *Goodrich, Deady & Goodrich*, for respondent.

PRATT, J. This general term has passed upon this case at two prior sittings, and what was stated in the opinions then rendered covers all the questions now raised. The evidence is substantially the same as upon the former appeals, and the judgment must be affirmed upon those opinions. The first may be found in 46 Hun, 526, and the last was rendered at the December general term, 1888, and reported in 3 N. Y. Supp. 290.

Judgment affirmed, with costs.

SCHMIDT v. STEINWAY & H. P. R. Co.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where, in an action for personal injuries, the question of plaintiff's contributory negligence is fairly submitted to the jury, their verdict must control.

Appeal from special term, Kings county.

Action for personal injuries, by Otto Schmidt against the Steinway & Hunter's Point Railroad Company. Plaintiff was engaged in excavating a sewer which ran along-side of defendant's car-track. A section of sewer-pipe was set up between the sewer and the track, for the purpose of making a guard around the excavation. One of defendant's cars came by this piece of pipe, and knocked it into the sewer, on plaintiff, causing the injuries. Judgment for plaintiff. Defendant appeals. For former report, see 8 N. Y. Supp. 664, and 9 N. Y. Supp. 939.

Argued before BARNARD, P. J., and PRATT and DYKMAN, JJ.

Foster & Foster, (*W. J. Foster*, of counsel,) for appellant. *M. L. Towns*, for respondent.

DYKMAN, J. Upon the first trial of this action the complaint of the plaintiff was dismissed at the circuit, and appeal was taken to this court, and we decided that the case was a proper one for the determination of a jury. Under such decision a new trial has now been had, and the jury has rendered a verdict for the plaintiff. The cause was tried without an error, and the charge of the trial judge laid a heavy burden upon the plaintiff; but it was successfully sustained, and we cannot interfere. The judgment and order denying a motion for a new trial should be affirmed, with costs.

PRATT, J. Most of the questions upon which this appeal depends were so fully considered on a former appeal as to require no further discussion. It is now urged that, as plaintiff himself adjusted the block upon which was placed the pipe whose fall caused the injury, he must be regarded as guilty of contributory negligence. One answer to this suggestion is that there is no reason to suppose the block was improperly placed. The plaintiff was at the bottom of the sewer, necessarily depending upon those above him for instructions how to place the block; and, plainly the block could not be so placed that a blow from the moving car would not displace the pipe. Moreover, the question of contributory negligence was fairly submitted to the jury. Their verdict must control. The foreman does not testify that in this instance he gave orders to the driver to start his car. But, if he did, defendants cannot avail themselves of his negligence to defeat this action. Negligence of a fellow-servant is not defense except for the common employer. Judgment affirmed, with costs.

VAN WOERT v. ACKLEY.

(Supreme Court, General Term, Fourth Department. April, 1890.)

1. COSTS—REMEDIES.

Code Civil Proc. N. Y. § 779, provides that where costs of a motion, directed by an order to be paid, are not paid within the time fixed, or, if no time is fixed, within 10 days after the service of the order, all proceedings on the part of the party required to pay them, except to vacate the order, are stayed, without further direction of the court, until payment. The section further provides that, when the order directs that the costs of the motion abide the event of the action, they may be taxed as a part of the costs of the action, or set off against costs awarded to the adverse party, as the case may require. On motion of defendant, an order was made granting a new trial, "with \$10 costs, to abide the event," and, on appeal, the order was affirmed. *Held*, that defendant could not have an order staying proceedings by plaintiff because of the non-payment of such costs.

2. SAME.

Neither will the non-payment of the costs included in the judgment of affirmance of the order granting a new trial justify such an order staying proceedings.

Appeal from special term, Otsego county.

Action by Andrew Van Woert against Willis Ackley. In the Otsego circuit of January, 1887, the plaintiff had a verdict for \$155. A motion for a new trial on the judge's minutes was made by the defendant, and granted by H. BOARDMAN SMITH, J., who presided at the trial; and he based his order granting such trial upon an error committed in the charge; and the order allowed "\$10 costs to abide the event." The plaintiff took an appeal from that order to the general term, and, after a consideration of the appeal, the general term, on the 18th of November, 1888, affirmed the order, with costs, and the defendant entered a judgment of affirmance, and for his costs, \$89.03, December 21, 1888. On the 14th of January, 1889, at a circuit and special term held in Otsego county, an order was granted containing the following words: "That plaintiff be, and he is hereby, stayed from prosecuting or moving said case, or taking any proceeding therein towards enforcing the trial thereof, until the costs of the appeal from the order granting the motion for a new trial are paid." At a special term held on the 14th of May that order was resettled and amended by the same justice who granted the same, and the plaintiff appeals from the order "staying plaintiff from moving this cause for trial until the costs of the appeal from the order granting the motion for a new trial are paid, and from each and every part of said order." Code Civil Proc. N. Y. § 779, provides that where costs, directed by an order to be paid, are not paid within the time fixed, or, if no time is fixed, within 10 days after the service of the order, all proceedings on the part of the party required to pay them, except to vacate the order, are stayed, without further direction of the court, until payment of such costs; and that, when the order directs that the costs of the motion abide the event of the action, they may be taxed as a part of the action, or set off against costs awarded to the adverse party, as the case may require.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

W. J. Palmer, for appellant. C. L. Wilbur, for respondent.

HARDIN, P. J. Inasmuch as the \$10 costs of motion in the order of January, 1887, were allowed to abide the event, the non-payment of them by the plaintiff does not permit the defendant to avail of the provision in section 779 of the Code of Civil Procedure in respect to a stay of proceedings. Upon the questions made as to the non-payment of the costs of the appeal included in the judgment of affirmance of the order granting a new trial, which costs amount to \$89.03, the cases of *Eisenlord v. Clum*, 5 N. Y. Supp. 512, and *Verplanck v. Kendall*, 47 N. Y. Super. Ct. 513, are in point, and adverse to the decision made at special term in this case. However, *Phelps v. Carman*, 26 Hun, 518, seems to be a decision which would support the order appealed
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from. An examination of chapter 390, § 3, Laws 1847, of section 779 as it appeared in the Code of Remedial Justice, (being chapter 8, p. 146, vol. 2, Laws 1876,) and section 12, c. 431, p. 456, vol. 1, Laws 1876, and Mr. Throop's note to section 779 of the Code of Civil Procedure, inclines us to follow the decision of the third department in *Eisenlord v. Clum, supra*. We think the order should be reversed. Order reversed, with \$10 costs and disbursements. All concur.

BLAKE v. MOORE *et al.*

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

MORTGAGE—TRANSFER OF PROPERTY—RELEASE OF MORTGAGOR.

Where a mortgagor, who had conveyed the premises to another subject to the mortgage, claims a release from liability on the ground that he notified the mortgagee to foreclose when the mortgage became due, which was not done, a judgment against him will not be disturbed when the notice relied on was given verbally at a casual meeting in the street, was not followed up in any way, and was of such a character that the mortgagee might well have failed to understand that he was required to elect between immediate action and a discharge of the mortgagor from personal liability.

Appeal from special term.

Action to foreclose a mortgage, brought by John Blake against Anson B. Moore, George E. Apsley, Charles A. Moran, William H. Guion and Amanda Guion, his wife, Perry B. Williams, individually and as trustee, Avery T. Brown, as assignee of William H. Guion, and Charles E. Powell. The mortgage was executed by Moore and wife, who shortly afterwards conveyed the mortgaged property to William H. Guion, subject to the mortgage. The mortgagor depended upon the ground that he had notified the plaintiff to proceed promptly by foreclosure, when the mortgage became due, and that, by reason of plaintiff's failure to do so, he was discharged. The court ordered a foreclosure, and entered judgment against the mortgagor for a deficiency. From this judgment he appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

A. J. Moore, for appellant. S. P. & J. McL. Nash, for respondents.

PRATT, J. The defense depends upon the question of fact whether the maker of the bond and mortgage notified the mortgagee to proceed promptly to collect the amount due. The court below refused to find that such a demand was made. The rule that the findings of a trial court on a question of fact will not be reversed where there is evidence to sustain it is applied with great rigor, and requires that the judgment be affirmed; and, while it may seem that the conclusion reached below upon the facts was opposed to the weight of evidence, it is plain that a good deal may be said to support the decision there reached. It is not too much to ask, if a mortgagor seeks to be relieved from the obligation to pay the mortgage debt upon the grounds urged here, that the evidence shall be clear and conclusive beyond a reasonable doubt. The court may well desire that the notice to the mortgagee to enforce the debt should be in writing, in order that the terms may not be open to dispute. If the intention of the mortgagor to resist any personal obligation in case the mortgagee does not proceed promptly is clearly expressed in writing, the court would be able to see that the notice was seriously given, and should have been seriously regarded. In the present case the notice is alleged to have been given at a casual meeting on the street, was verbal merely, does not appear to have been repeated or in any way followed up, although one version of the interview seemed to indicate that a further interview would be had. If we endeavor to harmonize the evidence on the theory that each party speaks the truth to the best of his recollection, we should probably believe that at a casual interview some discussion on the subject took place which was not sufficiently clear or definite to impress itself upon the mind of the mortgagee, and which failed to make him understand that he must elect between

immediate action to collect the debt on the one hand, and a discharge of the personal obligation of the mortgagor upon the other. Judgment affirmed, with costs. All concur.

PEOPLE v. CLEGG.

(Supreme Court, General Term, Second Department. July 18, 1890.)

INDICTMENT—ALLEGATIONS AND PROOF—AMENDMENT.

On the trial of an indictment for libel, which omits, by mistake, three words of the published libel, which is set out in the indictment, the indictment may be amended by the insertion of the words to conform to the proof, under Code Crim. Proc. § 293, providing that the court may, in its judgment, allow such amendment, if the defendant cannot be prejudiced in his defense on the merits thereby.

Appeal from court of sessions, Richmond county.

Conviction of D. W. Clegg of the crime of libel, published against Philip Wolf. Defendant appeals. Code Crim. Proc. N. Y. § 293, provides that, upon the trial of an indictment, if there is a variance between the allegation and the proof as to time, or in the name or description of any place, person, or thing, the court may, in its judgment, if the defendant cannot be prejudiced in his defense on the merits, allow the indictment to be amended.

Argued before BARNARD, P. J., and PRATT and DYKMAN, JJ.

Thos. W. Fitzgerald, Dist. Atty., for the People.

PRATT, J. The defendant was convicted, at a court of sessions held in Richmond county, of the crime of libel, under section 242 of the Penal Code. The libel consisted of a circular printed and circulated, of which the following is a copy:

"\$50.00.

"Ninety days after date, I promise to pay Charles Schmeiser the sum of fifty dollars, or order, for value received.

"*Dated Southfield, March 30, 1860.*

PHILIP WOLFF.

"Witness: THOMAS GARRETT."

"This much of a wealthy man who, then poor, now has pride in villifying one or more of his tenants, without mercy, to add to his wealth. 'Note not paid.'

"*Nov. 1887.*

A VICTIM."

"'A VICTIM.'

"My dear Philip Wolff, (police commissioner,) permit me to inform you that the original of said above copied note, neatly framed and adorned, (you too, no doubt, will be permitted to see it,) can be seen at the Widow Schmeiser's Hall, corner of Wright and Water streets, Stapleton, Staten Island.

"How about truth vs. vilification."

The circular was clearly libelous in its terms, and it appeared fairly from the evidence that it was false, and published in malice. The evidence fully justified the verdict. So that, unless some error was committed upon the trial, the judgment must stand. The court allowed the district attorney to amend the indictment, upon notice, by inserting the words, "Note not paid;" and the defendant claims to have been prejudiced thereby. These words were a part of the published libel that had been accidentally omitted. As soon as the article was put in evidence, these words were necessarily shown as a part of the case. The defendant could not have been surprised or misled, as these words were a part of the libel, and by inserting them the indictment was made to conform to the proof. Such an amendment was authorized by section 293 of the Code of Criminal Procedure, and in no way prejudiced the defendant. We have examined all the exceptions, and find none of sufficient importance to demand discussion. Judgment affirmed. All concur.

PEOPLE v. DECKER.

(Supreme Court, General Term, Second Department. July 18, 1890.)

1. FISHERIES—DRAGGING OYSTERS—EVIDENCE.

Where it is shown that defendant sailed over an oyster-bed with his rakes overboard, and that they were such as would disturb the oysters planted there, it is sufficient evidence to sustain a conviction under Penal Code N. Y. § 640, subd. 8, providing for the punishment of any one who unlawfully disturbs or interferes with the oysters of another.

2. SAME—IMMATERIAL ERROR.

The admission of expert testimony to show that defendant's rakes were such as would disturb planted oysters is not prejudicial to defendant when he himself admits that his rakes, if overboard when he was sailing over the bed, would have disturbed the oysters.

Appeal from court of sessions, Richmond county.

Howard H. Decker was convicted of sailing over the oyster-bed of Peter McDonald, with his rakes down, and disturbing the oysters, and sentenced to pay a fine of \$100, under Penal Code N. Y. § 640, subd. 8, providing for the punishment of any person who unlawfully takes or carries away, or interferes with, or disturbs by any means, the oysters of another, legally planted in the bed of any river, etc.

Argued before BARNARD, P. J., and PRATT and DYKMAN, JJ.

W. J. Powers, for appellant. T. W. Fitzgerald, Dist. Atty., for the People.

PRATT, J. The defendant was convicted under subdivision 8, § 640, of the Penal Code. It was proved beyond all question that the lines upon the defendant's rakes were about 14 fathoms in length, and if the rakes were overboard at the time he sailed over the ground in question they would disturb the oysters planted there. The case only involves a question of fact, and that is whether the rakes were overboard at the time charged. The defendant denies the charge, but two apparently disinterested witnesses, Polwarth and La Forge, testify to the contrary, and the jury believed the latter. The defendant also excepted to the evidence of witnesses skilled in the business, who testified that rakes rigged in the manner described in the evidence would disturb oysters. This testimony was immaterial, as the defendant himself testified that his rakes would go to the bottom, and disturb oysters if any were there. This admission justified a conviction in case the jury found he had his rakes overboard at the time, so that the defendant could not have been prejudiced by the admission of that testimony.

The defendant also claims that inasmuch as no witness saw an oyster disturbed, a case was not made; but we must assume that to have taken place which in the nature of things must have been the result of the defendant's acts. If the construction of the defendant is put upon the statute, no conviction could ever be had under the statute. The statute was passed to prevent just such acts as were committed by the defendant, to-wit, sailing over ground planted with oysters, and that defendant dragged his rakes for a long distance over it, and that such acts must necessarily disturb the oysters. This proof, taken altogether, we think, made out a case. Judgment affirmed. All concur.

KNEVALS v. PRINCE et al.

(Supreme Court, General Term, Second Department. July 18, 1890.)

CONSTRUCTION OF WILLS—PARTITION AMONG DEVISEES.

A testatrix directed all of her real estate to be divided in two equal portions, one of which she devised absolutely to her son, and the other to her daughter, to be kept intact, and to be used and enjoyed by her during her life, and to be left and divided among her children in such manner as she should direct. Soon after the death of the testatrix, the executors, who were also the devisees, made a form.

division of the realty, which was assented to, and executed by them, both as executors and as individuals, and possession of the respective shares was delivered. Held, that the division vested in the son the fee of that portion allotted to him.

Case submitted on agreed statement.

The case submitted is as follows: Charlotte G. Prince directed by her will that all of her real estate be divided into two equal portions, one of which she devised absolutely to her son L. B. Prince, and the other to her daughter Charlotte C. Henry, for life, "it being the intent of this provision of my will that the portion of my real estate herein given to my said daughter shall be used and enjoyed by her during her life-time, but that the same shall be kept intact for her children, and shall be left and divided between and among them in such manner as she may determine and direct, and to their heirs and assigns, forever. At the time of testatrix's death her daughter Charlotte C. Henry had three children, all grown. Part of the real estate devised consisted of 29 lots in the village of Flushing, which the devisees, L. B. Prince and Charlotte C. Henry, jointly contracted to convey to Caleb B. Knevals. Subsequently the executors, who were also the devisees, made a division of the real estate, and assigned the 29 lots to L. B. Prince. This division was agreed to, and executed by the devisees individually, and possession of the lots was given to L. B. Prince. The children of Charlotte C. Henry agreed to and acquiesced in the division, and are ready to execute any deeds necessary to confirm the partition, or to execute any conveyances required to give the vendee of the 29 lots a clear title. L. B. Prince is ready to convey the lots by warranty deed, but Caleb B. Knevals refuses to accept the title, on the ground that the title is not good.

Argued before BARNARD, P. J., and PRATT and DYKMAN, JJ.

Knevals & Perry, (James W. Perry, of counsel,) for plaintiff. *Calvin D. Van Name*, for defendants.

PRATT, J. It is expressly conceded that no other children will be born to Mrs. Henry; therefore any question that might arise from the happening of such an event is eliminated from inquiry. There is nothing in the will of Mrs. Prince to indicate that she did not intend L. Bradford Prince to have the benefit of the devise to him until after the death of Charlotte. On the other hand, the intent is plain that she desired the real estate to be divided immediately after her death, and such division has been had, and is satisfactory to all parties interested, and must be regarded as binding, especially after the children of Mrs. Henry all join in a conveyance. The expression of the will, "that the same shall be kept intact," applies only to the share of Mrs. Henry. It follows that the fee of the 29 lots in question is vested in L. B. Prince, and he can convey a good title thereto with a release from Mrs. Henry and all her children. It is true that each of the children have an interest in the real estate left by Mrs. Prince, and the same has not been specifically determined; but they all offer to release whatever interest or right they have or may have under the will, and such a conveyance, if good upon no other ground, would operate as an estoppel, in case such release shall be drawn in form as a warranty for the 29 lots in question. But, irrespective of these questions, we think the division of the real estate was effectual, and that the plaintiff will obtain a good title. All concur.

BERAN V. TRADESMEN'S NAT. BANK *et al.*

(Supreme Court, General Term, First Department. July 18, 1900.)

1. ASSIGNMENT—RIGHTS OF ASSIGNEE.

An assignment by D. of a portion of a claim against a bank, after stating that a suit was pending against the bank for the entire claim, provided that the suit was to proceed to final judgment in the name and at the expense of D., and that the sum

assigned should be paid to the assignee immediately upon the payment or settlement of the claim by the bank. The instrument then conferred authority upon the attorney of D. conducting the suit, or whoever should act for D. in the settlement, to pay to the assignee, immediately upon the receipt of the money, the amount assigned. *Held* that, notice of the assignment having been given, the assignee could maintain an action directly against the bank for his part of moneys paid by it to D. in settlement of the claim, the assignee not having consented that such portion should first go into the hands of D.

2. SAME.

A payment of money by the bank on the claim to buy its peace, by reason of which the suit was discontinued, was a settlement, within the meaning of the assignment.

Appeal from circuit court, New York county.

Action by Joseph Beran against the Tradesmen's National Bank, impleaded with Michael Duffy. Judgment was given dismissing the complaint on the merits, and plaintiff appeals.

Argued before VAN BRUNT, P. J., and BARRETT and BARTLETT, JJ.
Henry Thompson, for appellant. *William W. Niles*, for respondent.

BARTLETT, J. In May, 1880, the defendant Michael Duffy was suing the Tradesmen's National Bank to recover about \$40,000. The bank disputed the claim. On May 27, 1880, Duffy executed and delivered to one Adolph Klaber an assignment of the claim to the extent of \$10,000. On June 7, 1880, Klaber assigned to the plaintiff the interest in the claim which he had acquired by virtue of the assignment from Duffy. Shortly afterwards, in the same month, the plaintiff duly notified the bank and the attorneys for Duffy of both these assignments, and informed them that, upon any payment or adjustment of the claim, the sum of \$10,000 was to be paid to the plaintiff, and upon his receipt. In October, 1882, while the action to enforce the claim was still pending, the bank paid Duffy \$6,000; whereupon the suit was discontinued. The present action is brought to recover the \$10,000 interest in Duffy's claim against the bank, which was conveyed by Duffy to Klaber, and subsequently by Klaber to the plaintiff. The complaint was dismissed on the merits, at the conclusion of the trial at special term, and the plaintiff has appealed.

The record presents only two points which require discussion. The first relates to the construction which the court below has put upon the assignment from Duffy to Klaber. By that instrument Duffy transferred to Klaber his claim and demand against the Tradesmen's National Bank to the extent of \$10,000, which claim was stated to be then in suit in the supreme court. The assignment further provided as follows: "The said suit is still to proceed in my name, and at my expense, to final judgment or settlement, and without any charge or expense to said Klaber. If I recover from said bank or compromise my claim against said bank for a sum less than \$34,000, then said Klaber is to accept the sum of \$9,000 in full payment and discharge of said claim for the sum of \$10,000, and of all his claims and demands now in suit against me. The said sum so assigned by this instrument to said Klaber shall be paid to him immediately upon the payment or settlement by said bank, and I authorize and empower my attorney, who is conducting said suit, or whoever may act for me on the settlement or payment by said bank, to pay to said Klaber, immediately upon the receipt of said money, the amount due and assigned to him by and under this assignment."

In construing the language above quoted, the learned trial judge found that the intent and meaning of the said assignment was that not Klaber, but Duffy or his agents, should in the first instance receive whatever might be paid by the bank, and that it should then immediately be turned over to Klaber. The view of the court seems to have been that the terms of the instrument precluded any payment by the bank directly to Klaber, and hence that the plaintiff, whose rights are no greater than Klaber's, could not compel the bank to pay him, but that his only claim, if he had any under the assign-

ment, was against Duffy. The trial court also found that the payment of the \$6,000 to Duffy was made solely to buy the bank's peace, and to avoid further litigation and the expense thereof, and that in paying the said sum the bank did not admit that anything was owing upon Duffy's claim. The appellant assails the correctness of the construction put upon the assignment from Klaber to Duffy, and asserts that there is no evidence to sustain the finding that the sum of \$6,000 was paid to Duffy only to buy the bank's peace. If the assignment had not contained the fourth paragraph which is found in that instrument, there could be no doubt that upon the principles applicable to equitable assignments it would have entitled Klaber to receive directly from the bank a portion of any payment made in settlement of Duffy's claim, after notice of the assignment had been given to the bank. *Field v. Mayor*, 6 N. Y. 179; *Devlin v. Mayor*, 63 N. Y. 8, 15. Was its effect in this respect changed by the addition of that paragraph? I think not. There is no provision therein for the payment to Duffy of the interest which he assigned to Klaber by virtue of the previous portion of the instrument. The statement that the sum assigned to Klaber "shall be paid to him immediately upon the payment or settlement by said bank" is not such a provision. It does not necessarily imply that the money is first to go into Duffy's hands, but, when considered in connection with the clause which immediately follows, it shows that what the parties had in contemplation was the possibility that the bank might settle with Duffy's attorney; and therefore Duffy went on to say: "And I authorize and empower my attorney who is conducting said suit, or whoever may act for me on the settlement or payment by said bank, to pay to said Klaber, immediately upon the receipt of said money, the amount due and assigned to him by and under this assignment." The plaintiff has succeeded to Klaber's rights, and no more; and, if the bank had actually paid the \$6,000 which it did pay to Duffy's attorney, instead of to Duffy himself, there would be some plausibility in the position that the payment was in conformity with the terms of the assignment, which certainly import a willingness on the part of Klaber that the money which he was to receive should come to him through Duffy's attorney. I think it is going too far, however, to spell out of the language of the instrument any consent by Klaber that the sum intended for him should first go into the hands of Duffy. Such an interpretation would seem to render the execution of the assignment a useless formality, for, as is aptly suggested by the counsel for the appellant, if Duffy was to make any settlement he pleased, and receive the money himself, he could afterwards hand Klaber his portion, just as well without an assignment as with one. The evidence shows that \$5,500 of the \$6,000 paid by the bank went directly to Duffy by checks drawn to the attorneys of the bank and indorsed by them to his order; and to this extent, at least, it seems to me the payment was in disregard of the rights which the plaintiff had derived from Klaber under the assignment.

But it is contended in behalf of the respondent that, even if the assignment be otherwise effective in favor of the plaintiff, it cannot be enforced, because there has not really been any settlement of Duffy's claim, the payment made being only for the purpose of buying the bank's peace. A careful examination of the record, however, shows that the finding that such was the sole purpose of the payment is wholly without evidence to sustain it. Indeed, the finding seems to me to be clearly contrary to the evidence. In support of this view it is only necessary to refer to the affidavit which one of the attorneys for the bank prepared for Duffy, and which was verified by him a few days before the money was paid. That affidavit was entitled in the suit in which Duffy was prosecuting his claim against the bank, and in it he is made to speak of "a settlement or compromise now about to be made in this action." This one item of proof is sufficient to show conclusively to my mind that the settlement of Duffy's claim actually effected was something more than mere-

ly buying the bank's peace. But, even if it had been only that, I still think the transaction would fall within the scope and meaning of the term "settlement," as used in the assignment. In my opinion, the judgment should be reversed. Judgment reversed, and new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J. If it were not for the decision in the case of *Fairbanks v. Sargent*, 104 N. Y. 108, 9 N. E. Rep. 870, I should dissent, but I think that case is controlling.

BARRETT, J., concurs.

In re HERR'S WILL.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

LEGACY TAX—EXEMPTION—HOME FOR CONSUMPTIVES.

Under Rev. St. N. Y. (7th Ed.) p. 982, § 4, subd. 4, which provides that "every poor-house, almshouse, * * * and the real and personal property used for such purposes," shall be exempt from taxation, a legacy to a home for consumptives, whose inmates are entirely supported by charity, is not subject to the succession tax provided for in Laws N. Y. 1887, c. 713, § 1, since that act excepts "societies, corporations, and institutions now exempted by law from taxation." Following 7 N. Y. Supp. 852.

Appeal from surrogate's court, Kings county.

The court below adjudged that a legacy of \$1,000, bequeathed by the will of Frederick Herr to the Brooklyn Home for Consumptives, is subject to the collateral inheritance tax. The legatee appeals. For former reports, see 5 N. Y. Supp. 48, and 7 N. Y. Supp. 852.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Benjamin Estes, for appellant. *D. E. Meeker*, for the executors.

PRATT, J. The previous decision in the matter of a legacy under this will is decisive of this appeal. The opinion found in 7 N. Y. Supp. 852, fully discusses the questions involved. In that case the orphan asylum was held to be a house of industry. In this case the consumptive home, whose inmates are entirely supported by charity, is an almshouse. The same rule applies to one as to the other. It follows that the decree appealed from must be reversed, so far as it relates to the appellant, with costs.

UNDERHILL v. COLLINS.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

APPEAL—REVIEW.

Where, in an action for rent reserved on a written lease, the evidence is conflicting as to whether the landlord assented to the surrender of the premises, and the jury find for plaintiff, the verdict will not be disturbed.

Appeal from special term, Kings county.

Action for rent reserved on a written lease by Jeronemus S. Underhill against Samuel Collins, who abandoned the premises before the expiration of the term. Judgment for plaintiff. Defendant appeals. Defendant abandoned the premises because of gambling in the building, and sent the keys to plaintiff, who refused to accept them, and they were afterwards placed on plaintiff's desk. Plaintiff re-rented the premises for a short while during the term of the lease, and credited the rent to defendant.

Argued before BARNARD, P. J., and PRATT and DYKMAN, JJ.

P. Q. Eckerson, for appellant. *Walter S. Logan*, (*Charles M. Desmond*, of counsel,) for respondent.

PRATT, J. At request of defendant, the court charged the jury that, if the landlord rented the premises to other parties without notifying the defendant that he should do so, the verdict must be for the defendant. There was testimony given by the plaintiff that he refused to accept the surrender, and told defendant he would hold him for the rent. In view of the charge given, as above quoted, we must understand that the jury believed in the landlord's evidence. They were entirely justified in so doing. If defendant's liability was supposed to be of any value, no reason is apparent why the landlord should have been willing to release it. And the fact that the keys were once refused by the landlord, and at a subsequent time were put upon his desk in his absence, was strong corroboration of plaintiff's testimony. The court fairly left to the jury whether the landlord assented to the surrender. No error was committed, and the verdict must be affirmed, with costs. All concur.

CREGAN v. MARSTON *et al.*

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

MASTER AND SERVANT—PERSONAL INJURIES—DEFECTIVE APPARATUS.

Deceased was shoveling coal for defendants, in the hold of a canal-boat, and the coal was raised in buckets attached to rope falls operated by steam. One of these falls broke, and a bucket fell on deceased, killing him. The fall that broke was worn on the outside, and pulpy on the inside, and its condition was known to the engineer, whose duty it was to inspect the ropes, and renew them when worn. Defendants provided new and good ropes for this purpose, which the engineer could get on application. *Held*, that defendants were liable for the negligence of the engineer in permitting the continued use of a defective rope.

Appeal from circuit court, Kings county.

Action by Margaret E. Cregan as administratrix of Patrick Cregan, deceased, against William H. Marston and others, for the wrongful death of her husband. Judgment for plaintiff. Defendant appeals. Deceased was engaged in shoveling coal into buckets in the hold of a canal-boat. These buckets were raised by a rope fall operated by a steam-engine. The fall attached to one of the buckets broke, and the bucket fell on deceased, killing him instantly. The hoisting machinery, including the rope falls, was in charge of the engineer, whose duty it was to examine the ropes, and replace old and worn ones with new, which were kept on hand for that purpose. The rope that broke was worn on the outside, and pulpy on the inside, and this was known to the engineer.

Argued before BARNARD, P. J., and PRATT and DYKMAN, JJ.

C. Godfrey Patterson, for appellants. Charles J. Patterson, for respondent.

PRATT, J. The cases of *Daley v. Railroad Co.*, 147 Mass. 101, 16 N. E. Rep. 690; *Baker v. Railroad Co.*, 95 Pa. St. 211; and *Car Co. v. Parker*, 100 Ind. 181,—are all in point to show that the circuit judge properly laid down the law to the jury. The general principle on which those cases go is well settled in the courts of this state. The duty of supplying proper machinery to employes rests upon the master, and cannot be so delegated as to shift the responsibility. The rule is a beneficent one, and any restriction of it would be contrary to sound policy, and principles of humanity. The fact that sound machinery could have been obtained and used by the engineer upon application is not enough to relieve defendants from responsibility. The charge to the jury was as favorable to defendants as they had a right to demand, and the judgment must be affirmed, with costs. All concur.

HARLEM CO-OP. BLDG. & LOAN ASS'N v. QUINN.

(Supreme Court, General Term, Second Department. July 18, 1890.)

MORTGAGES—FORECLOSURE—PARTIES.

A *cestui que trust*, while a proper party, is not ordinarily a necessary party, in proceedings to foreclose a mortgage given by his trustee; and the complaint is not demurrable for defect of parties because of the non-joinder of the *cestui que trust*: the remedy being a motion that he be brought in.

Appeal from special term, Westchester county.

Foreclosure by the Harlem Co-operative Building & Loan Association against John Quinn as trustee of and under the last will and testament of Thomas Connell, deceased. The defendant demurred to the complaint for a defect of parties, in that no *cestui que trust* was joined with him. From an order overruling his demurrer, defendant appeals.

Argued before BARNARD, P. J., and PRATT, J.

Arthur Furber, for appellant. Harrison & Langdon, for respondent.

PRATT, J. The complaint avers that defendant, as trustee, borrowed money, executed a bond and mortgage to secure the same, made default, and prays a foreclosure and sale. The defendant demurs on the ground that the *cestui que trust* is not made a party defendant. The demurrer was properly overruled. A *cestui que trust* is a proper party, but not ordinarily a necessary party. Defendant has mistaken his remedy. If, for any reason, the presence upon the record of the *cestui que trust* as a party defendant was desirable, a motion should have been made that he be brought in. Judgment affirmed, with costs.

MITCHELL et al. v. THORNE.

(Supreme Court, General Term, Second Department. July 18, 1890.)

1. LUNATION—PLEADING.

A complaint praying that defendant be restrained from desecrating the burial ground of plaintiffs' ancestors, which was reserved in a grant of the land to defendant's predecessor in title as a burial-place for the grantor and his heirs forever, need not aver the intestacy of the ancestor.

2. SAME.

Where such complaint prays damages for the destruction already committed, it is not defective for failing to show that all persons in interest are made parties, for plaintiffs can only recover for such damages as they have sustained, and not for those sustained by persons not parties to the suit.

Appeal from special term, Queens county.

Action by Charles T. Mitchell and others against Mary A. W. Thorne, to restrain defendant from desecrating the burial ground of plaintiffs' ancestors, which plaintiffs allege was reserved by their ancestor in a conveyance of the land to defendant's predecessor in title as a place of interment for himself and his heirs, together with a right of way to the same. Defendant's demurrer to the complaint was sustained, and plaintiffs appeal.

Argued before BARNARD, P. J., and PRATT and DYKMAN, JJ.

A. N. Weller, for appellants. Parsons, Shepard & Ogden, (John M. Perry, of counsel,) for respondent.

PRATT, J. The demurrer admits that plaintiffs' ancestor set apart a portion of his lands as a burial place whereon many members of plaintiffs' family have been buried; and that, upon conveyance of the lands to defendant's predecessor in title, said ancestor reserved to himself and his heirs forever the right of interment in the land set apart for that purpose, and also right of way to the same. The plaintiffs' ancestor is dead, and defendant is proceeding to level off the graves, tear down head-stones, destroy the inclosing fence,

and threatens to continue said acts. The complaint does not aver that plaintiffs' ancestor died intestate, and defendant argues that, in the absence of such allegation, it does not appear that plaintiffs have any right of property in the cemetery, and that, in the absence of such right, this action cannot be maintained. This view prevailed at special term. But we are of opinion that the right of a descendant to appeal to a court of equity to prevent a desecration of his ancestor's grave does not depend upon the intestacy of the ancestor. The religious sensibility of the living in respect to the repose of the dead, and the protection that will be extended to it by a court of chancery, does not depend strictly upon statutes. The wife has the first right to bury her husband, but that right does not exclude the right of his next of kin to take care that his place of burial, once established, shall be exempt from arbitrary interference. *Pierce v. Proprietors*, 10 R. I. 227; *Wynkoop v. Wynkoop*, 42 Pa. St. 293. An opinion was expressed below that, as the complaint prays damages, it was defective in not showing that all parties having the same interest as plaintiffs are made parties to the suit. We do not regard that omission as important. It will scarcely be contended that plaintiffs can recover for the damages sustained by persons not made parties to the suit. But such damages, if any, as plaintiffs have themselves sustained, can properly be recovered, and do not require the presence of other parties. Judgment reversed, demurrer overruled, and judgment ordered for plaintiffs on demurrer, with leave to defendant to answer on payment of costs of special and general term. All concur.

In re CHURCH OF OUR LADY OF MERCY.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

1. MUNICIPAL CORPORATIONS—CHANGING GRADE OF STREETS—ABUTTERS.

Under Laws N. Y. 1883, c. 118, providing that villages shall be liable to property owners for damages occasioned by changing the grade of the streets, the liability of the village is the same, whether the existing grade was established by formal proceedings or only by general use.

2. SAME—CONSTRUCTION OF LAWS.

The act of 1883 is applicable to a village, though it is inconsistent with the local village charter previously enacted, and the village is liable in damages for the injury caused to property by changing the grade of the street, though it may not have been liable for such damage under its charter.

Appeal from special term, Westchester county.

The petition of the Church of Our Lady of Mercy for the appointment of commissioners to assess the damages accruing to its property from the change of grade made in the street on which it abutted, by the New York, New Haven & Hartford Railway Company, with the consent and by the authority of the village of Port Chester, against which damages were assessed in favor of petitioner. Defendant, the village, appeals from the award of the commissioners. Laws N. Y. 1883, § 1, provides that whenever the grade of any street, etc., in any incorporated village, shall be changed so as to interfere with any building situate thereon so as to injure or damage the property, the owner may apply to the supreme court for the appointment of commissioners to determine the damages; and section 3 provides that all damages determined by the commissioners, together with the costs of the proceeding, shall be a charge on the village.

Argued before BARNARD, P. J., and PRATT, J.

Close & Robertson, (H. D. Donnelly, of counsel,) for appellant. *Müller & Wells*, (James A. Briggs, of counsel,) for respondent.

PRATT, J. The amount of the award is abundantly sustained by the evidence. Several witnesses, well qualified to judge, testified in favor of a larger sum, and the award is rather below the amount fixed by most of the wit-

nesses. The appellant argues that, as there does not appear to be any record evidence that the grade of one of the streets interfered with had ever been legally established, no damages could be legally allowed for the change. One answer to this objection is that it does not appear that any such damage entered into the award. But we also think that the change of grade contemplated by the act of 1883, and for which damages are given to a property owner, refers to an existing grade, though it may not have been established by resolution. In other words, a grade may be established by general use.

The appellants argue with great force that the law of 1883, being a general law, inconsistent with the local village charter previously enacted, will not be allowed to have such an effect as practically to repeal the local law. But the question must be regarded as settled, so far as this court can do it, by the *Case of Stack*, 8 N. Y. Supp. 231. All the objections now urged were then passed upon by the court. We are still of opinion that the village is liable in damages for the injury shown, and that the petitioner pursued the proper course to obtain relief. Judgment affirmed, with costs.

ALDINGER v. PUGH.

PEOPLE *ex rel.* ALDINGER v. SAME.

(*Supreme Court, General Term, Fourth Department. July 1, 1890.*)

1. POWERS OF SPECIAL SURROGATE—INJUNCTION.

Laws N. Y. 1849, c. 806, § 2, as amended by Laws 1851, c. 108, declare that the special county judge and special surrogate provided for in the preceding section "shall possess all the powers and perform all the duties which are possessed and can be performed by a county judge out of court." By the old Code Proc. § 218, the county judge then had express authority to grant an injunction, and also, by section 403, in an action in the supreme court, to exercise within his county the powers of a judge of the supreme court in chambers. *Held*, that the special surrogate of Oneida county (whose office was created by said act) is authorized to grant a temporary injunction in an action in the supreme court.

2. SAME—REPEAL OF STATUTE.

No implication arises from the adoption of the Code that said amended act of 1849 was intended to be repealed; nor is there any inconsistency between that statute and the provisions of the Code upon the subject of special county judges and special surrogates, which would work a repeal thereof; especially as that was a special act, applying only to the counties enumerated.

3. REFERENCE—CONTEMPT.

Under Code Civil Proc. N. Y. § 2383, which requires that "upon the return of an order to show cause, the questions which arise must be determined as upon any other motion;" and section 1015, which empowers a court of its own motion to direct a reference "upon a question of fact arising in any stage of the action, upon a motion or otherwise, except upon the pleadings,"—the court properly directed a reference to determine a question of fact arising in a proceeding to punish for contempt.

4. APPEAL—TEMPORARY INJUNCTION.

An appeal cannot be taken from an order granting a temporary injunction, when no motion to vacate has been made as prescribed by Code Civil Proc. § 693.

5. CONTEMPT—FINDING—EVIDENCE.

The mere fact that defendants removed a quantity of hay from a leased farm in violation of a valid injunction issued at plaintiff's instance, is sufficient to support a finding that plaintiff's rights were "defeated, impaired, impeded, or prejudiced" thereby, as required by Code Civil Proc. N. Y. § 2366, to justify summary punishment; and the fact that they afterwards brought upon the farm the equivalent in manure of the hay so taken, thus substantially complying with the provisions of the lease, did not deprive the court of power to punish them for contempt, but was only a fact to be considered in mitigation.

6. SAME—AGENT.

An agent who, with knowledge that notice of an injunction has been served upon his principal, violates the injunction while acting as agent, may be punished for contempt, although he himself was not served.

Appeal from special term, Oneida county.

Action by Rozellen Aldinger against Emery S. Pugh. Defendant and Stephen J. Pugh appeal from an order adjudging them guilty of contempt, and

inflicting punishment therefor. On the 7th day of December, 1888, an injunction was granted by the special surrogate of Oneida county in an action in the supreme court, in which Rozellen Aldinger was plaintiff and Emery S. Pugh was defendant, by which the defendant, his agents, assistants, and assignees, were enjoined from selling, disposing of, or drawing away any of the hay on a certain farm owned by the plaintiff, and occupied by the defendant, in that action, during the pendency thereof, or until the further order of the court. This injunction was served upon Emery S. Pugh on the day it was granted. On the 22d and 24th days of the same month, and while the injunction was in full force, Stephen J. Pugh, the father of the defendant, removed from said farm about 11 tons of the hay thereon, which was referred to in said injunction. The injunction was not served upon Stephen J. Pugh until December 24th, but he knew of the service of it on the defendant, and the contents thereof. The defendant, Emery S. Pugh, was aware of the removal of such hay, but did nothing to prevent it. On December 31, 1888, an order requiring the said Emery S. Pugh and Stephen J. Pugh to show cause at a special term of the supreme court, to be held at the court-house in the city of Utica on the 8th day of January, 1889, why they should not be punished for contempt in knowingly violating such injunction, was duly granted by Hon. MILTON H. MERWIN, one of the justices of this court, and served on the appellants. On the 8th day of January, 1889, the parties appeared, and the court, upon reading and filing the order to show cause, the affidavits presented in support of such application, and affidavits produced in opposition thereto, and after hearing counsel for the plaintiff and counsel for the defendant and Stephen J. Pugh, made an order appointing a referee to take the evidence of the parties to that proceeding, and their witnesses, as to whether the defendant Emery S. Pugh and Stephen J. Pugh had violated such injunction; and, if so, whether such violation was willful, and whether the said Stephen J. Pugh aided or abetted the defendant Emery S. Pugh in violating the same; and, if so, whether such violation defeated, impeded, or prejudiced the plaintiff's rights, and to what extent; and directed him to report the facts, and return the testimony, with his opinion thereon, to the court. The referee thus appointed duly proceeded to execute such reference, and take the evidence of the parties and their witnesses, and reported the same to the court, with the facts found, and with his opinion thereon. The referee, among other things, found "that on December 22 and 24, 1888, the said Stephen J. Pugh drew away from said leased premises eleven tons of hay of the value of \$132, and that defendant was aware of such removal, and did nothing to prevent it; that by such removal, on December 22 and 24, 1888, defendant and S. J. Pugh, and each of them, knowingly and willfully violated said injunction order,—the defendant in permitting the said Stephen J. Pugh to remove said hay, and the said S. J. Pugh in aiding and abetting and assisting the defendant to remove, draw away, and dispose of the hay referred to in and restrained by said injunction order; and, further, in refusing to return the two tons of said hay removed by him on December 24, 1888. * * * At the time of the service of the injunction order, and also on December 22 and 24, 1888, the plaintiff was damaged by the failure on defendant's part to draw back manure equivalent in amount to the hay and straw then drawn away. This damage has since been remedied by defendant's drawing manure on the place from December 15, 1888, and through February and March, 1889, and inasmuch as the defendant, before the expiration of such lease, fully complied with all its provisions, except keeping the ten cows, and drew back upon said premises an amount of manure equivalent to the hay and straw drawn away by him, the object of this action is substantially defeated, and the plaintiff cannot be said to have suffered any damages from the breach of any covenant in the lease, or by removal of the hay."

Upon all the proceedings had in this matter, the testimony taken before the

referee, his report, opinion, and the affidavit of Henry F. Coupe as to the plaintiff's costs and expenses incurred in such proceeding, the matter came on for hearing at a special term of this court, held at the court-house in the city of Utica, June 15, 1889, when, after hearing counsel for the plaintiff and counsel for the defendant, Emery S. Pugh and Stephen J. Pugh, it was by the court adjudged and determined "that the defendants, Emery S. Pugh and Stephen J. Pugh, are guilty of contempt in having knowingly and willfully disobeyed the said injunction order granted in said action,—the said Emery S. Pugh in causing and permitting eleven of the tons of the hay mentioned in and restrained by said injunction, of the value of \$132, to be removed, drawn away, and disposed of while said injunction order was in force, to-wit, on the 22d and 24th days of December, 1888; the said Stephen J. Pugh in having, with full knowledge of said injunction order, of its contents, and of the service of it on the defendant, while acting as the agent, servant, and assistant of the said defendant, aided and abetted and assisted the said defendant, Emery S. Pugh, in said removing, drawing away, and disposal of said eleven tons of hay on the said 22d and 24th days of December, 1888; and that said violation of said injunction order was calculated to and actually did defeat, impede, impair, and prejudice the rights and remedies of the plaintiff in said action. It is further considered and adjudged and ordered that the said Emery S. Pugh and Stephen J. Pugh pay a fine of \$100 referee's fees, \$17 witness fees, \$50 counsel fees, and \$10 costs of this motion, in all the sum of \$177, to be paid to the plaintiff herein, said Rozellen Aldinger, to satisfy her costs and expenses in the premises, and that they stand committed to the common jail of Oneida county until said fine be paid." From this order and determination of the special term the defendants, Emery S. Pugh and Stephen J. Pugh, appealed. It is also stated in the notice of appeal that the "appellants intend to bring up for review the injunction order granted herein, and the order of reference to Charles G. Irish."

Argued before HARDIN, P. J., and MARTIN, J.

Edward Lewis, for appellants. *Henry F. & James Coupe*, for respondents.

MARTIN, J. As no motion was made to set aside or vacate the injunction order granted herein, the appellants are not in a position to review that order on this appeal. Their remedy was by an application under article 3, tit. 2, c. 7, of the Code of Civil Procedure, and not by appeal. *Id.* § 772. An appeal from an order granting a provisional remedy can only be taken when made upon notice. *Id.* § 1347. No appeal lies from an order granted *ex parte*. *People v. Common Council*, 30 Hun, 636; *In re Johnson*, 27 Hun, 538. We find no ground for disturbing the order of reference. The Code of Civil Procedure provides that, upon the return of an order to show cause in proceedings for contempt, the questions which arise must be determined as upon any other motion. Section 2283. The court may of its own motion direct a reference to determine and report upon a question of fact arising upon a motion. Code Civil Proc. § 1015. See *People v. Alexander*, 3 Hun, 211. The special term was fully justified by the evidence taken in this proceeding in finding that the appellants knowingly and willfully disobeyed the injunction, and in adjudging them guilty of contempt, if the officer granting such injunction was authorized by law to grant it. The appellants contend that the special surrogate of Oneida county had no power or authority to grant an injunction in such an action. If such authority existed, it was under and by virtue of the provisions of chapter 306, Laws 1849, as amended by chapter 108, Laws 1851, which provides: "Section 1. There shall be elected in the counties of Jefferson, Oneida, St. Lawrence, Oswego, Orange, Chautauqua, Cayuga, and Tioga, at the next general election, and as often thereafter, at any succeeding general election, as may be necessary, in the same manner as other county officers are elected, a local officer or two local officers to dis-

charge the duties of county judge and surrogate in their respective counties; in cases of vacancy or inability of such officers or either of them, in pursuance of section fifteen of article sixth of the constitution, when the duties of county judge and surrogate shall be discharged by the same person, there shall be elected, as aforesaid, one local officer; and in such of the said counties where the office of county judge and surrogate shall be separate there shall be elected, as aforesaid, two local officers; and the term of office of the persons so elected shall commence on the first day of January next after their election. They shall hold their offices for three years, and until others are chosen in their places, and duly qualified, and shall be subject to removal in the same manner and for the same causes as county judges and surrogates are subject to be removed." Section 2, as amended by Laws 1851, c. 108: "Such local officers so elected to discharge the duties of county judge (or of county judge and surrogate, in those counties where there is no separate officer to discharge the duties of surrogate) shall be designated as special county judge, and such local officers so elected to discharge the duties of surrogate in those counties where there shall be a separate officer to discharge the duties of surrogate shall be designated as special surrogate. Such local officers so elected to discharge the duties of county judge, or of county judge and surrogate, or to discharge the duties of surrogate in those counties where there shall be a separate officer to discharge the duties of surrogate, shall possess all the powers and perform the duties which are possessed and can be performed by a county judge out of court; and any proceeding commenced before any such special county judge or special surrogate may be finished by him, or he may by order direct that the same shall be finished by the county judge, or by the surrogate, as the case may be."

The provisions of this statute seem to confer upon the special surrogate of Oneida county all the powers and duties which are possessed and can be performed by a county judge out of court. When the statute under consideration was passed, and also when it was amended, a county judge was given express authority to grant an injunction. Code Proc. § 218. He was also authorized in an action in the supreme court to exercise within his county the powers of a judge of the supreme court at chambers. Id. § 403; *People v. Parr*, 24 N. E. Rep. 481. The effect of the statute of 1849 as amended was considered in the case of *Seymour v. Mercer*, 13 How. Pr. 564, and it was there said: "It is entirely clear that the legislature intended to confer upon these local officers, both special county judges and special surrogates, all the powers of the county judges which they could perform out of court or at chambers, as well as all other powers, both of county judge and of surrogate, in case of inability or vacancy in the offices, respectively." In that case it was held that the special surrogate of Cayuga county had authority to grant an order of arrest without regard to the questions whether the office of county judge was vacant or his inability to act. In *Kinney v. Roberts*, 26 Hun, 166, the special county judge of Oneida county made an order in an action in the supreme court requiring a party to appear and be examined under the provisions of the Code of Civil Procedure upon the application of his adversary; and in that case SMITH, P. J., in delivering the opinion of the court, said: "A question was made on the argument as to the power of the special county judge of Oneida to make the order for the examination. We think there is no reason to doubt his power. Such officer possesses all the powers and may perform all the duties of a county judge out of court. Laws 1849, c. 306, as amended by chapter 108, Laws 1851. When the act of 1849 was passed, county judges possessed the power in question, (Laws 1843, c. 379, Old Code, § 345,) and the power is continued to them by the present Code, (section 372.) The fact that the latter section does not mention special county judges does not divest them of the power conferred by the acts of 1849 and 1851. Those acts still operate to vest those officers with the powers possessed by

county judges out of court." This case was appealed to the court of appeals, and the appeal was dismissed by that court. 89 N. Y. 601. In *Babcock v. Clark*, 23 Hun, 391, it was held that the special county judge of Chautauqua county had power to grant an injunction. It seems that the statutes of 1849 and 1851 confer upon the special surrogate of Oneida county powers which are sufficient to authorize him to grant a temporary injunction in an action in the supreme court.

But the appellants contend that the statutes of 1849 and 1851 have been repealed. It is not claimed that they have been expressly repealed, but the claim is that they have been repealed by implication by the adoption of the Code of Civil Procedure. Repeals by implication are not favored in law. It is only where a later statute is repugnant to or inconsistent with an existing one, so that the two cannot be harmonized, or where the subsequent act shows that it was clearly intended to supersede the former statute, that a repeal by implication arises. *In re Curser*, 89 N. Y. 401; *People v. Crissey*, 91 N. Y. 616; *Mark v. State*, 97 N. Y. 578. We find no such inconsistency between the statute of 1849 as amended and the provisions of the Code of Civil Procedure as to work a repeal of the former statute, nor do the provisions of the Code show that they were intended to supersede the statute of 1849. The latter is in harmony with the provisions of the Code. Both can stand together, and both should be maintained and enforced. Again, the statute of 1849 as amended was a special statute relating only to 8 of the 60 counties of the state. "It is a rule of construction that a special statute providing for a particular case, or applicable to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would be taken strictly, and, but for the special law, include the case or cases provided for by it." *Van Denburgh v. Village of Greenbush*, 66 N. Y. 1; *In re Commissioners*, 50 N. Y. 493; *Association v. City of Buffalo*, 118 N. Y. 61, 22 N. E. Rep. 962. "Laws, special and local in their application, are not deemed repealed by general legislation, except upon the clearest manifestation of an intent by the legislature to effect such repeal, and ordinarily an express repeal by some intelligible reference to the special act is necessary to accomplish that end." *People v. Quigg*, 59 N. Y. 83; *In re Delaware & H. C. Co.*, 69 N. Y. 209; *Village of Deposit v. Deveraux*, 8 Hun, 317. Such is the rule even though the general law contains a general repealing clause as to inconsistent legislation. *Whipple v. Christian*, 80 N. Y. 523. See, also, *People v. Sheridan*, 1 N. Y. Supp. 61. Moreover, it was expressly held in the case of *Kinney v. Roberts*, 26 Hun, 166, that the statutes of 1849 and 1851 were not repealed or annulled by the Code of Civil Procedure.

We have examined the cases cited by the appellants, but have found nothing in them which would sustain their contention that the statutes in question were repealed by the Code of Civil Procedure. Those cases are clearly distinguishable from the case at bar; hence we conclude that the statutes conferring upon the special surrogate of Oneida county the powers, and imposing upon him the duties, which are possessed and can be performed by a county judge out of court, are not repealed, but in full force, and therefore that he had authority to grant a temporary injunction in this action. The appellants also contend that the order adjudging them guilty of contempt should be reversed, because the findings of the court and referee that the acts of the appellants in violating the injunction were calculated to and actually did defeat, impede, impair, and prejudice the rights and remedies of the plaintiff in said action, were not sustained by the evidence taken in this proceeding. The evidence and proceedings contained in the appeal book disclose that the plaintiff procured an injunction restraining the defendant, his servants, agents, assistants, and assignees, from selling, disposing of, or drawing away any of the hay on the farm mentioned in the complaint; and that the appellants, with-

out any application to vacate or set aside the injunction, knowingly and willfully disobeyed the order, and sold and removed the hay. That the acts of the appellants in thus removing this property, in defiance of the order of the court, were calculated to and actually did defeat, impede, impair, and prejudice the rights and remedies of the plaintiff is quite manifest. The plaintiff had a right to the order granted. The officer granting it had determined that she had that right. The order was valid until set aside. "If an order within the jurisdiction of the court is imprudently or erroneously granted, the remedy of the party aggrieved is by application to vacate it, or by appeal. It cannot be reviewed upon an application to punish for disobedience of it. So as long as it remains in force it is the duty of all parties to obey it." *People v. Bergen*, 53 N. Y. 404; *Railway Co. v. Ramsey*, 45 N. Y. 637; *Barr v. Titus*, 75 N. Y. 344; *People v. Dwyer*, 90 N. Y. 402. While the injunction remained in force the plaintiff had a right under it to prevent the appellants from interfering with the hay in question. She had a right to the remedy awarded her. When these proceedings were commenced the plaintiff had a right to the injunction granted, and to have it enforced for the protection of her interests. That right was invaded by the appellants when they sold and removed the property which they were enjoined from removing or selling. By that act the order of the court was rendered ineffectual, and the plaintiff's right and remedy under and by virtue of it were destroyed. This interference by the appellants was well calculated to, and did, for a time at least, impair, impede, prejudice, and defeat both the right and remedy of the plaintiff. That the appellants subsequently became alarmed at the possible consequence of their acts and discharged their liability to the plaintiff, so that she lost nothing under her contract with the defendant Emery S. Pugh, in no way deprived her of the rights which she possessed when the proceedings were instituted, nor did it discharge the appellants' liability for a wrongful interference with the property removed. As was tersely said by the judge at special term, "what was afterwards done by the defendant does not cure, but may mitigate." See *King v. Barnes*, 113 N. Y. 476, 21 N. E. Rep. 182.

The appellant Stephen J. Pugh claims that, as the injunction order was not served upon him, he cannot be punished for contempt in disobeying it. The referee, upon evidence which we think justified it, has found that Stephen J. Pugh on the evening of December 7th, or on the next day, was fully cognizant of the service of such injunction, and of its contents. The court from the evidence has also found that he, with full knowledge of such injunction order, of its contents, and of the service of it upon the defendant Emery S. Pugh, while acting as the agent, servant, and assistant of said defendant, aided, abetted, and assisted the said defendant in removing, drawing away, and disposing of the hay in question. In *Koehler v. Bank*, 6 N. Y. Supp. 470, affirmed 22 N. E. Rep. 1134, it was held that persons who have actual knowledge of the existence of an injunction order are bound by it, though it is not personally served on them. The case cited seems to be decisive of the question, and is adverse to the appellants' claim. We are of the opinion that the findings of the court and referee were fairly and fully justified by the evidence, and papers read on the application for the order appealed from, and that no error was committed in granting that order. Order affirmed, with \$10 costs and disbursements.

TITMAN et al. v. MAYOR, ETC., OF THE CITY OF NEW YORK.

(Supreme Court, General Term, First Department. July 13, 1890.)

LIMITATIONS—"PERSONAL INJURIES"—DEATH BY WRONGFUL ACT.

An action for wrongfully causing death is "for personal injuries," within Laws N. Y. 1886, c. 572, limiting to one year actions against the mayor, aldermen, and commonalty of any city having 50,000 inhabitants or over, for damages for personal injuries alleged to have been sustained by reason of its negligence.

v.10N.Y.s.no.7—44

On exceptions from circuit court, New York county.

Action for injuries resulting in death, caused by an obstruction in a street. The complaint was dismissed at the circuit, on the ground that the cause of action was barred by the statute of limitations.

Argued before VAN BRUNT, P. J., and BARRETT and BARTLETT, JJ.
L. Laftin Kellogg, for plaintiffs. *Thomas P. Wickes*, for defendants.

BARTLETT, J. The plaintiffs brought this action to recover damages under section 1902 of the Code of Civil Procedure for the wrongful act, neglect, or default of the defendants in causing the death of Thomas O'Maley, by leaving a large stone in Tenth avenue, near One Hundred and Forty-Fourth street, in the city of New York, which upset the sleigh in which Mr. O'Maley was riding on January 8, 1887, and threw him out. He died from the injuries thus received, on January 21, 1887. On February 4, 1887, letters of administration on the estate of Mr. O'Maley were issued to the plaintiffs. On January 4, 1889, the claim in suit was presented to the comptroller of the city of New York, and its settlement and adjustment were demanded, but it has not been settled or paid. This action was begun on February 6, 1889. Upon the trial at circuit the complaint was dismissed on two grounds, which are stated in the record as follows: (1) That, by the Laws of 1886, plaintiffs had one year and thirty days after the issuing of letters of administration in which to commence this action. (2) That the plaintiff did not have over two years from the death of the decedent in which to commence this action.

Upon these rulings the only questions which arise on the present appeal are (1) whether the plaintiffs' cause of action is barred by chapter 572 of the Laws of 1886, and (2) whether it is barred by section 1902 of the Code of Civil Procedure. Chapter 572, § 1, of the Laws of 1886, provides as follows: "No action against the mayor, aldermen, and commonalty of any city in this state, having 50,000 inhabitants or over, for damages for personal injuries alleged to have been sustained by reason of the negligence of such mayor, aldermen, and commonalty, or of any department, board, officer, agent, or employe of said corporation, shall be maintained, unless the same shall be commenced within one year after the cause of action therefor shall have accrued, nor unless notice of the intention to commence such action, and of the time and place at which the injuries were received, shall have been filed with the counsel to the corporation, or other proper law officer thereof, within six months after such cause of action shall have accrued." If an action for wrongfully causing death by negligence is "an action for damages for personal injuries alleged to have been sustained by reason of the negligence" of the defendants as a municipal corporation, then the one-year limitation prescribed by this statute is applicable to the case at bar, and the complaint was properly dismissed.

The learned counsel for the plaintiff insists that this is not an action for personal injuries at all, but a special statutory action growing out of a death caused by the wrong-doing of the defendant; that it is based wholly on the injury done to the estate and property of the decedent; and hence that it does not fall within the purview or terms of the act of 1886. On the other hand, the counsel to the corporation refers to the definition of "personal injury" in the Code itself as conclusive in regard to the meaning of the statute. "A 'personal injury' includes libel, slander, criminal conversation, seduction, and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person, either of the plaintiff or of another." Code Civil Proc. § 3343, subd. 9. It is to be noted, however, that the Code does not assume to apply this definition to the construction of other statutes, the section cited beginning with the words: "In construing this act, the following rules must be observed," etc.

The question is not free from difficulty, but I cannot resist the conclusion that the phrase "personal injuries," as used in chapter 572 of the Laws of

1886, was employed in a less restricted and technical sense that that which the plaintiffs' counsel would give it. Notwithstanding the distinctions which exist between the action for negligently causing death and the action for negligently causing bodily harm not resulting in death, I think nine lawyers out of ten would ordinarily speak of both as actions for personal injuries. And it seems to me that the legislature has spoken in the same way in the act of 1886. An injury to the person gives rise to both classes of actions, and that injury is the prominent idea associated with a negligence suit involving death, just as much as with a negligence suit involving less serious results. Until the passage of Lord Campbell's act in England, and similar statutes in this country, if the injured person died in consequence of his injuries, no damages were recoverable against the party by whose wrongful act or negligence he had suffered. It is undoubtedly true that, in a technical sense, the statute gives a new cause of action. *Whitford v. Railroad Co.*, 28 N. Y. 465; but see *Littlewood v. Mayor*, 89 N. Y. 24. Substantially, however, and considering the nature of the redress to be afforded, it is a continuation of the original cause of action for the benefit of those dependent on the services or bounty of the deceased, and who have been injured by the personal wrong done to him. The statute, says Judge Cooley, "continues for the benefit of the wife, husband, etc., a right of action which, at the common law, would have terminated at the death, and enlarges its scope to embrace the injury resulting from the death." Cooley, Torts, 264. In other words, the right of action growing out of what was clearly a personal injury, in the most restricted sense, is practically, though not technically, continued and extended by the statute. As RAPALLO, J., points out in *Littlewood v. Mayor*, *supra*, the statute "was intended to apply to the case of a party who, having a good cause of action for personal injury, was prevented, by the death which resulted from such injury, from pursuing his legal remedies, or who omitted in his life-time to do so." Such being the purpose of the change in the common law, I think the action thus authorized may reasonably and naturally be called an action for damages for personal injuries; and I have no real doubt that it was the intention of the legislature to apply the one-year limitation to suits of this character against municipal corporations, by the enactment of chapter 572 of the Laws of 1886. This view renders it unnecessary to discuss the question whether the cause of action was barred by the two-years limitation, and requires an affirmance of the action of the court below. Exceptions overruled, and judgment ordered for defendant. All concur.

PALLETT v. KINGS COUNTY EL. RY. CO.

(Supreme Court, General Term, Second Department. July 18, 1890.)

ELEVATED ROADS.—CONTRIBUTORY NEGLIGENCE.

In an action against an elevated railway company for the wrongful death of a painter who was engaged in painting the superstructure when struck by a passing train and killed, it appeared that deceased was in the employ of a company which did the painting, and that he could see an approaching train from where he was at work, and that he was not seen by the engineer or any one on the train. *Held*, that there could be no recovery.

On exceptions from circuit court, Kings county.

Action by Absalom Pallett, as administrator of Joseph A. Pallett, against the Kings County Elevated Railway Company, for the wrongful death of deceased. Complaint dismissed. Plaintiff excepts.

Argued before BARNARD, P. J., and PRATT and DYKMAN, JJ.

Wm. J. Gaynor, for plaintiff. Tracy, MacFarland, Ivins, Boardman & Platt, for defendant.

DYKMAN, J. We find nothing in this case to justify a recovery. The deceased was in the employ of a company engaged in painting the superstruct-

ure, and, if he was lawfully upon the track, the defendant owed him no duty, and was under no obligation to regulate the operation of its trains with reference to his presence. The testimony fails to convict the engineer of any failure in duty after the discovery of the deceased upon the track, and in fact there is no proof that he was seen by any person upon the train until he was struck, while it plainly appears that the deceased could see the train for a considerable distance from where he was struck. He was upon a railroad track, and was bound to know that a train might run over it at any time. Other persons upon or around the track made their escape from the incoming train with safety, and it is not apparent why he did not do so likewise. The exceptions cannot therefore be sustained, and the defendant must have judgment dismissing the complaint, with costs.

In re ROBINSON'S ESTATE.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

CONSTRUCTION OF WILLS—CLASSES—"CHILDREN"—TERM.

A testator devised property to his wife for life, with directions that at her death it should be sold by the executors; and the proceeds he devised to his children "then surviving, to be equally divided among them, share and share alike." Held, that testator's grandchildren living at the death of his wife were not entitled to take under the will.

Appeal from surrogate's court, Westchester county.

On final settlement of the accounts of Edward A. Robinson, executor of James W. Robinson, the surrogate excluded James W. Todd and others, grandchildren of decedent, from participation in that portion of the estate devised by the second clause of the will. The grandchildren appeal.

Argued before BARNARD, P. J., and PRATT and DYKMAN, JJ.

Herbert F. Andrews, for appellants. *Samuel Watson*, for respondents.

DYKMAN, J. This is an appeal from the decree of the surrogate for the final distribution of the proceeds of the property of the deceased, and the question presented for determination arises under the second clause of the will of James W. Robinson, deceased, which reads as follows: "*Second.* I give, devise, and bequeath the house and lot of land on State street, in the village of Sing Sing, where I now reside, and all the furniture and fixtures therein, to my wife, Hannah, and my daughters Emma B. and Angeline B., to have and to hold, use and enjoy, the same so long as my said wife shall live and remain my widow; and, as soon as practicable after the death or remarriage of my said wife, I direct my executors to sell the said house and lot, furniture and fixtures; and the proceeds thereof I give, devise, and bequeath unto my children then surviving, to be equally divided among them, share and share alike." The widow remained unmarried, and her life-estate in the premises named was terminated by her death. Previous to the death of the widow, and subsequent to the death of the testator, two of his children, William Henry Robinson and Mary J. Todd, died, leaving children, who are the appellants before us on this appeal, and their insistence now is that they fall within the meaning of the term "children," as it was employed by the testator in the second clause of his will. It is not always easy to discover the intention of a testator in the use of the word "children" in a last will and testament, and the uncertainty is produced by the flexibility of the term. In its primary and precise sense it stands for immediate offspring, and such is the ordinary sense in which it is properly used; yet it may with propriety be employed in an enlarged and collective signification, and so we read in the Holy Scriptures of the children of Israel who were the remote descendants of the patriarch Jacob. In the construction of wills and devises, the meaning of the word has sometimes been expanded so as to include grandchildren, when

the obvious intention of the testator could not be effectuated without such extension, but such construction is not adopted without the requirement of a strong case of intention or necessary implication. Aside from that, the word is understood, like all other words, in its popular signification. It is the province and object of courts in the construction of wills to ascertain and effectuate the intention of the testators, and in this case such intention can be collected only from the fair reading and interpretation of the instrument itself, as there are no extrinsic proofs. In such interpretation, words are to be understood in the sense in which they are ordinarily employed, and, in its popular as well as precise meaning, the word "children" signifies offspring of the first degree; and, if we assume such use of the word by the testator in this second clause of his will, the assumption will impute to him no intention of disinheritance, for the part of his will in which it is employed relates to a portion of his property only. The bulk of his estate was given to his children by the fourth clause of his will, so that, while we are at liberty to resort to the context of the will to assist us to determine the sense in which the word was employed by the testator, we yet obtain no light from that quarter. The question then recurs, can the appellants, the grandchildren of the testator, participate in the remainder in this real estate limited upon the life-estate of the testator's widow? The language is this: "I direct my executors to sell the said house and lot, furniture and fixtures; and the proceeds thereof I give, devise, and bequeath unto my children then surviving, to be equally divided among them, share and share alike;" and there is nothing in the structure of the devise to justify the extension of the signification of the word "children" beyond its proper meaning as denoting offspring in the first degree. It would be a forced construction to interpret the meaning of the phrase "my children then surviving" so as to include grandchildren, and especially so when such construction would permit the grandchildren to share equally with children, which is quite unnatural. It is to be observed that, in all the cases where the signification of the term "children" has been extended beyond its precise meaning, the construction has been aided by the context of the instrument, which cannot, as we have seen, be invoked in this case. Thus in *Re Paton*, 111 N. Y. 487, 18 N. E. Rep. 625, it was said in the opinion: "When the testator directs a division 'equally among the children he may then have, or those who may be legally entitled thereto,' he must be regarded as contemplating the possibility of there being other children entitled to share than his immediate offspring. The word 'those' must refer to children in order to have a meaning, and refers to the children or issue of his sons and daughters." In the case of *Prowitt v. Rodman*, 87 N. Y. 58, one of the propositions laid down by the court of appeals was "that the term 'children' may include issue, however remote, and will be held so to include whenever the reason of the thing demands it." All of the reported cases and the elementary works are in harmony upon this question, and they all inculcate the same doctrine, that the intention of the testator, as collected from the entire will, must prevail in its construction. In obedience to such principle, we think the intention of the testator in this case was plainly manifested, and that his children living at the death of his widow took the remainder in the house and lot, to the exclusion of his grandchildren. The decree of the surrogate should therefore be affirmed, with costs to be paid by the appellants.

All concur.

BYRON V. BELL *et al.*

(Common Pleas of New York City and County, General Term. June 2, 1880.)

1. ACTIONS ON CONTRACTS—EVIDENCE.

A provision in a contract for the construction of a piece of railroad that the amount due the contractor shall be determined by the measurements and calcula-

tions of the chief engineer of the construction company will not prevent the contractor, who alleges that the chief engineer's estimates are fraudulent and unjust, from proving the nature, extent, and value of his work by other competent witnesses.

2. SAME.

In an action on a contract, under which the contractor is entitled to different rates of compensation for different grades of work, where the contractor has testified to the amount and value of the work alleged to have been done by him, it is error to exclude testimony by the chief engineer, whom the contract designates as the arbitrator of all questions arising under it, as to deductions that should be made from the contractor's estimate because of charges for lower grades of work at rates fixed for higher grades.

Appeal from trial term.

Action by John H. Byron against Edward T. Bell and others, as administrators, etc., of Henry R. Low, deceased, on a contract for work done, and profits on work which defendants' intestate prevented plaintiff from doing. In 1881, defendants' intestate had a contract with the New York & Scranton Construction Company to build for it about 40 miles of railroad lying in New Jersey and Pennsylvania, being part of the New York, Susquehanna & Western Railroad. In May, 1881, defendants' intestate sublet to plaintiff about four miles of this work at specified prices for rock and earth excavations. The case was originally brought against Mr. Low in his life-time, and plaintiff obtained a judgment. Mr. Low appealed to the court of appeals, and the following statement of facts is taken from the opinion of that court, (16 N. E. Rep. 45:) "By the terms of the contract, the chief engineer of the construction company [Daniel H. Wood] was made the arbitrator between the parties to settle all differences arising out of the contract, to estimate the quantities and amounts of the several kinds of work, and make monthly certificates for the same, reserving 10 per cent. thereof. The final payment to be made was provided for in these words: 'But, in case of the full completion of said work by the party of the first part, then, and upon the final estimate thereof by the said chief engineer, the said party of the second part agrees to pay within 10 days, to the party of the first part, the full amount then due, including the reserve of ten per cent.' " The court of appeals held that the engineer's certificate was a condition precedent to plaintiff's right of recovery, and reversed the judgment in his favor because he had not obtained the certificate, and because his evidence failed to show that he had ever demanded it from the chief engineer. While the action was pending in the trial term, Mr. Low died, and his administrators were instituted as defendants. On the second trial, plaintiff testified positively (folios 168-172 of the case on appeal, referred to in the opinion) that he had demanded the final estimate before the bringing of the action, and that he had repeated such demand once a week for two months. Defendants then read plaintiff's cross-examination on the former trial, wherein he stated that he had made repeated inquiry of the chief engineer whether the estimate and measurements of the division engineers had been returned to the chief engineer, so that he could make the final estimate. The defendants also read the testimony given by Mr. Low on the former trial. Mr. Low stated that the whole estimate of the amount due plaintiff under his contract was \$86,354.49, and that he had been paid \$86,319.38. The examination then proceeded as follows, (folios 520-522, Case on Appeal, referred to in opinion:) "*Question.* Now, what was included in that whole estimate? *Answer.* Everything up to the time of this suit. Subsequently the statement by Mr. Truesdell to the chief engineer increased the N. J. Division \$2,046.83. *Q.* That is the statement that it has been said here was furnished to Mr. Wood some time in the month of March? *A.* Yes. It increased the amount, with Mr. Truesdell's estimate to Mr. Byron, of the N. J. Division,—increased the amount that would apparently be due to Mr. Byron, \$2,046.83. There should be deducted from that, as I suppose, that claim of 8,000 yards of earth,

measured twice. That was included at 23 cents a yard, which was twice measured, which is \$690. Of the rock taken out at Indian Ladder bluff, outside of the slope, that I had not assented to, and had not knowledge of, there were 1,158 yards that were charged to me at \$1.25, when, according to the testimony of the chief engineer, it should have been taken out and removed for 50 cents. I have deducted 75 cents a yard for this amount of rock that fell down, and was removed, and thrown over into the river, 1,158 yards, which makes \$868.50. There were 140 yards of riprap wall, estimated by Truesdell at \$1.50 per yard, which is 50 cents too much, or \$70 too much. I may state that this riprap wall is made from stone removed from the cut, and measured to him, allowed to him as rock-work in the cut, so he has been paid for that once. The aggregate of that deduction is \$1,628.50, which deducted from \$2,046.83 would leave \$418.33, from which I deduct overpayment, \$14.80, leaving due him, if the work had been certified to, \$403.53." To this answer the plaintiff objected, as not responsive, after the words, "due to Mr. Byron \$2,046.83," and the court sustained the objection, and struck out the objectionable part of the answer. The jury returned a verdict of \$7,872.20 in plaintiff's favor; and from a judgment thereon, and an order denying a new trial on the judge's minutes, defendants appeal.

Argued before LARREMORE, C. J., and BOOKSTAYER, J.

W. J. Groo, for appellants. L. Laflin Kellogg, for respondent.

LARREMORE, C. J. This case has been once tried and appealed to the court of appeals. The report of it in that court (*Byron v. Low*, 109 N. Y. 291, 16 N. E. Rep. 45) contains a statement of the facts. The appellants claim that on this new trial the objection which led to the reversal before has not been obviated; but I am of opinion that the testimony of plaintiff at folios 168 to 172, inclusive, makes out a *prima facie* case of a demand for the certificate from the chief engineer, as required by the contract. Plaintiff's direct testimony on the former trial on this point is not given, but we scarcely think appellants' contention that it was substantially the same as on the present trial can be correct. His former cross-examination, which was read on this trial, may all stand consistently enough with the direct evidence of a demand for the certificate itself, which is now given. There is other evidence from which the jury might have and did conclude that the certificate had been unreasonably refused. The case would, therefore, be analogous to the unwarrantable withholding by an architect, from a contractor, of a certificate of the completion of his contract. The contractor must, as a condition precedent to recovery at law, either produce the architect's certificate, or satisfactorily account for its absence. Similarly, in the case at bar, facts were shown from which the jury might infer that the engineer's certificate was kept back, without just cause, for an unreasonable length of time. Even under the decision of the court of last resort, therefore, we think the jury were authorized to find that the condition precedent had been complied with, and that plaintiff was not bound to wait longer before proceeding to enforce his rights, especially in view of the fact that defendant was about to depart from the country.

Many of the exceptions to rulings upon the trial we do not deem of any serious consequence. The contract provided that the work should be executed and performed under the direction of the chief engineer, or his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work performed should be determined. But, certainly, that could not preclude the testimony of other experts in a suit to enforce plaintiff's rights. We do not think the contract obliged plaintiff to submit to the chief engineer's decision and allowance, without the right of appeal to the court, if the former claimed that he was fraudulently or unjustly dealt with; and if, under any circumstances, he was entitled to sue, it goes without saying he had the right to call witnesses such as the assistant engineers Trues-

dell and Coons to prove the nature, extent, and value of the work. This exception was not well taken.

Considerable evidence was excepted to because it was alleged to relate to transactions with the original defendant, now deceased, but none of such exceptions seemed valid. Many of the answers complained of do not, as a matter of fact, relate either to conversations or transactions with the deceased; and such of them as may seem impliedly to do so come within the exception to the rule, made a part of the rule itself by section 829 of the Code. The testimony of the deceased defendant on the former trial was read on behalf of the defense here; and plaintiff, therefore, became entitled to give his version orally of the matters therein referred to.

The rulings as to the testimony of the said deceased, excluding a considerable portion of it, seem from the printed record rather strict; but they were within the discretion of the trial judge. In the ruling especially complained of at folios 520, 521, 522, much of the long answer was clearly irresponsible, as the court held; and, moreover, it contained conclusions and calculations. Nevertheless, we are constrained to hold that the exclusion of certain questions put to the witness Daniel H. Wood constituted error which will require a reversal. The plaintiff had testified as to the amount and value of the work alleged to have been done by him under the contract, from a statement he had made, and the same was offered and received in evidence without objection as to that method of proof. When Mr. Wood went on the stand, this paper was shown to him, and he was asked to state what deductions should be made from the amount. This question was objected to, and excluded. The following question was also put, with a similar ruling: "*Question.* What proportion of the 865 51-100 yards or riprap wall that Byron has estimated at a dollar and a half a yard,—what proportion of it should be at a dollar a yard?" This question was put to Mr. Wood later on, and excluded: "*Question.* From what you saw there on the ground at Indian Ladder bluff, what amount of rock, in your opinion, was taken out outside of the slopes, as provided for in the contract and specifications?" The contract provided that the plaintiff should be paid "for rock cut at Indian Ladder bluff one dollar and twenty-five cents per cubic yard;" and a portion of the judgment rendered depends upon the jury's estimate of how much of such rock was actually cut. It must be remembered that the contract did not specify a gross sum for plaintiff's compensation, but merely rates for different kinds of work; and therefore, both from the very nature of the agreement, and because directly raised by the answer, the amounts and kinds of work actually performed were at issue. This witness, Mr. Wood, was not only the chief engineer of the New York & Scranton Construction Company, but by the contract itself he was "appointed a common arbiter, to whom all and every question of difference between the parties, growing out of this contract, shall be referred, and whose decision shall be final and binding upon both parties." Certainly, he was a competent expert upon all these matters upon which his testimony was excluded, and such testimony would have been very relevant for the defense. It was a serious error not to allow him to testify as to the facts, as it would have been if the court, under defendant's objections, had rejected the evidence of the assistant engineers Truesdell and Coons. Defendants were, in effect, deprived of the evidence of their principal witness on a most important branch of the controversy. I cannot discover that this error was in any manner cured, and there is no alternative but to order a new trial. Judgment reversed. New trial ordered, with costs to abide the event.

DARRAH v. BOYS.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

PAYMENT—EVIDENCE.

Plaintiff testified that defendant, a broker, had sold a note for him, and that he had refused to pay over the proceeds. Defendant gave evidence tending to show that the relation of banker and customer existed between him and plaintiff, and that he had paid out such proceeds on checks drawn by plaintiff. A letter from plaintiff was put in evidence in which he spoke of leaving money on deposit with the defendant. Held, that a judgment for plaintiff for such proceeds would not be disturbed.

Appeal from trial term.

Action by James N. Darrah against James Boys. Judgment was given for plaintiff, and defendant appeals.

Argued before LARREMORE, C. J., and BOOKSTAYER, J.

J. M. Ferguson, (John A. Deady, of counsel,) for appellant. Carrington & Emerson, for respondent.

BOOKSTAYER, J. The defendant is, and at the time of his transactions with the plaintiff was, a broker and banker and a dealer in commercial paper. Before the acts complained of, the defendant had sold for the plaintiff a promissory note, receiving one-half the amount in cash, and the other half in another note. On the 27th of June, 1888, plaintiff delivered to the defendant a note for \$4,567.12, which the latter was to sell on the same terms, and, as plaintiff claims, was to pay over the cash realized therefor, less the discount, to him, upon receiving it. Subsequently the defendant received \$1,200 cash on account of the note, and never received more, the difference being in some way settled between the plaintiff and the purchaser without defendant's intervention. Before the commencement of this action plaintiff demanded the cash received on this note of the defendant, which was refused. Thereupon this action was commenced for the conversion of the proceeds. The defense interposed was a denial of the conversion and payment. The answer also set up a counter-claim, which was stricken out on demurrer. On the trial the plaintiff testified to his version of the transaction as above set forth, and the defendant gave evidence tending to prove payment in full, and also that the relation of banker and customer existed between the parties, and that the \$1,200 had been credited to the plaintiff on his account as such customer, and paid out as directed by him. It was shown on the part of the defendant that plaintiff had drawn a number of checks on the defendant, but plaintiff claimed that these were drawn at defendant's request, instead of paying cash, except in a few instances, when they were drawn for small amounts, and then the plaintiff arranged with the defendant for their payment when presented. The defendant also introduced in evidence a letter written by the plaintiff to him, in which he says: "I told them [the Mount Morris Bank] I kept an account with you, so take care and give me a good send-off. I will see you in the morning, and hope there will be no further delay about Clarke. I want to keep an account with you, and remember the more money we get from Clarke the more I can afford to leave on deposit with you." This, in our opinion, went far to corroborate defendant's theory; but this, together with the accounts tending to show payment and an actual indebtedness of the plaintiff to defendant, and all the other circumstances in the case, were fairly submitted to the jury in a charge to which the defendant took no exception, and they rendered a verdict in favor of the plaintiff. We have carefully examined the conflicting testimony in this case with the aid of the oral arguments and briefs of both parties, and, while we might have arrived at a different result, we cannot say that the preponderance of evidence is so great as to authorize us to reverse the judgment on that account, in the absence of anything

tending to show that there was a mistake on the part of the jury, or that they were influenced by bias, passion, prejudice, or corruption. No other question being raised by the appeal of this case, the judgment should be affirmed, with costs.

CROWLEY v. MURPHY.

(*Superior Court of New York City, General Term. June 27, 1880.*)

EJECTMENT—PLEADING—AMENDMENT.

After two trials in ejectment, in which the defense is adverse possession, an amendment introducing a new party plaintiff is improperly allowed, both because of the laches of plaintiff in making the motion to amend, and because on a new trial, to which defendant is entitled as a matter of right, a new issue will be presented as to whether adverse possession can be shown as against the new party.

Appeal from an order made at special term allowing the plaintiff to amend the summons and complaint in this action by adding the name of one Ellen Daly, as party plaintiff, and by adding to the complaint such allegations as might be appropriate to set forth her interests in the premises mentioned in the complaint. The action was commenced in the year 1888, in the name of Cornelius George Crowley, grantor, and Joshua C. Sanders, grantees, against Mary Murphy and others, under section 1501 of the Code of Civil Procedure, to recover the possession of certain premises situate within the city and county of New York.

Argued before FREEDMAN and TRUAX, JJ.

David B. Ogden, for appellant. *Townsend & Mahlon*, for respondent.

TRUAX, J. It is not necessary for us to determine the interesting questions suggested by counsel for respondent. If Ellen Daly was not a necessary party, plaintiff should not have made the motion that he did make. We think that in view of the fact that there have been two trials of this action, and that defendant had paid one large bill of costs to plaintiff, and because of the laches of plaintiff in making the motion, the motion should have been denied, and plaintiff left to commence his action anew. There is another and more important reason why the motion should have been denied. This is an action of ejectment. As before stated, the case has been tried twice. And the defendant has availed herself of the statutory right given by section 1525, and has paid the costs required by that section in order to obtain a new trial. This new trial should be of the same issues as those that were tried in the first action. One of the issues tried in the first action was whether, as against the plaintiff in that action, there had been adverse possession. Now, if the amendment sought for is allowed, a new issue will be presented in this action, viz., whether the defendant can show adverse possession not only against the plaintiff, Cornelius J. Crowley, but against another person, Ellen Daly. The plaintiff, if he saw fit to do so, could have discontinued this action, and could have begun another, in which new action he could have brought in all of the necessary parties. The order appealed from is reversed, with costs, and the motion is denied, with \$10 costs.

McMURRAY v. ENNIS.

(*City Court of Brooklyn, General Term. June 28, 1880.*)

ADMINISTRATOR—BANK-CHECK PAID AFTER DRAWER'S DEATH.

An administrator of a solvent estate cannot recover moneys obtained from a bank, after deceased's death, upon a check given by him a few days before death, in payment of debts, though the holder knew of his death, and failed to inform the bank thereof.

Appeal from trial term.

Action by Mary Ann McMurray, as administratrix of Lawrence Ennis, deceased, against Teresa Ennis. The judgment was for the plaintiff. Defendant appeals.

Argued before VAN WYCK and OSBORNE, JJ.

Stinson & Williams, for appellant. *L. B. Bunnell*, for respondent.

VAN WYCK, J. The trial court, at the request of both parties, and without objection or exception of either, found that Lawrence Ennis, a few days before his death, delivered, for valuable consideration, checks for \$1,200 drawn by him to the order of defendant, Teresa Ennis, which checks she had cashed at the bank a few days after his death, without disclosing his death. This is an action by his administratrix to recover from defendant such sum for money had and received by her to plaintiff's use. Judgment was rendered in favor of plaintiff, from which defendant appeals. There is no controverted question of fact raised by either party, and there is no intimation that the estate of Ennis is insolvent. This appeal presents to us a single question of law, viz.: If a debtor, a few days before his death, delivers, in payment of his indebtedness, his own check to the order of his creditor, who a few days after such death receives from the bank the money on the same without informing the bank of the death, can the administratrix of such dead debtor recover the sum so received by the creditor, when the estate is not shown to be insolvent? Strange to say, an apparently thorough research fails to disclose either an English or American authority adjudicating this point. This would indicate either that such a case seldom occurs, or, if it frequently occurs in actual practice, the business mind, at least, has acquiesced in the regularity and justice thereof. When we consider the universal use of the bank-check to transfer money from debtor to creditor in this country and England, in the transaction of the immense volume of commercial, mercantile, and other business, requiring millions of checks in each year, the conviction is irresistible that it daily occurs that, at the death of debtors, their checks to order of creditors are uncollected in the hands of creditors, or in the mail for them, or on deposit with banks or bankers, or in the mail after such deposit, for collection. The well-known diligence and alertness of creditors engaged in every branch of business renders it certain that, in daily practice, checks of deceased debtors in the possession of creditors are paid by the banks until such banks are actually informed of death of the drawers. Any other rule would do much to clog the wheels of business, and bank-checks would fall into disuse; for banks would not pay them unless they had actual information that the drawers were alive, and creditors in cash transactions would not receive payment by check. What we deem to be the existing practice should be upheld in the interest of the business public, creditors, banks, and debtors, unless to do so would violate some established rule of law. The doctrine evolved from such a practice antagonizes no express adjudication on the exact point. Respondent suggests that it is hostile to the principle of proportionate equality of creditors in the assets of a dead debtor. The answer to that objection is that the infringement of such right is not involved in this case, for there is not the slightest intimation in the evidence that the Ennis estate is insolvent. Then, again, the doctrine, so far as it applies to the cause at bar, is in perfect harmony with the equally well established rule that creditors of the solvent estate of a deceased debtor are entitled to be paid in full. Defendant has not exceeded her right in that respect. Respondent laid some stress on the rule that death revokes the authority of an agent, but he overlooked the modification or exception thereto. A creditor receiving from a debtor a check in payment of his claim, it is an authority coupled with an interest, viz., to receive the money from the bank, if it will pay the same, and retain the money as his own. Such an authority, death never revokes. Respondent chiefly rests his right to recovery on the theory that death vests all the personal property of

the intestate, *instantly*, in his administratrix. This is only partially true. It is not vested absolutely in her to do with as she pleases, but rather in trust to pay the debts due the creditors in full, if sufficient. The most that can be said in this case is that such trust has executed itself, so far as defendant is concerned, by virtue of the particular circumstances surrounding the transaction, without the active intervention of the administratrix. The contention of appellant does not, in our opinion, invade, harmfully at least, any of the established principles of our law.

The action for money had and received to the use of another is in its nature a purely equitable action, and can never be maintained unless, according to natural justice and equity, the plaintiff is entitled to the money as against the defendant. It admits of any defense which shows the plaintiff ought not, in good conscience, to recover. "In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money." *Moses v. Macferlan*, 2 Burrows, 1010, 1012; *Bank v. Raymond*, 3 Wend. 69, 74; *Eddy v. Smith*, 13 Wend. 489. "Whether the defendant could sue at law, in his own name, to recover the money, or whether, having fairly got it, this action for money had and received to the plaintiff's use can be maintained, are very different questions. This is an equitable action, which may be defended upon the same equitable principles as those upon which it is maintained. As a general rule the question is, to which party, *ex aequo et bono*, does the money belong? * * * To allow the plaintiff to recover it back would be to make this the first in a circuit of four actions, which would end in leaving the money just where it was in the beginning." *Buel v. Boughton*, 2 Denio, 91, see 93. See, also, *Moyer v. Shoemaker*, 5 Barb. 319; *Barber v. Cary*, 11 Barb. 549, 551; *Bank v. Ellings*, 66 N. Y. 625, see 626. Testing the case before us by the principles of the foregoing authorities, it is quite evident they do not favor the recovery of plaintiff. Defendant was a creditor of Lawrence Ennis, and so found to be by the court, at the request of both parties, without objection or exception. *Fish v. Jacobsohn*, *40 N. Y. 539. It was his moral and legal duty to pay her, and he did all he could to do so out of his funds in this bank, which cashed the check for her. She was entitled to be paid in full by him during his life, or out of his estate after death, if solvent. Under such circumstances, she is not obliged, "by the ties of natural justice and equity, to refund the money." Her retention of it is not against good conscience. In the language of BRONSON, J., in *Buel v. Boughton*, 2 Denio, 94, "to allow the plaintiff to recover it back would be to make this the first * * * [of two actions] which would end in leaving the money just where it was at the beginning."

Though the exact question before us has apparently never been passed upon by the courts, yet we find it discussed in two cases, and expressions made favorable to the contention of this appellant. In *Tate v. Hilbert*, 2 Ves. Jr. 118, Chancellor LOUGHBOROUGH said: "If she had received it [meaning the money on a check] immediately after the death of the testator, before the banker was apprised of it, I am inclined to think no court would have taken it from her." RUGGLES, J., in *Harris v. Clark*, 3 N. Y. 93, at p. 110, said: "If the draft had been accepted by Clark & Co., the drawees, before or after the death of Sidney Smith, the drawer, it would have operated from the time of Smith's death as an assignment, * * * and would have afforded to the plaintiff a remedy against that firm." It is true that the decision in both of these cases turned upon other questions, and these quotations from the opinions are mere *obiter dicta*; but they show that the only judicial expressions found upon the point here involved have been in accord with what we have suggested and believe to be the actual practice in business circles. The text-writers on negotiable paper seem to take the same view. Daniel, Neg. Inst. § 1618b, and note; Parsons, Notes & B. (2d Ed.) 287; Chit. Bills, (12th Amer. Ed.) p. 325.

note 1; Benj. Chalm. Bills, (1889,) pp. 278, 274, notes. Banks, bankers, holders of checks, and the personal representatives of deceased drawers of checks, must be assumed to have been familiar with this unanimity of expression of courts and text-writers upon this doctrine, and to have acted upon and acquiesced in it as well, judging from the dearth of contests in relation thereto in reported cases. This seemingly accepted doctrine should not be disturbed, unless some special equity should intervene, calling for its modification in the particular case,—for instance, to prevent an unconscionable preference of one creditor of an insolvent estate over the others; to prevent the retention of money so collected on a check given without consideration, or obtained by fraud, or given as a step in an incomplete *donatio causa mortis*; or to prevent the success of any attempted wrong against good conscience, natural justice, and equity. In our opinion, this judgment should be reversed, and new trial ordered, with costs to abide the event.

COLLINS v. LONG ISLAND R. CO.

(City Court of Brooklyn, General Term. June 23, 1890.)

RAILROAD COMPANIES—NEGLIGENCE.

Plaintiff's intestate, in attempting to cross defendant's railroad track in front of a train rapidly approaching and in full view, fell down, was struck by the locomotive, and killed. A companion had asked her not to cross. When she fell, the locomotive was 50 or 60 feet away. Held, that she was guilty of negligence defeating a recovery for her death.

Appeal from trial term.

Action by James Collins, as administrator, etc., against the Long Island Railroad Company. The action was dismissed, and plaintiff appeals.

Argued before OSBORNE and VAN WYCK, JJ.

M. L. Towns, for appellant. Hinsdale & Sprague, for respondent.

OSBORNE, J. Plaintiff, as administrator, etc., of his deceased wife, Elizabeth Collins, brought this action to recover damages from defendant for causing the death of his intestate. The action was dismissed by the learned trial judge at the close of plaintiff's case, on the ground that negligence was shown on the part of the deceased, and that no negligence was shown on the part of the defendant. Plaintiff's counsel excepted to this ruling, and takes this appeal. It appears from the evidence that on the morning of August 19, 1889, deceased, in company with her sister-in-law, Mrs. Nichols, and her cousin, Maria Brown, started from plaintiff's residence on Linwood street, intending to take one of defendant's so-called "rapid transit trains" for Flatbush avenue. They went into the waiting room on the south platform at the Elton-Street station, and after waiting there a few minutes started to walk on a plank cross-walk across the railroad tracks to the platform on the north side, from which they were to take the train. While on the south platform they all saw a train of defendant's road approaching at a rapid rate of speed. As deceased started ahead, her sister-in-law, Mrs. Nichols, called to her to come back. Said to her, "Come back," or "Don't cross." Deceased, however, disregarded the warning so given to her, and went on. She crossed the first or south track, and as she reached the first rail of the second or north track, on which the train was approaching, she slipped and fell, and before she could recover herself the locomotive struck her, and she was killed. The locomotive was between 50 and 60 feet away from her when she fell.

Evidence was offered by plaintiff to show that the plank cross-walk over which deceased was going at the time she fell was defective, and it appeared that one end of the first plank beyond the third rail, at about the place where deceased fell, was broken or worn off, leaving a space about 8 inches long and 9 inches wide, the surface of which was depressed, varying from 1½

to 3½ inches, and it was claimed that this alleged defective condition of the cross-walk caused the deceased to fall. The answer to this claim is that no one of plaintiff's witnesses was able to positively testify that the fall of the deceased was caused by this depression. While they agree that it was at or about this spot that deceased fell, we are left to inference or conjecture alone as to whether the fall was actually occasioned by this depression. Admitting, however, for the sake of the argument, that this depressed spot on the extreme edge of the cross-walk caused deceased to fall, still we are of the opinion that the complaint was properly dismissed on the ground of deceased's contributory negligence. Here was a railroad train in plain sight, and rapidly approaching. Deceased saw it, and started to cross the track in front of it. She was warned of the danger of crossing then by one of her companions, who called to her not to cross. She apparently thought that she could get over in time, and kept on, but unfortunately, in her haste, she slipped and fell, and met her death. How closely she had calculated or, rather, miscalculated, is shown by the fact that when she fell the locomotive was only between 50 and 60 feet from her, and even if she had not fallen, she would still have had to cross the track and get up on the platform before she would have been out of danger. It seems to us that the mere statement of such a condition of affairs carries with it the inevitable conclusion that deceased was guilty of negligence, and that such negligence on her part caused her death. *Pakulinsky v. Railroad Co.*, 82 N. Y. 424; *Connelly v. Same*, 88 N. Y. 346; *McPhillips v. Railroad Co.*, 12 Daly, 365. Judgment dismissing complaint affirmed, with costs.

VAN WYCK, J., concurs.

HEALY v. BULKLEY.

(City Court of Brooklyn, General Term. June 23, 1890.)

1. BUILDING CONTRACTS—EVIDENCE.

In an action for breach of a contract for the building of a house, evidence as to the cost of removing defective material, and of replacing the same in accordance with the contract, was admissible.

2. DAMAGES—INSTRUCTION.

In such action a request to charge as to the rule of damages for defective workmanship or poor material is properly refused as too general, where there is also a claim for material not furnished, and for delay in the performance of the contract.

Appeal from trial term.

Action by Catherine Healy against Washington Bulkley. There was a judgment for plaintiff, and defendant appeals.

Argued before CLEMENT, C. J., and OSBORNE, J.

Samuel P. Potter, for appellant. *Thos. D. Rambaut*, for respondent.

PER CURIAM. The plaintiff brought this action to recover damages for breach of contract for the building of a house, and on the trial it was claimed that the defendant delayed performance, and that there were defects in the work. The jury rendered a verdict for the plaintiff for the sum of \$450, and from the judgment entered thereon this appeal is taken. We are only called upon to review certain exceptions, and, after a careful examination of the same, we think that there was no erroneous ruling which resulted injuriously to the rights of the defendant. It was proper to allow the plaintiff to show the cost of removal of defective material, and of replacing the same in accordance with the contract. Such cost did not necessarily constitute the measure of damage, but the testimony was properly admitted, to be weighed by the jury in arriving at a conclusion. *Kidd v. McCormick*, 88 N. Y. 991. The request to charge as to the rule of damages was properly refused as too general. It was the correct rule as to defective workmanship or poor ma-

terial, but in this case there was also a claim for material not furnished, and for delay in the performance of the work. Judgment and order denying new trial affirmed, with costs.

SCHULT v. MOLL.

(City Court of Brooklyn, General Term. June 23, 1890.)

1. **WILLS—CONSTRUCTION.**

A testator gave to each of his two children one-third of his estate, and to his wife "one-third; that is to say, her dower right of my estate." The wife was given power, in conjunction with the executor, to sell the real estate, and the children, on reaching their majority, were to receive the interest of one-third of any moneys derived from such a sale. *Held*, that the wife took one-third of the testator's real estate absolutely.

2. **CURTSEY—DIVORCE.**

A divorced husband is not entitled to a tenancy by the curtesy in property acquired by the wife subsequent to the divorce.

Appeal from special term.

Action by William A. Schult against Conrad Moll. There was a judgment for plaintiff, and defendant appeals.

Argued before OSBORNE and VAN WYCK, JJ.

Moffett & Kramer, for appellant. *W. W. Butcher*, for appellee.

VAN WYCK, J. This action is brought to compel specific performance of a contract to convey real estate, or for damages in case defendant cannot give a good title. Defendant claimed that his title to the real estate in question was good and valid, and he prayed judgment that plaintiff be compelled to complete said contract. On the trial at special term, defendant had judgment as prayed for, and plaintiff appeals. All the material facts were stipulated on the trial, and questions of law only arise on this appeal. It appeared that on February 2, 1876, one John Hablawitz died seised of the premises in question, leaving a last will and testament dated December 27, 1875, which was duly admitted to probate, and the construction of this will raises the principal question to be decided on this appeal. The pertinent portions of said will are as follows: "*First*. After all my lawful debts are paid and discharged, I give, bequeath, and devise as follows: To my adopted daughter, Wilhelmina Hablawitz, one-third of my real estate; to my daughter, Catherine Hablawitz, one-third of my real estate; to my wife, Babetta Hablawitz, one-third,—that is to say, her dower right of my estate." Testator further gave his said wife, in conjunction with his executor, power to sell his real estate, "the money arising from such sale or sales to be deposited in the savings bank by my wife and the below-named executor, until my above-named children arrive at the age of twenty-one years; then they to receive their interest of one-third of the money deposited therein. And I further devise to my wife the rents and interest of my estate during the minority of my children."

Babetta Hablawitz, mentioned in said will, had been the wife of one John Reinig, who on March 25, 1867, obtained a judgment of absolute divorce against her, which contained the usual restriction against her remarriage during the life-time of said John Reinig, who is still alive. Before and after said divorce, and down to the death of John Hablawitz, he and said Babetta lived and cohabited together as husband and wife. Wilhelmina Hablawitz, mentioned in said will, was the daughter of John and Babetta Reinig, born in lawful wedlock, and said Catherine Hablawitz was the issue of the testator and Babetta. Babetta Hablawitz died intestate August 15, 1876. Catherine Hablawitz died March 14, 1877, aged two years, leaving no relatives on her putative father's side, and only her maternal grandmother, Phillipine Algaier, and her half-sister, Wilhelmina, on her mother's side. Said Phillipine Algaier

died intestate, January 18, 1880, leaving her surviving said Wilhelmina and others, as her heirs at law. On June 15, 1883, proceedings were instituted under the statute to sell the real estate of said Wilhelmina as an infant, and, under the deed executed by the special guardian in those proceedings, defendant claims to have acquired a good and valid title. Defendant claims that Babetta Reinig or Hablawitz took, under the will of John Hablawitz, an undivided third of his real estate absolutely; that, on her death intestate, her one-third descended to her daughters Wilhelmina and Catherine in equal shares; that on the death of said Catherine her one-third which she took under her father's will, and her one-half of her mother's one-third, descended to her half-sister Wilhelmina, who thereupon became seised of the whole of said premises in fee-simple absolute. The special term has found in favor of the contention of defendant. Plaintiff claims that, under the will of John Hablawitz, Babetta only took a life-estate in one-third of testator's realty, and that on her death said one-third passed to the legal heirs of John Hablawitz, whoever they may be, and that, even if she took an absolute fee in said one-third, then, on her death intestate, her divorced husband became entitled to an estate by the curtesy therein.

It will thus be seen that the principal question herein is as to the meaning of the devise to Babetta Hablawitz. We think that the expressed intention of the testator was to give Babetta (his wife so called) one-third of his real estate absolutely, and that well-settled rules of interpretation bear out this construction. To construe the devise to Babetta as giving her only a life-estate would result in intestacy of the testator as to the one-third devised to her, on her decease. Such a construction is to be avoided if possible. The general presumption is that, when a man makes a will, it is his intention to dispose of all of his estate. 2 Redf. Wills, 442; *Vernon v. Vernon*, 53 N. Y. 361. It is to be observed that in the clause of his will, giving power to sell his real estate, and directing the proceeds to be deposited in savings bank during the minority of his children, the direction is that, on their attaining the age of 21 years, they were to receive then one-third of the money deposited, thus leaving a fair and reasonable inference to be drawn that testator assumed that he had disposed absolutely of the remaining one-third. The learned counsel for the appellant contends that the words in the devise to Babetta, "that is to say, her dower right of my estate," import an intention to give Babetta only the dower that a wife would take in her husband's real estate in case of intestacy. If the testator had so intended, it would have been very easy for him to have so expressed himself. It is well known that a popular belief exists in the minds of many unprofessional persons that a wife is entitled to her one-third of her husband's estate absolutely in any event, and we can readily suppose, from the language used, that testator had this idea in his mind. A further reason for using this language may be drawn from the fact that Babetta was not the legal wife of the testator, and the testator, knowing this, may have used this language with the intention of giving her a sort of conjugal status. We think the language used may be read as, and is of the same import as, if testator had said, "in lieu of her dower right in my estate." There is nothing in the suggestion of appellant's counsel that, if Babetta took a fee, then, on her death, her divorced husband was entitled to a tenancy by the curtesy in said one-third. This property was acquired by Babetta long after the dissolution of her marriage with Reinig, and he can inherit no interest therein by virtue of having once been her husband. *In re Ensign*, 37 Hun, 152. For the foregoing reasons we are of the opinion that the judgment should be affirmed.

In re COMMISSIONER OF PUBLIC WORKS.*(Supreme Court, General Term, Second Department. July 18, 1890.)*

1. CONSTITUTIONAL LAW—EMINENT DOMAIN.

The legislature can delegate the power to determine whether New York city shall acquire the fee or only an easement in the different parcels of land condemned for the new Croton aqueduct under Laws N. Y. 1883, c. 490, providing for its construction.

2. EMINENT DOMAIN—CONSTRUCTION OF STATUTES—CONSTRUCTION OF AQUEDUCT.

The legislative intent to confer upon the aqueduct commissioners the power to determine what lands shall be taken in fee, and in what an easement only shall be acquired, is clearly denoted by section 4 of the act, requiring them to adopt maps and plans of the sites of the proposed aqueduct dams, reservoirs, etc., indicating thereon in what parcels the fee, and in what an easement, is to be acquired; and also by sections 6 and 10, requiring that the title, interest, or easement sought to be acquired in each parcel shall be stated in the petition for the appointment of the commissioners of appraisal, and that upon the filing of their oath the city shall be seized in fee of those parcels of which it has been determined by the aqueduct commissioners that the fee should be acquired.

3. SAME—EXTENT OF TITLE ACQUIRED BY THE PUBLIC.

When, in conformity with the act, the aqueduct commissioners make maps and plans of the proposed route, and indicate on them that only a permanent easement is to be acquired in certain parcels, through which the aqueduct is to run 250 feet beneath the surface, and also state in the petition for the appointment of the commissioners of appraisal that an easement only is to be acquired, the city acquires such permanent easement only, and not the fee of the parcels designated.

4. SAME—RIGHTS OF OWNERS.

Nor does the city, under section 10, providing that it or its agents may enter, use, and occupy in perpetuity, all the parcels described in the map for the purpose of constructing and maintaining the aqueduct and all of its appurtenances, acquire the fee of those parcels in which a permanent easement only was taken; for this section does not confer upon the city the power to enter or use the land in any other way, or for any other purpose, than that designated in the plans and maps in accordance with which the parcels were condemned.

Appeal from special term, Westchester county.

Petition by Hubert O. Thompson, commissioner of public works, for the appointment of commissioners of appraisal, under Laws N. Y. 1883, c. 490, providing for the construction of the new Croton aqueduct, to condemn lands for that purpose. Frank B. Mallory, William B. Wadsworth, and the executors of George W. Parsons, all owners of real estate affected by the proceedings, appeal from the report of the commissioners of appraisal, and the allowance of damages.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Foster & Wentworth, (Thos. F. Wentworth, of counsel,) for appellants.
William H. Clark, (De Lancey Nicoll, of counsel,) for respondent.

DYKMAN, J. This case brings to us three appeals from the report of the commissioners of appraisal appointed to ascertain and determine the compensation to be made by the city of New York to the owners or the persons interested in the real estate sought to be acquired or affected by the proceedings under chapter 490 of the Laws of 1883, to provide new reservoirs, dams, and a new aqueduct, with the appurtenances thereto, for the purpose of supplying the city with an increased supply of pure and wholesome water. The appeals are taken by the executors of George W. Parsons, deceased, owners of a portion of parcels Nos. 608, 610, and 612 of the land described on the map of said aqueduct; by Frank B. Mallory, owner of parcels Nos. 606, 608, part of parcel No. 609, and certain contiguous land not laid out on the map; and by William B. Wadsworth, the owner of other land contiguous to the aqueduct, but not laid down on the map. These three appeals present separate interests; but the claims were all represented by the same counsel, and were tried before the commissioners upon the same evidence, and two of them present the same questions. In the Parsons claim and the Mallory claim, it

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is the insistence of the appellants that the city acquired a fee in the property appropriated, and not an easement, and that, therefore, the commissioners adopted an erroneous principle, and erred in excluding testimony tending to show the damage which the appellants would sustain by the taking of a fee, and consequently awarded them insufficient compensation. The Wadsworth case involves the question of the competency of certain testimony rejected by the commissioners, and all the appeals require an examination of the statute under which the proceedings were instituted and concluded.

Section 1 of the law designates certain officials and private individuals to carry the provisions of the act into execution, for the purpose of supplying the city with an increased supply of pure and wholesome water, and that they shall be known as the "Aqueduct Commissioners." Section 2 requires the commissioner of public works, under the direction of the aqueduct commissioners, to submit to them a plan or plans, with maps, specifications, estimates, and particulars relating thereto, for the construction of a new aqueduct or conduit for water from some point on the Croton river or Croton lake to some point in the city of New York, and for the construction of one or more dams and reservoirs to retain such water, and for the construction of such sluices, culverts, canals, pumping works, bridges, tunnels, blow-offs, ventilating shafts, and other appurtenances, as may be necessary to the proper construction, maintenance, or operation of such aqueduct, dams, and reservoir. Section 3 authorizes the entry upon contiguous land for the purpose of making surveys and examinations for the preparation of the maps required to be made. Section 4 requires the commissioner of public works to prepare six similar maps or plans of the proposed sites of the proposed dams, reservoirs, and aqueducts, sluices, culverts, canals, pumping works, bridges, tunnels, blow-offs, ventilating shafts, and the appurtenances thereof, upon which maps there should be laid out and numbered the various parcels of real estate on, over, or through which the same were to be constructed and maintained, or which should be necessary for the prosecution of the work authorized by the act. On such maps, also, the natural and artificial division lines existing on the surface of the soil at the time of the survey were to be delineated, and there was to be plainly indicated thereon of which parcels the fee, and over or through which parcels the right to use and occupy the same in perpetuity, is to be acquired. By section 6 it is provided that, after the maps are filed, the counsel to the corporation shall apply to the supreme court for the appointment of commissioners of appraisal, upon a petition, signed and verified by the commissioner of public works, which should contain a general description of all the real estate to, in, or over which any title, interest, right, or easement was sought to be acquired for the city, for the purposes of the act, each parcel being more particularly described by a reference to the number of such parcel as given on the maps; and the title, interest, or easement sought to be acquired to, in, or over such parcel, whether a fee or otherwise, was required to be stated in such petition. By section 7 the counsel to the corporation was required to publish a notice of such application for the appointment of commissioners, and a statement of the boundaries of the dams, reservoirs, sluices, culverts, canals, pumping works, bridges, tunnels, blow-offs, and ventilating shafts, and of the route of the aqueduct by courses and distances, and of the greatest and least width of its track, with separate enumerations of the numbers of the parcels to be taken in fee, and of the numbers of the parcels in which an easement is to be acquired, with a reference to the time and place of filing the maps; and that was declared a sufficient description of the real estate sought to be taken or affected. Section 10 provided that, on filing the oath of the commissioners of appraisal, the mayor, aldermen, and commonalty of the city of New York should become seized in fee of all the land described on the maps as parcels of which it had been determined to acquire a fee. The subsequent provisions of the act relate to pro-

ceedings beyond the acquisition of the property, and therefore require no further pursuit at this time; but the portions of the law already outlined are sufficient to furnish the rule for the determination of these appeals.

After the passage of the act, the aqueduct commissioners organized under it; and the maps and plans required by the fourth section were prepared and adopted, and the commissioners of appraisal were appointed. Upon the maps adopted, the parcels affected by the constructions were all numbered and shaded,—some were colored pink, some blue, and some yellow; and each of the maps contained the following explanatory note: "The right to be acquired in the parcels of land upon the map is delineated as follows: The fee is colored pink; the easement in perpetuity is colored blue; a temporary easement is colored yellow." In the petition presented to the court for the appointment of commissioners of appraisal, it is stated that, "of the real estate so proposed to be taken or affected, certain parcels are required as shaft sites, dumping grounds, portals, open cuts, blow-offs, embankments, gate-houses, etc., for the purpose of constructing and maintaining said aqueduct. The boundaries of said parcels are as follows; the said parcels being colored on said maps in pink." "It is also proposed to acquire a temporary easement sufficient to authorize the use and occupation of the surface of certain real estate for the construction, and until the completion, of said aqueduct. The boundaries and description of said real estate required for such purpose are as follows; such real estate being colored on said maps in yellow." "The boundaries and descriptions of the sites of the several tunnels which it is proposed to construct are as follows, being colored on said maps in blue." Then follows a description of a strip of land, 33 feet in width, on each side of the center line of the survey of the aqueduct route as shown on the maps, running through the land of Parsons and Mallory, and including the parcels numbered on the maps from 604 to 616, inclusive; and the strip so described is marked on the maps in blue, which manifests the intention of the commissioner to acquire a perpetual easement only in those parcels. The commissioners awarded \$3,804 for the acquisition of the easement in perpetuity in parcels 609, 610, and part of 612, being the Parsons land, and \$832.70 to Mallory for the perpetual easement in parcels Nos. 606 and 608 and part of 609, and \$2,000 for damages to contiguous real estate. No entry was made upon the land of Wadsworth, but he interposed a claim for damages to contiguous real estate, and his claim was not allowed.

The scope and meaning of the statute under which these proceedings were instituted is entirely free from ambiguity, and it manifests the intention of the legislature to delegate to the city of New York the power to exercise the right of eminent domain, and to confer upon the commissioners appointed to construct the new aqueduct the power and discretion to take such interest and right in the lands necessary to be acquired for the accomplishment of the public purpose in contemplation. Such a delegation of authority and power is not only within the competence of the legislature, but it is precisely within the limitation of the constitution, which restricts the right to condemn private property for public use to the reasonable necessity of the corporation in the discharge of its public duty. *Railroad Co. v. Kerr*, 72 N. Y. 330; *Sweet v. Railway Co.*, 79 N. Y. 293; *Cooley, Const. Lim.* 559; *Railroad Co. v. Davis*, 43 N. Y. 137; *Washington Cemetery v. Prospect Park R. Co.*, 68 N. Y. 591; *Clark v. Worcester*, 125 Mass. 226. In the last case the question involved had reference to the compensation to be made for the construction and maintenance of a sewer on the land of the claimant, and it was, therefore, similar to these; and the court said, in the opinion: "The right to take is limited by the public exigency stated. Beyond that, the power to exercise the right of eminent domain is not given. The statute is to be strictly construed in this respect. * * * The power to take land for the purpose stated does not confer the right to take an absolute estate in fee-simple, be-

cause such an estate is not necessary to the enjoyment of the defined privilege. * * * The use, only, of the petitioner's land was taken, and that use is limited to the purposes named. * * * For all purposes consistent with that enjoyment, the right to use the land remains in the owner of the fee." Reaching the conclusion that it was within the power of the legislature to delegate the power to determine what interest or right the city should acquire in the lands in question, it is in order now to inquire what the intention of the legislature was, as the same is expressed in the act.

In section 4 the aqueduct commissioners are required to adopt maps and plans indicating the sites of the proposed dams, reservoirs, aqueducts, etc., and to indicate upon the maps "of which parcel the fee, and on or over which parcels the right to occupy the same in perpetuity, is to be acquired." Then the petition for the appointment of commissioners of appraisal is required to state "the title, interest, or easement sought to be acquired in or over such parcel,—whether a fee or otherwise." Then, again, in the notice of the application for the appointment of such commissioners, there was required a "separate enumeration of the parcels to be taken in fee, and of the numbers of the parcels in which an easement is to be acquired." By section 10, when the oath of the commissioners of appraisal was filed, the city became seised in fee of these parcels of land, described as parcels of which it has been determined by said aqueduct commissioners that the fee should be acquired. These provisions of the statute denote the intention of the legislature to confer upon the aqueduct commissioners the power to determine what land shall be taken in fee, and in what land an easement shall be acquired, and the extent and nature of such easement.

It becomes, therefore, next in order to inquire what the aqueduct commissioners have determined in the exercise of the power so delegated to them, and with what intention such power has been exerted, so far as their action has affected these appellants. They first determined upon and adopted a map and a plan of construction, according to which the portion of the aqueduct affecting the parcels of real estate in question is laid from 250 to 300 feet below the surface of the ground, and by which there is to be no structure of any kind between the upper surface of the aqueduct and the surface of the earth; and the surface of the land is not to be disturbed or used in any way. Upon the adopted maps of the proposed site and location of the aqueduct, they have designated the entire portion thereof running through the land in question as being from 250 to 300 feet below the surface of the earth, and have indicated by the blue color that the fee of this property was not to be acquired, but only the right to use and occupy the same in perpetuity with the aqueduct. Then a petition was presented to the court, stating that a permanent easement only was to be acquired in these lands, and the notice of such presentation was in conformity and harmony with the statement in the petition. Thus the commissioners have indicated their determination to acquire in these lands only an easement for the perpetual occupation of the same by the aqueduct, and for the use of that structure for a continuing water-way. We therefore reach the conclusion that the city has acquired only a permanent easement in these lands, unless the legislature has authorized a use of the premises by the city which is inconsistent with and excludes other ownership. Such is the contention of these appellants, and that presents the great question in the construction of this aqueduct law.

The argument in favor of the acquisition of a fee is based upon section 10 of the act, which, as we have already seen, provides that, upon filing the oath of office of the commissioners of appraisal, the city "shall be and become seised in fee of all those parcels of real estate which are on the maps in the fourth section referred to, described as parcels of which it has been determined by said aqueduct commissioners that the fee should be acquired; * * * and the said commissioner of public works, and the said aqueduct commission-

ers, and the said mayor, aldermen, and commonalty of the city of New York, or any person or persons acting under their or its authority, may enter upon, and use and occupy in perpetuity, all the parcels of real estate described in said map, for the purpose of constructing and maintaining on, in, under, or over the same the said aqueduct, dams, and reservoirs, with the said blow-offs, sluices, culverts, bridges, tunnels, ventilating shafts, and other appurtenances." The provisions for the entry upon and use of the land, it is insisted, confers upon the corporation of the city of New York and its agents the right to enter upon and use and occupy in any manner the parcels of land in question, so long as such occupation and use is for the purpose of constructing or maintaining the aqueduct or its appurtenances, and that such use is inconsistent with and excludes the ownership of the fee by any one other than the city. We do not find the position tenable. Within the scheme of the act, there are but two uses which can be made of these lands in question for the purpose of constructing or maintaining the aqueduct and its appurtenances, as laid out on the maps of the aqueduct commissioners,—one by the occupation of an under-ground portion of them by the body of the aqueduct, and the other by establishing through them a communication by a shaft or tunnel between the surface of the ground and the body of the aqueduct. The latter is a purpose not contemplated by the last part of section 10 of the act; but, independent of that, the land in question cannot be appropriated to any such use. The law requires the aqueduct commissioners to adopt plans for the construction of such tunnels as may be necessary to the construction, maintenance, or operation of the aqueduct, and for the location of the sites of such tunnels, and provides for the acquisition of the fee of the land through which the same are to run; and the manifest purpose and design of the requirement for the location of the sites of the tunnels was to assist in the selection of the parcels of land in which the city should acquire a fee, and therefore their location was a prerequisite and a condition precedent to the appointment of commissioners of appraisal and their acquisition. The city could make only what was necessary to the accomplishment of the public purpose in view, which was the building of the conduit; and, as an essential prerequisite to the condemnation of any interest in land, it was necessary to designate with certainty the situation and location of all land to be affected, and the right to be acquired therein, and the purpose of such acquisition; and nothing could be taken which was not specified upon the maps and plan of construction, and described and prayed for in the petition for the appointment of commissioners of appraisal. No sites for any erection were located upon the property in question, except the aqueduct, and the petition only asked for a permanent easement therein for that purpose; and therefore no entry can be made upon these lands, and no use or occupation of them can be had except for the purpose of constructing or maintaining the aqueduct 250 feet beneath the surface. These principles run through and control all the cases of this kind. Wherever a map is required to be made of property proposed to be taken for public purposes, great particularity and precision is required; and, the appropriation of property in virtue of the right of eminent domain is derogation of private right, nothing can be taken by implication. The fair interpretation of the statute, therefore, is that the city has the right to occupy continuously and permanently all the land described and designated on the map as sites for tunnels or other appurtenances, and that no right exists to construct anything in any place not designated on the map. The law invested the commissioners with discretionary power to take a fee in land necessary for some purposes, to take a permanent easement in others, and a temporary easement in others; and that discretion has been exercised and exhausted. They decided to construct an aqueduct in an under-ground excavation, far below the surface of the earth, from Croton lake to the city of New York, a distance of over 29 miles; and, as the right to excavate such an opening, and

construct and maintain the aqueduct therein, was all they required, they decided to take a permanent easement in the land through which it passed, for that purpose. As such an interest in the land was all that was necessary to the attainment of the end in view, it was all that could be justly taken.

In the case of *Washington Cemetery v. Prospect Park R. Co.*, 68 N. Y. 591, the land had been taken for a street; and the court there said: "No implication ought to be indulged that a greater interest or estate is taken than is absolutely necessary to satisfy the language and object of the statute making the appropriation. * * * The land is taken for an avenue, and this purpose is fully satisfied by the taking of an easement in the land for the street or highway. There is nothing inconsistent in the public use of the land for an avenue, and the retention by the land-owners of the fee, subject to the easement. It is not necessary that exact or technical language should be used in a statute for taking private property for public use in order to vest the fee in the public; but it must clearly appear, before this effect can be given to a statute, that it was the intention of the legislature, disclosed by the act itself, to take a fee." This long extract is made because it is an authoritative statement of the principle which must control the question now under examination. No interest is necessary in the lands in question beyond an easement, and the use of the land for an aqueduct is perfectly consistent with the retention of the fee subject to that servitude. There is no reason why the owner should be deprived of the use of his land, which he can enjoy to the fullest extent; and there is yet less reason for compelling the city to take and pay for the fee, when its acquisition is unnecessary. Nothing in the law positively requires the city to take and pay for land beyond its necessities, and it should not be compelled or permitted to do so without the plain requirement of the statute. Proof of the value of the land was therefore properly excluded; and, as the city took only an easement, the award is ample. The Parsons claim and the Mallory claim endure the same result.

The Wadsworth claim rests upon a different basis. Neither the aqueduct, nor any other structure, rests upon the property, and the claim was for consequential injury. The commissioners decided that no injury had resulted, and made no award, and we concur with them in that conclusion.

There was a question of evidence, which requires no examination, and which was properly disposed of by the commissioners. The orders should all be affirmed, with \$10 costs and disbursements. All concur.

PADDOCK v. EAGER.

(Supreme Court, General Term, Second Department. July 18, 1890.)

PARENT AND CHILD—PARENT'S RIGHT TO THE CUSTODY OF THE CHILD—HABEAS CORPUS.

On a petition by the father for a writ of *habeas corpus* to obtain the custody of his minor child from her grandmother, it appeared that respondent had reared the child from infancy, in a home of wealth and refinement, and that the child, who was about seven years old, was devoted to respondent, and desired to remain with her. Petitioner had no means to speak of, and no home, and intended to have the child live with his father and step-mother. He had failed to support his wife during her life, and he did not attempt to get the custody of the child till after her death. *Held*, that the interests of the child required that she should be left with respondent. PRATT, J., dissenting.

Appeal from special term, Orange county.

Application by Wilbur L. Paddock for writ of *habeas corpus* to obtain the possession of his infant child, Grace Paddock, who was in the custody of her grandmother, Mary C. Eager. An order was made at the special term awarding the custody of the child to petitioner, and respondent to the writ, Mary C. Eager, appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

M. N. Kane, (B. R. Champion, of counsel,) for appellant. *John B. Mayo*, (G. W. McElroy, of counsel,) for respondent.

DYKMAN, J. This is a proceeding under a writ of *habeas corpus* for the procurement of the custody of an infant child, and the controlling facts are these: The relator was married to Jennie H. Eager, the daughter of the respondent, in June, 1881, and she died in May, 1889, leaving an infant daughter, named Grace Paddock, who is now nearly eight years of age. She was born at the home of the respondent, and has lived with her most of the time since. The relator failed to support his wife after his marriage, and she lived at her mother's, and died there. The respondent is a woman of wealth and refinement, and she has reared this child from infancy, and has become attached to it by the closest ties of love and affection, and the attachment is mutual, and the child, who was about seven years of age when she was examined in this proceeding, expressed the strongest desire to remain with her grandmother, and she is not too young to have a choice. Until this time the father never sought the custody of his child, and she remained with the respondent not only with his assent, but from positive necessity, arising from his failure to furnish her support; and even now he has no home, no household, and no means, and earns only about \$17 a week, which can be but little more than sufficient for his own maintenance. What is perhaps worse than all, he proposes to compel this child to live with his father and step-mother, who are entire strangers to her, and who have, and can have, no affection for her, and who, in common with the relator, entertain extreme hatred and resentment towards the respondent and her family. So that it comes to this: The relator, after his long neglect of his child, expects this court to remove her from the only home she ever knew, where she is surrounded by wealth and affection, and where her young life has been made happy, and where she has been nourished and cherished with a solicitude and a wealth of affection, born of the love entertained for her unfortunate mother, whose untimely death they attribute to her husband, and deliver her to him, to the end that he may place her with his step-mother, where, so far as we can see, she will experience only the absence of all her present comforts, and the deprivation of all her future prospects. Add to all these considerations the dying request of a broken-hearted mother, and the case is before us. It may be stated preliminarily that we find no room in this case for the operation of the writ of *habeas corpus*, whose office is to release persons improperly restrained and deprived of their liberty. This little girl is under no restraint, and suffers no deprivation of her personal liberty; on the contrary, she is where she would be, and she desires to remain where she is, and she enjoys the utmost freedom.

But the relator bases his application upon his natural rights as the father of the child, and demands her surrender to him because she is his child, and the order appealed from was doubtless granted upon that theory. As we have already said, the office of the writ of *habeas corpus* is discharged by allowing the party detained to go free and exercise his volition, but in the case of a child, incompetent from infancy to exercise proper discretion, the courts sometimes undertake to determine for it, and then the welfare of the child is the paramount consideration which controls the exercise of the discretion of the court. The rights of parents are to be subordinated to the interests of the child, and to be regarded no further than they are in harmony with its welfare. They have no paramount right to the custody of their children which they can enforce against all other considerations. *In re Waldron*, 18 Johns. 418, was a case much like the present, where an infant was in the custody of its grandfather; and it appeared that it would be more to the benefit of the infant to remain with him than to be put under the care of the father, and no improper restraint was shown. The court refused to direct the infant to be delivered to the father. The same doctrine is to be deduced from the case of *Mercein v.*

People, 25 Wend. 64, where the whole subject underwent a most exhaustive examination in the late court for the correction of errors. To the same effect is *People v. Kling*, 6 Barb. 366; *People v. Wilcox*, 22 Barb. 178; *In re Welch*, 74 N. Y. 299; *Wilcox v. Wilcox*, 14 N. Y. 576; *Brush v. Brown*, 35 Hun. 324.

The foregoing principles are well settled, and run through all the cases, and the light cast by them upon this case renders it plain and simple. There is scarcely a pretense that the interests of this child will be subserved by her delivery to her father. Moreover, it is not her interest which he seeks to promote, or her happiness which he desires to secure or advance, but his action is evidently incited by malevolence of purpose towards the respondent and her family. He does not expect to have his child with him, or to enjoy her society, but he desires to remove her from her home where she was born, and where she is environed with refinement and morality and virtue and wealth, where she will be nurtured and educated, and enjoy the care and protection of those who are of her blood, and bound to her by ties of nature and association, and where she desires to remain, and place her with his step-mother, who is not of her kindred, who can entertain for her no natural affection, who does not desire her, and to whom she will be a burden, where she can receive none of the advantages which wealth and refinement can supply, and where she will forfeit the pecuniary provision made for her by her mother's will upon condition that she remain in the family of the respondent. Under such circumstances, and in view of all the facts and the surroundings of the case and the parties, the natural rights of the parent must yield to the manifest interests of the child, and she must remain in the family of the respondent so long as she desires to do so. Her best interests will be thus subserved, and the order appealed from must be reversed, with costs and disbursements.

BARNARD, P. J., concurs.

PRATT, J., (*dissenting*.) The appellants argue that in applications for the custody of a child the chief concern of the court will be the interest of the child, and not the legal right of any claimant. That rule may be conceded, but it by no means follows that the rights of parents are extinguished. In *Howe v. Potter*, (R. I.) 17 Atl. Rep. 129, the case chiefly relied on by appellants, the court did not base its decision upon the real or supposed interests of the child. The court there say that "primarily the welfare of the child is to be considered; but when * * * that is not the controlling consideration, the court may look beyond it to existing relations." In that case the welfare of the child was believed to be assured in the hands of either claimant. That question being thus eliminated from the controversy, the decision was based on the relations existing between the child and the various litigants, and the mother, having voluntarily allowed the child to live with the sister of her deceased husband from birth until the age of nine years, was properly held to have waived her *prima facie* right to the custody of the child. One consideration there dwelt upon by the court was that the mother had other children, while the aunt had none. But the court distinctly recognizes that, other things being equal, the prior right is in the parent as against any third party. We might rest the decision of this case upon that rule; but a careful study of the testimony convinces us that the interests of the child, and the superior legal right of a parent, concur to require an affirmance. The father has no other child, and can do more for his daughter than would be possible under other circumstances. The grandmother has several children, whose claims upon her bounty are at least equal to those of her grandchild. In the ordinary course of events the father, who is still young, will be able to care for his daughter during many years, which cannot be said with quite the same probability of the grandmother. But a consideration still more controlling

is that the testimony gives reason to believe that if the child remains with her grandmother she will be taught to dislike her father, and an estrangement produced in her feelings towards him which no affection on his part could ever change. Her present dislike for him, which can be ascribed to nothing but the influences by which she is surrounded, is strong evidence that a change is required both for her sake and for his. On the other hand, the testimony shows no reason to believe that if placed with her father any effort will be made to estrange her feelings from the family of her mother. Having lost her mother, the court will not willingly so dispose of her custody that the misfortune be made greater by an estrangement from her natural protector and nearest surviving relative. The order appealed from should be affirmed, with costs.

TALLMADGE, Respondent, v. PRESS PUB. CO., Appellant.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

Appeal from special term, Kings county.

Action for libel by Daniel W. Tallmadge against the Press Publishing Company. For former report, see 7 N. Y. Supp. 895.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

De Lancey Nicoll, for appellant. *Datley & Bell*, for respondent.

DYKMAN, J. There are two appeals from orders before us in this action,—one from an order denying a motion for leave to serve an amended answer, and one from an order denying a motion for leave to serve a supplemental answer. We think both motions should have been granted. Great liberality is allowed in pleading under our system of practice, and the defendant in this action should be allowed full opportunity to present every defense it may have to this action. The delay incident to the service of a new answer is of small consequence in comparison with the possible miscarriage of justice by reason of an insufficient answer. Both orders should be reversed, with \$10 costs and disbursements, and the motions for leave to serve an amended or supplemental answer should be granted on payment of \$10 costs to the defendant.

In re NEALE'S ESTATE.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

LEGACY TAX—EXEMPTION—ALMSHOUSE.

Under Rev. St. N. Y. (7th Ed.) p. 982, § 4, subd. 4, providing that every "almshouse," and "the real and personal property" "belonging to or connected with the same," and used for the purposes thereof, shall be exempt from taxation, a legacy to such an institution is not subject to the succession tax provided for in Laws N. Y. 1887, c. 718, § 1, since that act excepts "societies, corporations, and institutions now exempted by law from taxation."

Appeal from surrogate's court, Kings county.

The Faith Home for Incurables is an incorporated benevolent and charitable society, whose object is to maintain respectable homeless persons, afflicted with incurable disease. It is maintained entirely by charity, and its inmates are people without home, money, or friends able to support them. Rev. St. N. Y. (7th Ed.) p. 982, § 4, subd. 4, provides that "every poor-house, almshouse, house of industry, * * * and the real and personal property used for such purposes, belonging to or connected with the same," shall be exempt from taxation. Laws N. Y. 1887, c. 718, § 1, provides:

"All property which shall pass by will, * * * other than * * * societies, corporations, and institutions now exempt by law from taxation * * * shall be and is subject to a tax of five dollars on every hundred dollars," etc. From a decree of the surrogate holding that a legacy to said society under the will of Wealtha A. Neale, deceased, was taxable, the society appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Moore & Wallace, (Thomas S. Moore, of counsel,) for appellant. *Edmond Conger Brown*, for executors. *James W. Ridgway*, Dist. Atty., for county treasurer.

PRATT, J. The questions involved in this appeal were considered in *Re Herr's Will*, 7 N. Y. Supp. 852. By the rule there laid down the decree made below is erroneous, and must be reversed, and the Faith Home for Incurables declared free from taxation. Decree reversed. All concur.

BROWN v. ALLEN et al.

(Supreme Court, General Term, Fourth Department. July 1, 1890.)

1. TAXATION—TAX-DEEDS—PRESUMPTION OF REGULARITY.

In an action for the price of lands in L. county, the defense was a breach of covenant. Defendants offered in evidence tax-deeds of the lands, which had been recorded over two years, to the state, based on taxes assessed prior to the conveyance to covenantees. Act N. Y. 1855, § 65, as amended by Laws 1860, c. 209, provides that such deeds shall be presumptive evidence that the sale, and all proceedings prior thereto, and all notices required to be given previous to the expiration of the two years allowed for redemption, were regular and according to law. Laws 1885, c. 448, provides that as to certain counties, including L., such deeds shall, after being recorded two years, be conclusive evidence of the regularity of the sale, and of the proceedings prior thereto, and of the notices for redemption. Held, that these deeds were at least *prima facie* proof that the title of the covenantees was lost by reason of liens prior to the deed to them.

2. COVENANTS—BREACH.

The lands were wild and uninclosed. The tax-sale was in 1871. The deeds to the state were given in 1876, and recorded in 1877. The covenantees never recorded their deed, had nothing to do with the land after 1871, and in 1874 said there was no use in recording the deed, as their title was not good, owing to the sale for taxes. Laws N. Y. 1885, c. 238, creating the forest commission, provided (section 7) that all lands owned by the state in certain counties, including L., should constitute the "forest preserve," should be kept forever as wild forest lands, and should be cared for by the forest commission. Held, that this act, with the report of the forest commission to the legislature, showing that said land was included in the forest preserve, was such an assertion of ownership as constituted a constructive eviction by the state, entitling defendants to a remedy on the covenant.

Appeal from circuit court, Lewis county.

Action by Clara J. Brown against Sally Allen and others, administrators of Emory Allen, deceased. From a judgment for plaintiff, defendants appeal.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

H. W. Bentley and *E. McCarty*, for appellants. *C. D. Adams*, for respondent.

MERWIN, J. This action is brought to recover a balance due upon a bond, dated May 24, 1870, executed by Emory Allen and Newton Northam to Marietta L. Brown, and assigned by her to the plaintiff on the 2d January, 1873. It is conditioned for the payment of \$2,500, as follows: \$500 and interest on the 1st day of January then next; \$1,000 on August 1, 1871, and \$1,000 on August 1, 1872, with interest. The plaintiff admitted a credit of \$1,051.99 as of July 18, 1874; and the judgment is for the balance. Emory Allen died February 26, 1886; and Northam died January 6, 1885. This action was commenced June 19, 1889. At the date of the bond, Marietta L. Brown, the

obligee therein, and Edward A. Brown, conveyed to Allen and Northam, the obligors, certain lands in the town of Greig, in the county of Lewis, consisting of six parcels, containing in all 857.14 acres, for the consideration, as stated in the deed, of \$3,171.40. The bond in suit, and a mortgage upon the premises conveyed, were given back for a portion of the purchase money. The deed contains a covenant on the part of the grantors "that the premises thus conveyed, in the quiet and peaceable possession of the said parties of the second part, their heirs and assigns, they will forever warrant and defend against any person whomsoever lawfully claiming the same, or any part thereof." The defense in this action is based on this covenant. The claim of the defendants is that at the time of the sale the premises were subject to the lien of taxes previously assessed, by virtue of which, through subsequent sales and conveyances, paramount title was acquired by the purchasers, who took possession, and actually or constructively evicted the grantees, Allen and Northam.

The main questions on this appeal are: *First*, whether the evidence given by defendants showed paramount title; and, *second*, whether there was actual or constructive eviction. With a view of showing paramount title, the defendants offered in evidence several deeds from the comptroller of the state to the people of the state, given upon tax-sales made in pursuance of the provisions of chapter 427 of the Laws of 1855. These deeds covered the premises in question, and had been duly recorded in Lewis county for more than two years. One of them, covering several parcels of the land in question, purported, in substance, to be based on taxes assessed prior to the conveyance to Allen and Northam. It is not clear that the other parcels were sold on such taxes. This, however, is not here important, as the question here is whether the defendants have any remedy as to any part of the premises. The claim of the plaintiff is that these deeds furnished no evidence of the power to sell. The claim of the defendants is that the deeds, presumptively, at least, show title in the state. No evidence was given by the plaintiff to the contrary.

By section 65 of the act of 1855, as amended by chapter 209 of 1860, it was provided that such deeds "shall be presumptive evidence that the sale, and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular, according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto." By chapter 448 of 1885 the section above referred to was further amended, so far as the county of Lewis and several other named counties were concerned, by providing that all such conveyances, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, "shall, six months after this act takes effect, be conclusive evidence that the sale, and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular, and were regularly given, published, and served, according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto." In *People v. Turner*, 117 N. Y. 227, 22 N. E. Rep. 1022, it was held, with reference to a comptroller's deed given in 1881, and similar to those given in this case, that the act of 1885 was constitutional, and that the deed was conclusive even as to an omission of the assessors amounting to a jurisdictional defect. Page 234. In *Wood v. Knapp*, 100 N. Y. 109, 2 N. E. Rep. 632, it was held that the burden of proof was upon the party questioning the title of a grantee in a comptroller's deed given under the act of 1855, of showing by affirmative evidence that some material requirement of the statute had been omitted, or defectively performed, in the proceedings under which the sale was consummated. We must

therefore assume, I think, that the defendants made at least a *prima facie* showing that the title of Allen and Northam to the premises, or some part of them, was lost by reason of liens prior to the deed to them.

The court below, in ordering a verdict for the plaintiff, held that no sufficient eviction was shown. Was this correct? The deed to Allen and Northam seem to have not been recorded. There is evidence in the case tending to show that after 1871 they never had anything to do with the premises; that in 1874, their agent, upon being applied to by the agent of the plaintiff to have their deed recorded, replied that there was no object in getting the deed recorded, that the title was not good, as the lands had been sold for taxes. The tax-sale was in 1871, and the deed from the comptroller to the people of the state, of 183 acres of the premises, is dated February 1, 1875, and recorded May 30, 1877. The other deeds were later. In 1885, by chapter 283 of the Laws of that year, the forest commission was created. By section 7 of that act, all the lands then owned by the state, or which might thereafter be acquired by it, within certain counties,—one of which was the county of Lewis,—were constituted the “forest preserve.” The lands so designated were to be kept forever as wild forest lands, and not to be sold or leased except in certain special cases. The care, custody, control, and superintendence was given to the forest commission; and prosecution for all trespasses or injuries was provided for. The defendant offered to show that the lands in question were included within the forest preserve; but this, being objected to by the plaintiff, was excluded. The report of the forest commission, made for the year 1885 to the legislature in pursuance of the act, and which showed that the specific lots in controversy here were included in the forest preserve, was also excluded. As a general rule, the possession of the grantee must be disturbed before there can be an eviction. But in case of unoccupied or abandoned property the rule, in its full sense, at least, does not apply. In regard to such a case, it is said in *St. John v. Palmer*, 5 Hill, 599, that it is not necessary that the covenantee should be evicted by legal process. It is enough that he has yielded the possession to the rightful owner, or that such owner has entered, the premises being vacant, and taken possession. In that case the premises had been sold upon a decree of foreclosure of a prior mortgage. No actual possession had been taken by the purchaser; but he had, after his title became perfect, offered to sell the premises, and had paid taxes. It was said that, as there was no actual possession in any one, no formal act was necessary for the purpose of giving the purchaser the complete enjoyment of his legal rights. The constructive possession was transferred to the purchaser, and he afterwards exercised acts of ownership. It was held that there was such an eviction as amounted to a breach of the covenant. In the same case Judge COWEN was of the opinion that the covenant was broken the moment the title passed to the purchaser on the foreclosure sale, and that an action by the covenantee would lie although the purchaser had done nothing by way of asserting his title. In a similar case, (*Wood v. Fornerook*, 3 Thomp. & C. 303,) it is said by MULLIN, P. J.: “The owner of the legal title to uninclosed and uncultivated land is presumed to be in possession, as possession in law follows the title. To entitle a plaintiff to recover damages for the breach of the covenant for quiet enjoyment, an eviction must be proved; or he may, in the event of his title being divested by a superior title, surrender possession to the owner of the superior title, or notify his grantor that he relinquishes all claim to said premises, or he may show that the owner of the superior title has offered them for sale.”

In the present case the evidence would justify the finding that at or before the acquiring of the title by the state the grantees, Allen and Northam, abandoned the property, and were not from that time in possession. The lands were apparently wild lands, uninclosed and unimproved. The state, having become the owner of the title, was constructively in possession; and its own-

ership was publicly asserted by its forest preserve act of 1885, and by the acts of its forest commission under the authority given by the statute. The acts of this commission were competent evidence on the subject. The state, in order to perfect and complete its possessory right, was not bound to seek out and personally notify the prior owners, who were not in possession. Nor were Allen and Northam, or those representing them, in order to perfect their remedy on the covenant, bound to enter into possession, and subject themselves to the pains and penalties of trespassers under the forest preserve act. There was, in substance, a surrender to paramount title effectively asserted.

In *Schulenberg v. Harriman*, 21 Wall. 44, it was held that an act of the legislature directing the possession and appropriation of property, or offering it for sale or settlement, was equivalent to an entry for the purpose of taking advantage of the breach of a condition in a previous grant. In *McGary v. Hastings*, 39 Cal. 368, it is, in substance, said that the mere passage of a law making public land liable to entry was such assertion of the title of the government as authorized an abandonment by a vendee under an invalid title. In *Green v. Irving*, 54 Miss. 450, it was held that a grant of land by the state, while holding the paramount title, is such hostile assertion of such title as justifies persons in possession under defective titles in treating it as an eviction, abandoning possession, and suing their covenantors. These cases are quite pertinent to the question here. The forest preserve act, supplemented by the evidence above referred to as offered and rejected, was sufficient to show a hostile assertion by the state of its title, and a constructive eviction, under the circumstances of this case. We are, therefore, of the opinion that the court below erred in holding that there was no eviction sufficient to give the defendants a remedy on the covenant. The judgment must, therefore, be reversed. Judgment reversed upon the exceptions, and new trial ordered, costs to abide the event.

MARTIN, J., concurs. HARDIN, P. J., concurs in the result.

IN RE MOULTON'S ESTATE.

(Supreme Court, General Term, Fourth Department. July 1, 1890.)

1. EXECUTORS AND ADMINISTRATORS—APPOINTMENT—CITATION.

Since Rev. St. N. Y. pt. 2, c. 6, tit. 2, art. 2, § 27, marg. p. 74, gives the widow of a decedent the first right to administer on his estate, no citation need issue on her petition for letters of administration under Code Civil Proc. § 2563, which provides that every person who has a right of administration prior to or equal to the petitioner must be cited on a petition for letters of administration.

2. SURROGATE COURTS—SPECIAL SURROGATE OF ONEIDA COUNTY—CURATIVE ACT.

Letters of administration granted in 1886 by the special surrogate of Oneida county, without record proof of his authority to act by reason of the surrogate's incapacity, are validated by Laws N. Y. 1888, c. 455, which legalizes the official acts of the special surrogate performed by him since January, 1885, in so far as such acts may be affected by the failure to make and file a certificate showing the occurrences of the surrogate's disability.

3. EXECUTORS AND ADMINISTRATORS—REMOVAL—FRAUDULENT CONVEYANCES.

Though Laws N. Y. 1888, c. 814, authorizes executors or administrators to maintain an action to set aside fraudulent conveyances made by a deceased person, the fact that an administratrix, in her individual right, claims the ownership of a mortgage formerly belonging to her intestate under an assignment alleged to be fraudulent as to his creditors, is no ground for the removal of the administratrix. On her refusal to bring an action to set aside the assignment, the creditors may bring the action, alleging her refusal and making her a defendant.

4. SAME—INADEQUATE BOND.

Persons interested in an estate cannot insist on a summary removal of the administratrix because her bond is inadequate in amount, or her sureties insufficient, since Code Civil Proc. § 2596, directs that, after such inadequacy or insufficiency shall have been determined in a proceeding instituted before the surrogate, the administratrix shall be given a reasonable time, not to exceed five days, in which to procure a new bond, before her letters can be revoked.

5. SAME—FAILURE TO FILE INVENTORY.

Since Code Civil Proc. N. Y. § 2685, subd. 2, provides for the removal of an administratrix where she has "willfully refused or without a cause neglected to obey" an order by the surrogate, and since section 2715 provides that the surrogate may by order compel her to file an inventory, her failure to file the inventory, in the absence of an order by the surrogate directing her so to do, is not a ground for removal.

Appeal from surrogate's court, Oneida county.

Petition by Miriam M. Kellogg, Sarah M. Kellogg, Julia Ann Sleeper, and Eliza Pratt, creditors and heirs at law of David Moulton, deceased, for the revocation of letters of administration theretofore granted to Emily A. Moulton, widow of the deceased. From a decree in favor of the administratrix the petitioners appeal.

In the notice of appeal the appellants state that they "intend to bring up for review, upon such appeal, the surrogate's order of reference, herein made and entered in said surrogate's office on the 22d day of December, 1886; * * * the surrogate's order herein made and entered in said surrogate's office on the 13th day of February, 1888; * * * the surrogate's decision and order denying the petitioners' motion to amend their petition in this matter." David Moulton, in his life-time a resident of the town of Floyd, in Oneida county, died on the 7th day of May, 1886, intestate. On the 18th of May, 1886, Emily A. Moulton filed her petition for her appointment as administratrix in the surrogate's office of said county; and having filed her oath of office and a bond in the penalty of \$12,000, with two sureties, letters of administration were issued to her on the 20th day of May, 1886, to which letters were attached "the seal of office of our said surrogate," and, in witness of their due execution, was placed thereon the date, to-wit, the 20th day of May, and the same were signed by J. D. F. Stone, special surrogate. On the 2d day of October, in the year 1886, W. B. Bliss, surrogate, duly attached his signature to an exemplification of the letters. Appraisers were appointed, and an inventory was made and filed in the surrogate's office, September 29, 1886. On the 9th of December, 1886, the administratrix filed a new bond, with two sureties, in the penal sum of \$20,000, which was on the that day approved by the surrogate, and filed in his office. On the 18th day of May, 1886, Emily A. Moulton commenced an action in the supreme court against the appellants, the heirs at law of David Moulton, deceased, for the purpose of foreclosing a mortgage which bore date the 10th day of May, 1877, and was executed by Amie H. Kellogg to Charles S. Symonds, as assignee in bankruptcy of David Moulton, and which mortgage was assigned by Charles F. Symonds, as assignee in bankruptcy, to Emily A. Moulton, by an instrument in writing, bearing date the 29th day of December, 1877, claiming to be due on said mortgage \$8,650, with interest from the 10th of November, 1877. After issue joined in the action to foreclose the mortgage, the case was partly tried before a special term, when, by an order made in that action, the proceedings were suspended "to allow petitioners to take proceedings in the surrogate's court to remove said administratrix, and obtain the appointment of an administrator in her place."

On the 24th day of December, 1886, the appellants verified their petition addressed to the surrogate of Oneida county, praying for the removal of Emily A. Moulton from the office of administratrix, stating therein that she had "presented her petition to said surrogate of the county of Oneida in the usual form, praying that such proceedings be had that administration of the goods, chattels, and credits of said deceased be granted to her, and filed her bond of the same date in the sum or penalty of \$12,000 only; * * * and thereupon, on the 20th day of May, 1886, letters of such administration, in the usual form, were issued and signed by J. D. L. Stone, special surrogate of said county, appointing said Emily A. Moulton administratrix of the goods, chattels, and credits of the said David Moulton, deceased;" also stating that

she had filed an inventory with the surrogate "showing assets of said estate for administration to the amount, as footed, of \$8,163.61;" also stating that "said administratrix, by reason of her misconduct and dishonesty in the execution of her office as representative of decedent, is disqualified, and is unfit for the due execution of her office; * * * that she has sought to conceal, and has concealed, property and assets belonging to said estate, * * * and has neglected and has willfully refused to obey provisions of law relating to the discharge of her duties; that she has been guilty of wrong and other misconduct in the execution of her duty as administratrix in retaining possession and control of assets, and the evidence thereof, belonging to the estate of decedent, and is claiming the same as her own, which greatly embarrasses the administration, and jeopardizes the interests of your petitioners, and others interested in the distribution of said estate, viz., that the mortgage hereinafter mentioned, as your petitioners are informed and believe, is a part of and belongs to the estate of said David Moulton, and yet said administratrix refuses to have it included in the inventory of the estate, but fraudulently claims it as her own. * * *" The petition also alleges that "she has become and is incompetent and disqualified by law to act as such administratrix, * * * and the grant of said letters was obtained by false suggestions of material facts and suppression of her antagonism to the said estate." In the petition it is also alleged "that the aforesaid petition of said Emily A. Moulton represents that she was the widow of said David Moulton, whereas the petitioners claim and believe that she was never lawfully married to him, nor lived with him as his wife, but separate and apart as a single woman; and that the goods, chattels, and credits of said deceased did not exceed \$6,000, whereas they were at least \$20,000, including the mortgage hereinafter mentioned, as your petitioners are informed and believe to be true." It is also alleged in the petition of the appellants "that the assignment of said mortgage, and the bond accompanying it, to said Emily A. Moulton, was unlawfully, wrongfully, and fraudulently obtained, or so obtained and held in trust for the use and benefit of said David Moulton, subject to his control and disposition. * * * Said Emily A. Moulton (then Emily A. Mickle) entered into a conspiracy with said David Moulton to defraud his creditors, and to save said farms to him, and in furtherance thereof they, and those acting with them, caused to be written a certain contract or antenuptial agreement whereby it was provided that, in consideration of marrying said Moulton, he was to pay her \$50,000, as follows: \$10,000 within one year after marriage, and \$10,000 each year thereafter, until the whole \$50,000 was paid,—in lieu of all dower. Such agreement bears date the 1st day of February, 1876, but it was made in 1877, long after the said petition in bankruptcy was filed, and said adjudication was made as aforesaid, and after the pretended making of such agreement she claimed to have been married to said David Moulton, which the petitioners, on information and belief, deny, but, if she was ever married to him, such marriage, if at all, took place long after the filing of said petition in bankruptcy and the adjudication aforesaid; and the motive and intent of all such acts was to prevent the estate of said David Moulton, and particularly the real estate described in said mortgage, from passing to said assignee, he then being indebted to divers persons to the amount of about \$200,000, and to save the said property to said David Moulton; and thereafter he made proof in that proceeding in bankruptcy of her pretended claim on said agreement." They also alleged that they were "each and all creditors of the said David Moulton, and of his estate." On the 30th day of December, 1886, Emily A. Moulton verified her answer to the amended petition of the appellants, in which petition she admitted some of the matters alleged in the petition of the appellants, and denied certain allegations contained therein, and alleges her ownership of the bond and mortgage, and that "at the time of the assignment thereof by said Symonds the same were held

and owned by said Symonds, as assignee in bankruptcy of Frank W. Davis, David Moulton, and Jeremiah C. Carr, in a proceeding in bankruptcy then pending in the district court of the United States for the northern district of New York; that the petitioners, Sarah M. Kellogg, Miriam M. Kellogg, Julia Ann Sleeper, and Eliza Pratt, and the undersigned, were creditors of the said David Moulton, and were parties to that proceeding; that each proved and filed a claim against the estate of said David Moulton in bankruptcy, and the same were duly adjudicated by said bankrupt court, and by the order and decree of said court were ordered to be paid, and were paid;" and she also alleged that she had filed a new bond in the sum of \$20,000, "with two good and sufficient sureties, which bond * * * was duly approved by said surrogate." On the 22d of December, at a surrogate's court, after hearing the parties, an order was made by the surrogate, appointing "Frederick G. Fincke, Esq., referee, to take and report to the surrogate the evidence upon the facts as to the alleged grounds for revoking said letters of administration, with his opinion thereon; * * * and said referee bring in his report before the surrogate with all convenient speed, and the hearing of the parties herein on the confirmation of the report of the referee, and the decree to be made herein, be brought on upon a notice of eight days." After the referee had taken great volume of testimony at the instance of the respective parties, he made his report on the 31st of December, 1887, and in his third conclusion of law said, viz.: "That Emily A. Moulton was duly and legally appointed administratrix of the estate of David Moulton, deceased, and was lawfully entitled to such appointment, which was not obtained by her by reason of any concealment of fact, and by reason of any 'false suggestion of a material fact,' and that she has faithfully discharged her duties as administratrix, and has not been guilty of misconduct in the execution of her office as such administratrix, and that the letters of administration written to her should not be revoked; and that the petitioners are not entitled to the relief asked for in their petition, and are not entitled to the removal of said Emily A. Moulton from her position as administratrix, and that said Emily A. Moulton should be allowed to continue the discharge of the trust and duties of administratrix, and settle up said estate, and that the petitioners herein should be dismissed." On the 11th of January, 1888, the petitioners prepared and served about a hundred exceptions to the referee's report, and on the 13th day of February, 1888, in the surrogate's court, the petitioners asked leave to give evidence of the debts and claims against the estate of David Moulton, and the amounts and numbers of each of the debts and claims, to which the respondent objected; and thereupon the surrogate ordered the matter "sent back to F. G. Fincke, Esq., the referee herein, to take and report to the surrogate the evidence which the petitioners may offer on the question of fact of the debts and claims against said estate," and on the 6th day of March, 1888, the referee made an additional or supplemental report, in which report, among other things, he stated that the assets of the estate amount to the sum of \$8,153, and that he had before him "no facts upon which to form an opinion as to the solvency of the estate;" although in his report he stated that the total amount of claims admitted and disputed is the sum of \$8,680.75. On the 12th of March, 1888, the petitioners filed exceptions to the supplemental report.

At a surrogate's court on the 14th of May, 1888, an order was made reciting the proceedings already had, and: "(1) That the report of the said Frederick G. Fincke, the referee herein, and the questions of fact and the conclusions of law as herein found and determined by him, be, and the same are hereby, in all things ratified and confirmed, and are to stand as the order and determination of this court. (2) That the petition of the said petitioners Miriam M. Kellogg, Sarah M. Kellogg, Julia Ann Sleeper, and Eliza Pratt is hereby dismissed. (3) The costs, charges, and expenses, incurred by the said

Emily A. Moulton in her defense to this proceeding, be charged against and be paid from the estate of the said David Moulton, deceased." On the 27th of June exceptions were filed to the decree of the surrogate, and the appellants subsequently presented requests to find 75 matters of fact and 28 matters of law. Interspersed with the requests are the words, "I so find;" "I refuse to find except as found by me in my finding;" "Petitioners except;" "I refuse to find;" which expressions are printed in italics, although they nowhere appear to have any signature of the surrogate. In the case presented, it is stated: "The surrogate made the same rulings and decisions as made by the referee to same, and to each thereof, and gave to the petitioners and respondent an exception to each of his rulings and decisions against the petitioners and respondent, and the petitioners and respondent duly excepted. The said surrogate has marked on the margin of said requests to find, etc., as appears thereon, and the petitioners have duly taken exceptions to each of such refusals to find or rule. After this matter and proceeding were so heard, tried, and submitted to the surrogate for decision and decree, at a surrogate's court held in and for the county of Oneida, at the surrogate's office in Rome, on the 14th day of May, 1888, the said surrogate made and entered a decree, as annexed hereto. But the said surrogate did not file, nor has he filed, in his office, his decision in writing, which states separately the facts found and the conclusions of law, except as stated in the decree herein, to which omission or refusal the petitioners duly excepted." On or about the 25th day of June, 1888, the respondent's attorney served a copy of said decree, and on the 27th day of June, 1888, the petitioners duly made, filed, and served exceptions to said decree, and each part thereof, as hereinbefore appears. The case then contains 32 requests to find, and, interlined or printed in opposite the requests, are the words, "I so find. W. B. B.," or, "I decline to so find," or, "Findings with certain qualifications,"—with the initials of the surrogate added; and following are 25 requests to find certain conclusions of law, with interlineations, with words, "I refuse to find. W. B. B.;" or words, "I so find;" and following each of the expressions of refusal are the words, "Petitioners except." And on the 22d of August, 1888, it appears there were filed with the surrogate certain formal exceptions to the refusal of the surrogate to find.

Code Civil Proc. N. Y. § 2662, provides: "Every person being a resident of the state, who has a right to administration, prior or equal to that of the petitioner, and who has not renounced, must be cited upon a petition for letters of administration." Section 2715 provides: "A creditor, or person interested in the estate, may present to the surrogate's court proof, by affidavit, that an executor or administrator has failed to return an inventory or a sufficient inventory, within the time prescribed by law therefor. Thereupon, if the surrogate is satisfied that the executor or administrator is in default, he must make an order, requiring the delinquent to make the inventory, or a further inventory."

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

E. J. Richardson, for appellants. C. M. & G. E. Dennison, for respondent.

HARDIN, P. J. 1. Section 2545 of the Code of Civil Procedure provides that "the surrogate must file in his office his decision in writing, which must state separately the facts found and the conclusions of law." If the parties to the proceeding now before us had followed the requirements of this section, by presenting to this court a "decision in writing," which stated separately the facts found and the conclusions of law, the practice would have been much more satisfactory than that which now appears in the appeal-book before us; and it would have been in keeping with our decision in *Otis v. Hall*, 6 N. Y. St. Rep. 592, and also our decision in *Re Keef*, 43 Hun, 98. In the latter case it was said in the opinion delivered in this court, viz.: "Unless
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some authority can be found to the contrary, we thin. the safer practice would be for the surrogate to make an independent decision, with findings of fact and law, accepting or rejecting the conclusions of the referee, as shall seem just. Exceptions can be filed to such findings and to subsequent refusals to find or findings in settlement of case, as provided in section 2545."

2. It appears by the evidence, as well as by the admission made upon the hearing, that there was an intermarriage of the respondent with the deceased. The position of the appellants, to support which they gave considerable evidence, is that the marriage took place in the spring of 1877. The position of the respondent is, to which she gave considerable evidence in support thereof, that the marriage took place in the spring of 1876. Being the widow of the deceased, she was per force of the statute¹ entitled to administer upon his estate, having the prior right to letters of administration. *In re Page*, 107 N. Y. 266, 14 N. E. Rep. 193; *Libbey v. Mason*, 112 N. Y. 525, 20 N. E. Rep. 355. Having a right to administration, no notice or citation was necessary. Code Civil Proc. §§ 2660-2662.

3. Whatever force there may have been in the objection made to the appointment of the respondent as administratrix, and the issuing of letters of administration to her by the special surrogate of the county of Oneida, without record proof of his authority to act (by reason of sickness, absence, or disability of the surrogate) when the objection was taken in the petition filed in 1886, we think the force thereof has been wholly removed by chapter 455 of the Laws of 1888, which provided in that chapter that "the official acts of John D. F. Stone, as special surrogate, * * * since the 1st day of January, 1885, while acting in the place of the surrogate of said county by reason of the sickness, absence, or lunacy of said surrogate, so far as such acts may be affected, impaired, or questioned, by reason of the failure of the making and filing of a certificate showing the occurrence of such disabilities, as required by law, are hereby legalized, ratified, and confirmed, and the same shall have all the force and effect and validity as if such certificate had been made and filed." It may be observed incidentally that the surrogate seems to have approved of the action of the special surrogate very soon thereafter. Surely, such was apparent from the action of the surrogate in filing the inventory, and in approving and filing a bond executed by the administratrix. Whatever irregularity there may have been we think was cured before the making of the order brought before us on this appeal.

4. Sections 2684, 2685, 2686, and 2687 of the Code of Civil Procedure confer upon the surrogate's court power and prescribe the practice and mode of procedure for the removal of an administrator or revocation of letters of administration issued to such administrator. Section 2685 provides that "a written petition, duly verified, praying for a decree revoking those letters, and that the executor or administrator may be cited to show cause why a decree should not be made accordingly: (1) Where the executor or administrator was, when letters were issued to him, or has since become, incompetent or disqualified by law to act as such, and the grounds of the objection did not exist, or the objection was not taken by the petitioner, or a person whom he represents, upon the hearing of the application for letters; (2) where, by reason of his having wasted or improperly applied the money or other assets in his hands, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the property committed to his charge, or by reason of other misconduct in the execution of his office, or dishonesty, drunkenness, improvidence, or want of understanding, he is unfit for the due execution of his office; (3) where he has willfully refused, or without good cause neglected, to obey any lawful direction of the surrogate contained in a decree or order, or any provision of law relating to the discharge of his

¹Rev. St. N. Y. pt. 2, c. 6, tit. 2, art. 2, § 27, marg. p. 74.

duty; (4) where the grant of his letters was obtained by a false suggestion of a material fact." Section 2686 provides that "a petition, presented as prescribed in the last section, must set forth the facts and circumstances showing that the case is one of those therein specified. Upon proof, by affidavit or oral testimony, satisfactory to the surrogate, of the truth of the allegations contained in the petition, a citation must be issued according to the prayer thereof." It is further provided in section 2687: "Upon the return of a citation, issued as prescribed in the last section, if the objections, or any of them, are established to the surrogate's satisfaction, he must make a decree, revoking the letters issued to the person complained of. But the surrogate may, in his discretion, dismiss the proceedings, upon such terms, as to costs, as justice requires, and may allow the letters to remain unrevoked, in either of the following cases: (1) Where the case is within subdivision third of the last section but one; (2) where the case is within subdivision fourth of that section, if the person cited is entitled to letters, notwithstanding the false suggestion." We think questions arising under these sections are largely "in the discretion of the surrogate." In considering certain powers of the surrogate, in *McGregor v. Buel*, 24 N. Y. 169, not wholly dissimilar to the questions which may arise under the sections of the Code to which we have just referred, it was said by DENIO, J.: "The determination of the surrogate upon such questions is, as it should be, summary and exclusive." We think the provisions of section 2687, to-wit, "if the objections, or any of them, are established to the surrogate's satisfaction, he must make a decree revoking the letters issued to the person complained of," were intended to confer upon the surrogate a judicial discretion in viewing the facts and circumstances disclosed by the evidence furnished to sustain the objections made. See *In re West*, 40 Hun, 296; affirmed 111 N. Y. 687, 19 N. E. Rep. 286.

We think that the evidence and proceedings submitted to the surrogate fail to establish that the administratrix was "incompetent or disqualified by law to act as such." It was provided in the Revised Statutes (volume 2, p. 75) that no letters of administration should be granted "to any person who shall be judged incompetent by the surrogate to execute the duties of such trust, by reason of drunkenness, improvidence, or want of understanding. * * * In expounding that provision of the statute, the chancellor said, in *Coops v. Loverre*, 1 Barb. Ch. 47, viz.: "No degree of legal or moral guilt or delinquency, therefore, is sufficient to exclude a person from the administration, as the next of kin, in the cases of preference given by the statute, unless such person has been actually convicted of an infamous crime. * * * The improvidence which the framers of the Revised Statutes had in contemplation, as a ground of exclusion, is that want of care or foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe, and liable to be lost or diminished in value by improvidence, in case administration thereof should be committed to such improvident person. * * * The evidence in this case tending to show the respondent's dishonesty, and that he had been guilty of divers offenses against the laws of society, but which could not throw any light upon the question of his providence or improvidence, should therefore have been excluded by the surrogate." In *McMahon v. Harrison*, 10 Barb. 659, it was held, viz.: "Under the provisions of the Revised Statutes respecting the granting of letters of administration in cases of intestacy, vice and moral delinquency will not of themselves disqualify a person to act as administrator." In *Emerson v. Bowlers*, 14 N. Y. 452, the question considered by the court was whether the appellant there was legally incompetent to serve, and it was said that the fact that a person is "of small pecuniary means, and that he has been guilty of misconduct or mismanagement in administering the trust-estate, do not authorize the surrogate to supersede the letters testamentary, under 2 Rev. St. p. 72, §§ 18-21, and Id. p. 69, § 3, on the ground that the executor is legally

incompetent to serve 'by reason of improvidence;' and it was also further held: "The term 'improvidence' refers to such habits of mind and conduct as render a man generally, and under all ordinary circumstances, unfit to serve;" and, in delivering the opinion in that case, COMSTOCK, J., referred to *Coope v. Lowrerre, supra*, approvingly; and the same case was approved in *McMahon v. Harrison*, 6 N. Y. 447; and the case was also approved in *Coggschall v. Green*, 9 Hun, 472; and in the course of the opinion delivered by TALCOTT, J., it was said, viz.: "Moral guilt or delinquency is not a ground for excluding a person from receiving letters unless he has been convicted of an infamous crime."

The learned counsel for the appellants, in a very exhaustive argument submitted to us, lays great stress upon the circumstances attending the transfer of a mortgage for \$8,650 by Symonds, as assignee, to the plaintiff, and to the fact that she had commenced an action to foreclose that mortgage, and had emitted to place the same upon the inventory filed, and seems to suppose that her removal from the office of administration was essential in order to enable the appellants, as heirs at law, or as creditors of the deceased, to contest the title of the plaintiff to the mortgage, and to enable them to assert that the mortgage in fact was an asset belonging to the estate of the deceased; and he calls our attention to the Laws of 1858, c. 314, which authorizes executors or administrators to maintain an action to set aside fraudulent conveyances, transfers, or assignments made by the deceased. It must be borne in mind that the object of that statute is to enable creditors summarily to reach assets that have been fraudulently disposed of by the intestate; however, we see no difficulty, under the provisions of that statute, in the creditors availing themselves of all its provisions in this case, even though the respondent remained as the administratrix. Surely, upon creditors applying to the administratrix to bring such an action as the Laws of 1858 authorizes, she would be called upon to yield to the request, or to make a refusal. If she refused, then the creditors could bring an action and make her a defendant in her representative as well as her individual capacity, and allege her refusal to bring the action, and thus the creditors would have the full benefit of the provisions of the statute to the same extent as though the action had been brought by the administratrix. In *Bate v. Graham*, 11 N. Y. 237, it was held that if the administrator "collude with the fraudulent vendee, or, after reasonable request, refuse to take proceedings to impeach his title and reach the property in his hands, a creditor may maintain an action against him and the executor or administrator for that purpose." That case was decided in 1854, and was referred to approvingly in *Bank v. Leggett*, 51 N. Y. 554. In *Phelps v. Platt*, 50 Barb. 490, it was said: "Ordinarily a creditor of the estate of a deceased person cannot maintain an action against a fraudulent vendee of the latter to impeach the sale of personal property, unless the executor or administrator should collude with the fraudulent vendee, or, after reasonable request, refuse to take proceedings to impeach the title and reach the property in his hands." We are of the opinion that the removal of the respondent from the office of administratrix was not necessary to enable the appellants, as creditors, to maintain proper action to avoid the alleged ownership by the plaintiff of the mortgage on the ground that it was the property of the deceased, and that the transfer thereof to the plaintiff was fraudulent. In *Re Kellogg*, 39 Hun, 284, it was said by LANDON, J.: "This executor, being the donee of the gift, did not disaffirm it. His interest was opposed to his duty. But he ought to have disaffirmed it, and, because he voluntarily failed in duty, the surrogate has power to compel his performance of it. The statute authorizes the surrogate to control executors. 2 Rev. St. p. 220, § 1. In such case the general creditor can invoke this remedy. The statute dispenses with judgment and execution. *Southard v. Benner*, 72 N. Y. 424." We see nothing in that case inconsistent with the views we have already ex-

pressed. In *Lichtenberg v. Herdtfelder*, 103 N. Y. 307, 8 N. E. Rep. 526, it was said: "The fact that the fraudulent grantee is one of the executors furnishes no insurmountable obstacle. If she should refuse to restore the lands to the estate, she should be removed from her office of executrix, and then the remaining two executors could, under the act of 1858, disaffirm the conveyances of the real estate, and bring an action to set them aside; or the two executors could commence the action, making the executrix a defendant, and in such an action obtain for the estate the relief demanded. If the two defendants refused to commence the action upon the application of the creditors or some of them, they could be compelled to commence it by an order of the surrogate, who has ample power to that end, under section 2481 of the Code."

In *Harvey v. McDonnell*, 113 N. Y. 580, 21 N. E. Rep. 695, it was said: "But the administrators do not avail themselves of the power given to them by statute. It was their right and duty to do so. They have been applied to, and refuse. Is the creditor, therefore, without a remedy? Clearly not. Upon the face of the complaint, it is apparent that the administratrix has an interest adverse to the creditors of the estate. They call for property which she claims to own in her own right, and which she refuses to apply upon the debts of her intestate. These circumstances require an exception to be made to the general rule which forbids an estate or its management to be taken from the hands of those lawfully intrusted with it; for it is equally well settled that where such parties are either in collusion with one holding the property alleged to have been fraudulently transferred, or where, as in this case, it is actually claimed by them, or the trustee unreasonably refuses to sue, the creditors, or other persons interested, may themselves bring an action for or reclaim the property fraudulently transferred, making the transferees and the trustee parties. 1 Story, Eq. Jur. § 423; *Dewey v. Moyer*, 72 N. Y. 70; *Bate v. Graham*, 11 N. Y. 237; *In re Cornell*, 110 N. Y. 551, 18 N. E. Rep. 142; *Bank v. Leygett*, 51 N. Y. 552. In such a case the creditor stands in the place of the trustee, and it is immaterial that he is not a judgment creditor." In *Lore v. Dierkes*, 51 N. Y. Super. Ct. 157, it was said: "Although the instrument may be fraudulent as to creditors, the next of kin or their representative cannot avoid it. The representative of the next of kin, or rather the administrator, avoids it in behalf of creditors. Such an avoidance cannot result in favor of those for whom it cannot be avoided, but against whom it is vested." If the bond and mortgage which were assigned by Symonds to the plaintiff were the property of Moulton at that time, it may be said upon the assumption that he consented to the assignment, as the evidence seems to indicate he did; that he, if living, could not be heard to question the respondent's ownership to the same. In *Phillips v. Wooster*, 36 N. Y. 414, it was said: "So that, if the money paid was the debtor's, as he now insists it was, and the conveyance to the wife, therefore, fraudulent as against creditors, it was not fraudulent as against him, for he was not only consenting to the act, but himself performed it." In *Renfrew v. McDonald*, 11 Hun, 258, in speaking for this court, TALCOTT, J., said: "The recipient of property with intent to defraud creditors possesses the intimacy and confidence of the fraudulent debtor, and advises the attempted fraud, and consents to be made the instrument thereof. To allow the grantor in such a case to set aside the grant, and be restored to all he parted with for the illegal purpose, would be to afford great encouragement to future attempts of that character."

5. If the bond given by the administratrix upon her appointment, or the new bond given by her for \$20,000, was irregular or "inadequate in amount," or the sureties therein were insufficient, a remedy is provided therefor in section 2597, Code Civil Proc. Persons interested in the estate under such circumstances may present a petition to the surrogate stating the insufficiency of the sureties, "or that the bond is inadequate in amount;" "praying that

the principal in the bond may be required to give a new bond, in a larger penalty, or new or additional sureties, as the case requires; or, in default thereof, that he may be removed from his office, and that letters issued to him may be revoked;" and it is further provided that, when the bond is given by an administrator, "the petition may also be presented by any creditor of the decedent." Thereupon, if it appears to the surrogate that there is reason to believe that the allegations of the petition are true, he must cite the administrator to show cause why the prayer of the petition should not be granted. Section 2598, Id., provides for the surrogate's hearing the allegations and proofs of the parties, and that, if he finds that any of the objections are valid, "he must make an order, requiring the principal in the bond to give new or additional sureties, or a new bond in a larger penalty, as the case requires, within such a reasonable time, not exceeding five days, as the surrogate fixes, and directing that, in default thereof, his letters be revoked." We think these sections provide ample remedy in a case where the surety "is insufficient," or where the bond is "inadequate in amount." Although the appellants claim that the bond was defective in that it was inadequate in amount, and that the sureties were insufficient, and that one of the sureties was incompetent, they did not seek the remedy prescribed by the sections just alluded to. Having omitted to seek the remedy prescribed by the sections, we think they were not in a situation to insist, for either of the causes mentioned, on a removal of the administratrix under section 2685, Id.

6. If the administratrix "failed to return an inventory, or a sufficient inventory, the appellants had a remedy therefor under section 2715, Id. If an order under that section had been obtained, and the administratrix had "willfully refused or without a cause neglected to obey" it, such refusal would have furnished ground for her removal, under subdivision 3, § 2685, Id.

7. Appellants have taken multitudinous exceptions, which are found distributed throughout the case presented to us, to rulings of the referee in receiving and in rejecting evidence; to the rulings of the surrogate in receiving or rejecting evidence; the conclusions of fact found by the surrogate; to refusal of surrogate to find certain facts; to refusals of the surrogate to find certain conclusions of law; and to his findings upon certain questions of law. Fortunately, we need not protract this opinion to the extraordinary length that would be required to discuss each of these exceptions in detail. We have carefully looked at all of them, and we are of the opinion that no errors were committed in receiving or rejecting evidence which make it apparent to this court "that the exceptant was necessarily prejudiced thereby." Id. § 2545; *Brick v. Brick*, 66 N. Y. 144; *Horn v. Pullman*, 72 N. Y. 269; *In re Ross*, 87 N. Y. 514; *Snyder v. Sherman*, 88 N. Y. 656.

This court having the power to decide questions of fact which were before the surrogate, as we held in *Re McGraw*, 45 Hun, 354, affirmed 111 N. Y. 66, 19 N. E. Rep. 233, in the exercise of that power we are of the opinion that the surrogate in the discharge of his official duty, and in applying his judicial discretion to the case before him, having regard to all the aspects thereof, properly reached the conclusion evidenced by his order refusing to remove the respondent from the office of administratrix of the goods and chattels of David Moulton, her deceased husband. We are of the opinion that the several orders brought up by the appeal of the appellants should be sustained. Decree of the surrogate of Oneida county refusing to revoke letters of administration to Emily A. Moulton, and intermediate orders, affirmed, with costs against the appellants personally. See *In re West*, 40 Hun, 297. All concur.

In re STONEBRIDGE.

(Supreme Court, General Term, First Department. July 13, 1890.)

1. INSOLVENT CORPORATION—EXAMINATION OF DEBTOR—NOTICE TO ATTORNEY GENERAL.

A warrant, issued at the instance of a receiver of an insolvent corporation for the arrest and examination of its debtor, should be vacated on motion, unless notice was given to the attorney general under Laws N. Y. 1838, c. 878, § 8, requiring service on him of a copy of all motion papers, and of any other application, in any proceeding for the dissolution of a corporation, or the distribution of its assets.

2. SAME—NOTICE OF APPOINTMENT OF RECEIVER.

2 Rev. St. N. Y. p. 469, § 70, providing for notice of the appointment of a receiver for an insolvent corporation, and section 72, that, after the first publication, every one having any of its property or indebted to it shall account therefor to the receiver, a warrant cannot, until after the first publication, be issued for the arrest and examination of one on whom a personal demand has been made, under 2 Rev. St. p. 48, § 12, and 2 Rev. St. p. 469, § 72, providing that where a receiver of an insolvent corporation shall show that any one has concealed or embezzled any part of the estate, or can testify as to the concealment and embezzlement thereof, a warrant may issue for his arrest and examination.

BARTLETT, J., dissenting.

Appeal from special term, New York county.

Appeal from an order denying a motion to vacate a warrant issued on the application of George N. Stonebridge, Jr., receiver of the New York Book Company, for the examination of John B. Alden in relation to the company's property. For former report, see 6 N. Y. Supp. 811.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

Dill, Chandler & Seymour, for appellant. Henry Bischoff, Jr., (Charles E. Hughes, of counsel,) for appellee.

BARTLETT, J. The warrant against the appellant was issued at the instance of George H. Stonebridge, Jr., receiver of the New York Book Company, assuming to act under certain provisions of the Revised Statutes relating to trustees of insolvent debtors, which provisions are by law made applicable to receivers of corporations. 4 Rev. St. (Banks' 8th Ed.) pp. 2524-2534, and p. 2682, § 72. No notice of the application for the warrant was given to the attorney general. This is the first point made in the brief of the appellant, and it is fatal. The precise question has been determined by the court of appeals in a case where an application was made to me for a warrant of this kind, at the Kings county special term, in November, 1889. The application was denied on the sole ground that no notice thereof had been given to the attorney general, as prescribed by the Haggerty act. Laws 1883, c. 878. The order refusing the warrant was affirmed by the general term, on this and other grounds; and was sustained in the court of appeals on the ground alone that the attorney general should have had notice of the application, without considering the other questions discussed by the general term. *In re Van-ames*, 23 N. E. Rep. 1149. The decision mentioned is conclusive against the position of the respondent, and renders it necessary to reverse the order appealed from, without discussing the other interesting points presented by the appeal.

VAN BRUNT, P. J. The respondent in this action, on the 12th of February, 1889, was appointed receiver of the New York Book Company, in proceedings taken to procure the sequestration of the property of said corporation for the purpose of paying the debts thereof. The said receiver duly qualified, and published a notice requiring all persons indebted to the said corporation, or having the property of said corporation in their possession, to pay such debts or sums of money, or to deliver the same to him at his office. This notice was not signed by the receiver, nor did it contain the name of the receiver in any part thereof, and it was impossible to determine from the notice who had issued the same. It being claimed upon the part of the receiver that the ap-

pellant, Alden, had certain property of the corporation in question in his possession, an application setting up these facts was made to the court for a warrant against the said appellant, that he might be brought before the court for the purpose of being examined pursuant to the statute in such case made and provided. This warrant was granted, and, a motion having been made to set the same aside upon various grounds, that motion was denied, and from the order denying the same this appeal is taken.

In the foregoing statement of facts it has not been deemed necessary to state all the proceedings which have been taken in reference to the appointment of the receiver, nor to make particular reference to the papers upon which the warrant in question was granted, except so far as it sets forth the point upon which this appeal may be determined. By the provisions of the Revised Statutes under which the proceedings in question were initiated, (section 70, 2 Rev. St. p. 469,) it is provided that the receivers, immediately on their appointment, shall give notice thereof, which shall contain the same matters required by law in notices of trustees of insolvent debtors. By section 72 it is provided that, after the first publication of the notice of the appointment of receivers, every person having possession of any property belonging to such corporation, and every person indebted to such corporation, shall account and answer for the amount of such debt, and the value of such property, to the said receiver. The section further provides that all the provisions of law in respect to trustees of insolvent debtors, the collection and preservation of the property of said debtor, the concealment and discovery thereof, and the enforcement of such discovery, shall be applicable to the receivers so appointed, and to the property of such corporation. It will be seen by the provisions of this section that it is not until after the first publication of the notice of the appointment of the receiver, as provided by section 70, that it becomes obligatory upon the person indebted to the corporation to account and answer for the amount of such debt, and the value of such property, to the receiver. In the case at bar, although an attempt to publish the notice required by section 70 is made, yet it contains no notice as to who has been appointed receiver, nor to whom the property is to be delivered. Therefore the obligation created by section 72 did not spring into existence, as it is only after the publication of the notice of the appointment of the receiver, as already stated, that the duty to account and answer for debts due to the corporation, and property belonging to the corporation, arises.

It is urged upon the part of the respondent that the publication of the statutory notice to creditors and debtors of the corporation was not a condition precedent to the receiver's application for the warrant, because personal demand had been made upon Alden for the delivery of the property of the company before the application was made. It may be said, in answer to these suggestions, that where the statute provides one proceeding for putting a party in default, and provides for a particular way of giving notice, a notice given in another way, although equally effectual, cannot establish such default. As already seen, the language of section 72 is explicit. After the first publication of the notice of the appointment of the receiver, then the duty to deliver the property shall arise, and there is no provision whatever that it shall arise before. It is true that section 12, (2 Rev. St. p. 43,) relating to the powers, duties, and obligations of trustees and assignees, provides that whenever the trustees shall show by their own oath, or other competent proof, that there is good reason to believe that the debtor, his wife, or any other person has concealed or embezzled any part of the estate of such debtor vested in said trustees, or that any person can testify concerning the concealment and embezzlement thereof, a warrant may be issued commanding the sheriff to cause such person to be brought before the court for the purpose of being examined. But this provision is to be read in connection with the provisions of section 72, upon which it is ingrafted by the latter part of this section. It certainly

was not intended that before the duty of delivering over the debts and property of the company, by reason of the publication of the notice, this provision in regard to examination should go into effect, because, under that very provision of the statute, until that notice was given, the alleged debtor was not in default. We think, therefore, that the necessary preliminary to the initiation of these proceedings was the putting of the debtor in default by the publication of the proper notice of the appointment of the receiver in order that the debtor might deliver over the property. It appears clearly from the record in this case that no such notice was given. The appellant was not put in default by the demand, because that was not the method provided by the statute for putting him in default, and, not being in default in respect to delivery of this property, it is difficult to see how the court was justified in issuing the warrant for his examination.

The other points raised upon this appeal it does not appear to be necessary to consider, as the one suggested seems to be fatal. The order should be reversed, with \$10 costs and disbursements.

BARRETT, J., (dissenting.) The point that the receiver cannot apply for this warrant until after the first publication of the notice of his appointment (as required by 2 Rev. St. p. 469, § 70) is not, in my judgment, well taken. Under the Revised Statutes, (Id. § 67,) a receiver appointed upon the voluntary dissolution of a corporation became vested with its property from the time when his bond was filed. His right thereafter to sue for and recover such property, without regard to the notice, was specially recognized. It is true that section 72 provides that debtors shall account to the receivers "after the first publication of the notice," but the same section applies to the receivership all the provisions of law, in respect to trustees of insolvent debtors, and the collection and preservation of the property of such debtors. One of the latter provisions is that, "notwithstanding any such notice, the trustees may sue for and recover any property or effects of the debtor, and any debts due to him at any time before the day appointed for the delivery or payment thereof." 2 Rev. St. p. 48, § 10. This is *in part materia* with the provision as to the vesting of the property and assets of the corporation in the receiver from the time of the filing of his bond. It also enforces the statutory declaration that, from the same time, the receivers are "trustees of such estate for the benefit of the creditors of such corporation and of its stockholders." And it is not inconsistent with the requirement that the debtors shall account "after the first publication of the notice." This latter provision does not qualify the receiver's right to sue. The intention plainly was to prescribe a period after which the debtor could not plead payment to the corporation or its officers in ignorance of the receiver's appointment. But, further, the provision as to the publication of notice is not jurisdictional. The object is to give the best practicable notice, but notice is the essential thing. Personal notice is not required, because of the probability that the creditors and debtors are numerous. The form prescribed is the statutory substitute for actual notice. If, however, personal notice is given to every debtor and creditor, and that can be made to appear conclusively as matter of fact, what good reason can there be for delaying the execution of the receiver's trust? It certainly seems unreasonable to permit a debtor who has had actual notice, and who has, in fact, paid the receiver a part of his debt, to throw this representative of the creditors out of court upon the trivial technicality in question, when that officer seeks to recover the balance of the debt. The present case is quite analogous to this illustration, for it appears that Mr. Alden not only had due personal notice of the receiver's appointment, but that he actually delivered up to that officer the books of account of the corporation, and then informed him that there were no other assets. There is still another answer to this objection, and that is that the object of the proceeding is not the col-

lection of a debt or the delivery of property, but simply the procurement of testimony. Thus the statement in the petition as to notice was superfluous; for, even if such notice was a prerequisite to proceedings to compel the delivery of property or the payment of a debt, there is no suggestion or implication in the statute of its being a prerequisite to the mere discovery of such property or debt. And certainly it is the bounden duty of the receiver to put himself in a position whereby, upon the publication of notice, he may advisedly invoke against debtors or bailees ordinary legal remedies. That the proceeding was "intended as an informal, but prompt and effective, substitute for the tedious and expensive process on a bill of discovery," was explicitly held in *Noble v. Halliday*, 1 N. Y. 333. The following observations of RUGGLES, J., who there delivered the opinion of the court, are quite appropriate to the present case: "The necessity and utility of the proceeding are too obvious to require elucidation. The property of an insolvent corporation is usually in the hands of the officers and agents under whose management it has become insolvent. They are frequently its largest debtors; and the power of compelling them and all others to disclose its condition, and of ascertaining by that means where its property is, in whose hands, under what claim or pretense it is held, and who are its debtors, is indispensable to the interest of its creditors for whose benefit it is to be collected and distributed by the receiver." The proceeding under the statute is terminated by the signature of the person examined to his deposition, and the attestation thereof by the officer conducting the inquiry. 2 Rev. St. p. 44, § 13. Such proceeding may be instituted even against a witness (section 12) who can testify concerning the concealment or embezzlement of property by any other person. The warrant is nothing more, in substance, than a subpoena, obedience to which is insured in the first instance. Modern legislation would probably have substituted the more genial process of a judge's order; but the object to be attained is the same, however brought about.

These views are emphasized by reference to Code, §§ 1788, 1789. Under these sections, even a temporary receiver, appointed in sequestration proceedings, has power "to collect and receive the debts, demands, and other property of the corporation. * * * and to maintain any action or special proceeding for either of those purposes." Such temporary receiver is not required to give the notice already referred to, yet clearly, under the express authority of the statute above quoted, he may proceed against debtors or bailees. Now, this temporary receiver may be continued by the final judgment, and thereupon he becomes, in the language of section 1788, "a permanent receiver, and has all the powers and authority conferred, and is subject to all the duties and liabilities imposed, upon a receiver appointed upon the voluntary dissolution of a corporation." It would certainly be strange if the same officer, who, as temporary receiver, is lawfully prosecuting debtors and bailees, should—the moment he is appointed permanent receiver—be compelled to pause until after the formality of this first publication has been gone through with. Upon the whole, I am of opinion that the petitioner had a right to institute the present proceeding as soon as he was appointed permanent receiver. He was not required by the court to furnish any additional security beyond that which he had already given as temporary receiver. Nor was the court called upon by any statutory provision to require him to furnish additional security. He was simply, in the language of the section, "continued by the final judgment." There was no break in the office. The receiver was receiver throughout, and his bond was effective throughout. The fact that he filed a bond when originally appointed is sworn to, and such proof is not negatived by the certificate of the clerk that no bond was filed after the 7th of November, 1888. The petitioner was appointed on the 3d of November, 1888, and the bond was undoubtedly filed between that date and the 7th of November. If not, the appellant should have shown the omission by a cer-

tificate covering the period commencing with the appointment. It is not necessary to decide whether the receiver was bound to file the oath required of trustees of insolvent debtors, (2 Rev. St. p. 41, § 5,) for the proof that such oath was filed is quite satisfactory, and we even find a copy of the oath among the papers used in opposition to the motion to vacate.

The point is made that the warrant was void because no notice of the application therefor was given to the attorney general. There is nothing in this point. This proceeding is not within the Act of 1883, c. 378, § 8. It is not for the dissolution of the corporation, nor for the distribution of its assets, and it would be absurd to require the receiver to notify the attorney general of every step he takes to discover property and debts, or to secure such property and debts when discovered. The attorney general, however, had due notice of the application for the appointment of the receiver. This is denied by Mr. Alden upon the strength of the judgment roll and proceedings in the sequestration suit. But these proceedings sufficiently show that the attorney general had notice; and it was incumbent upon the objecting party to rebut what thus appears, and to show affirmatively, as matter of fact, that such was not the case. The attorney general's admission of due service appears to be indorsed upon the original notice of motion for the appointment of a temporary receiver, and proof of the service upon him of all the papers thereon is recited in the order. There is, it is true, no proof of the service upon the attorney general of the papers upon which the court subsequently relieved the original appointee, and substituted Mr. Stonebridge *pendente lite*. It seems, however, that the original order was amended *nunc pro tunc*, simply by making this substitution, and thus a recital of notice to the attorney general appears on the order so appointing Mr. Stonebridge as temporary receiver. This, however, would probably not have answered but for what followed. All the papers upon the application for final judgment, and for the continuance of Mr. Stonebridge, as permanent receiver, were duly served upon the attorney general, together with a copy of the proposed judgment, in which this language was used: "Second, that George H. Stonebridge, Jr., Esq., heretofore appointed receiver of the said corporation, is hereby continued as the permanent receiver thereof, with the usual powers and duties," etc. This proposed judgment also recited that "copies of all the preceding papers" in the action had been served upon the attorney general, and that Stonebridge had been, by order entered therein on the 11th day of October, 1883, duly appointed receiver of all the assets of the company, and had duly qualified and entered upon his duties as such receiver, and was then, at the date of the judgment, the receiver of the corporation. The provisions of the act of 1883 were thus substantially complied with, and the validity of Mr. Stonebridge's appointment cannot now be successfully attacked,—certainly not by party or witness in this collateral proceeding.

It is also claimed that the proceedings should have been dismissed because in their institution and conduct the receiver employed the attorneys for one of the creditors of the corporation. This is carrying the rule that a receiver should not employ the attorney of either of the parties to the suit entirely too far. These gentlemen were not even attorneys for the plaintiff in the action wherein the receiver was appointed. They happen to represent one of the creditors of the corporation, who, if the receiver secures any property, will share equally with the other creditors. The receiver represents all the creditors, and the stockholders as well. The point would be the same in principle if these attorneys represented a stockholder. It was entirely natural and proper for a receiver thus appointed to look for assistance, in securing something for his *cestuis que trustent*, where he would be likely to get it. It is quite different where the receiver is appointed in a partnership suit, or even in a proceeding designed for the benefit of a single creditor. "The undertaking to act as solicitor or counsel for the receiver, under such circum-

stances, would," as was said by the chancellor in *Ryckman v. Parkins*, 5 Paige, 545, "frequently cast upon the person thus assuming to act, inconsistent and conflicting duties; both of which duties could not properly be discharged by the same person." Here, however, there can be no such conflict of duty. The receiver, representing all the creditors, who, regardless of individual zeal, must share alike, cannot well be placed in a false position by availing himself of the knowledge acquired by the counsel of any one of such creditors. A question may ultimately arise with regard to compensation; but, so far as the present proceeding is concerned, there is no ground for dismissal.

The question of the constitutionality of the act was sufficiently considered by Mr. Justice DANIELS in his dissenting opinion on the previous appeal in this matter. 6 N. Y. Supp. 811. There is nothing in the prevailing opinion there to indicate that the majority differed with him on this head. The question, too, seems to be reasonably free from doubt. There is here no attempt to punish any one, or to deprive any one of property without due process of law. The party or witness is simply brought before the officer to be examined upon proof sufficient to warrant the inference of concealment or embezzlement. If upon such examination the officer was authorized summarily to overrule a claim of title, and to compel the delivery of the property discovered, the case of *In re Beebe*, 20 Hun, 462, would be applicable. But the act there under consideration is plainly distinguishable from the present, in that it "was not passed," as Mr. Justice BOARDMAN observed, "for the purpose of the examination, but to get possession of the property claimed, if the examination proved favorable." Here discovery is alone the aim and end of the proceeding. It will be observed, too, that the constitutionality of the law was not even questioned in *Noble v. Halliday*, *supra*, while the practical working of the act was commended.

The verification of the petition is certainly informal, but it should not, under the circumstances, be treated as an absolute nullity. The venue, though absent from its usual place, may properly be gleaned from all that appears on the face of the petition. This petition is entitled in the supreme court, "City and County of New York," and it purports to have been verified before "Nicholas Schloeder, Notary Public, (158,) N. Y. Co." The words "City and County of New York" in the title have no legal relation to the proceeding, and are superfluous, except as indicating the venue. Ordinarily, these words, in such a connection, refer to the designated place of trial. They could have had no such meaning here, for the proceeding of itself is not an action, nor is it initiated in an action, nor can it result in a trial. Consequently these words indicate nothing save the locality where the oath was administered, and where the proceeding was about to be commenced. The presumption that the notary officiated within his jurisdiction is thus strengthened by the context; and the presumption that the officer has not violated his duty is sufficient *prima facie* to establish the fact that the oath was administered by him in the county appended to his name. *Parker v. Baker*, 8 Paige, 430; *Barnard v. Darling*, 1 Barb. Ch. 219; *People v. Stovell*, 9 Abb. N. C. 461. But, apart from this, the objection was waived by the failure to make it below. It nowhere appears in this record that the point was specified as one of the grounds of the motion to vacate. If the objection had been taken, it would, according to the ruling in *Smith v. Collier*, 8 N. Y. St. Rep. 172, have been competent to permit an amendment in accordance with the fact. Nor would the objection have been necessarily fatal, even without an amendment, for the statute does not require a petition, and the warrant may issue when the officer is satisfied of the existence of the necessary facts by the oath of the receiver, "or other competent proof." Here there was this oath; but, whatever question there may have been as to its sufficiency, there was also other competent proof sufficient to sustain the warrant.

There are still other objections to the proceeding upon the appellant's brief, but they need not be specially considered. They are of a trivial and technical character, suggestive of a desire to evade the examination at all hazards, and upon the most trumpety grounds. Upon the facts, there was ample to warrant the examination. The order should therefore be affirmed, with costs.

WITTENBROCK v. MABIUS *et al.*

(Supreme Court, General Term, First Department. June 6, 1890.)

DEPOSITION—COMMISSION TO TAKE—SOJOURNERS.

A person who lives in New Jersey, but does business in New York city, "sojourns" in such city, within Code Civil Proc. N. Y. § 916, providing that the place where a witness is required to attend to be examined under a commission to take testimony in an action pending in another state, "must be in the county in which he resides or sojourns." VAN BRUNT, P. J., dissenting.

Appeal from special term, New York county.

Action by Henry Wittenbrock against L. Mabijs and others. Egbert Achtmann was subpoenaed to appear and be examined as a witness under a commission issued in the action. His motion to vacate the subpoena was denied, and he appeals. Code Civil Proc. N. Y. § 916, provides that "the place where the witness is commanded to attend must be within the county in which he resides or sojourns; or, if it is in another county, not more than 40 miles distant from his residence, or the place of his sojourn."

Henry C. Wilcox, for appellant. A. B. Porter, for respondent.

BRADY, J. The appellant was subpoenaed to attend before a commissioner, to give testimony in an action pending in the superior court of Sacramento county, Cal., but moved to vacate the process upon two grounds: (1) That there was no proof presented to the learned justice showing his materiality as a witness; and (2) that he was neither a resident nor sojourner in this state. The motion was denied, and hence this appeal.

The application, in one respect, was a complete misapprehension of the provisions of the Code relating to the subject, and was so treated throughout. Section 915 provides for the examination of a witness when a commission has been issued for that purpose in an action pending elsewhere, in which case the presentation of the commission requires the issuance of a subpoena. The justice of this court applied to has then nothing else whatever to do with the matter. If satisfied there is a commission, that is enough; and for the reason, not only, that it is so by the demands of the section mentioned, but for the reason that the issuance of the commission determines the materiality of the witness to be subpoenaed. It is only when a commission has not been issued (section 917) that a question is presented as to such materiality. The motion, for that reason, should have been denied, unless it appeared, as required by section 916, that the witness did not reside or sojourn in this county. It is conceded that he lives in the state of New Jersey, but does business in this city. Does such a person sojourn here? He has a temporary residence or abode here, undoubtedly, during business hours, and this makes him a sojourner. See Worcester and Webster. Indeed, a sojourner has an abode less temporary than a man who goes daily from his actual residence to a place where he does business; for that place, for certain purposes, and very important purposes, is one of temporary residence. The statute referred to, indeed, contemplates the examination of a traveler temporarily residing or abiding in the county in which he is required to appear. The definition of "sojourn" by the authorities already cited is "a temporary residence, as that of a traveler in a foreign land, a sojourner; to have a temporary abode; to live as not at home." All that the statute designed to accomplish was to protect the witness from unnecessary inconvenience, by requiring his exam-

ination where he is, and a sojourner, even as a traveler, would be exposed to as little disturbance by a subpoena as possible. His examination there would be the least objectionable. If engaged in business, there can be no possible objection to his attendance at the place where he conducts it, and he becomes from that fact more than a sojourner. He is one with a fixed abode during the business hours of the day; sojourning not as a traveler, but a *quasi* resident, for an object, and an important one. The order appealed from, for these reasons, should be affirmed, with \$10 costs and the disbursements of the appeal.

DANIELS, J. I agree to the result, on the ground that the witness to be examined has not been aggrieved, or in any manner injuriously affected, by the order. It was his duty to appear and testify as he was directed by the subpoena, especially after the order was made denying his application to set aside the subpoena. Section 1347 of the Code vested him with no authority to question the order by an appeal. I agree, therefore, to an affirmance of the order.

VAN BRUNT, P. J. I dissent. I cannot find that the court ever acquired any jurisdiction whatever over the appellant.

KEATING v. GUNTHER.

(*Supreme Court, General Term, Second Department. July 12, 1890.*)

1. CONTRACTS FOR THE SALE OF LAND—SPECIFIC PERFORMANCE—INCUMBRANCES.

In an action to enforce the specific performance of a contract for the sale of land, it appeared that there were two past-due mortgages on the land, of which defendant knew; and he also knew that they were to be satisfied out of the purchase price, which far exceeded the amount of the mortgages. *Held*, that they constituted no valid objection to the title, nor defense to the enforcement of the contract.

2. SAME—COMPENSATORY DAMAGES.

The fact that there is a small and trifling charge on the land for the maintenance of a fence, which it is highly improbable will ever be required, affords no substantial objection to the title; for compensatory damages may be allowed for such defect.

3. SAME—FAILURE OF TITLE AS TO PART.

Where the contract of sale describes the land as "the same premises now occupied by myself and family," it is no objection to the title that the boundary fence is set a little inside of the true line, and that the space between it and the line is occupied by telegraph poles; for there is no failure of title as to quantity under such contract, especially if it be not shown that the outside strip is held under a claim of title.

Appeal from special term, Orange county.

Action by Catharine Keating against Jacob Gunther to enforce the specific performance of a contract for the sale of land. Judgment for plaintiff compelling defendant to accept the title, and defendant appeals. The opinion of the special term, referred to, is as follows:

"There is no merit in the defense in this action. The defendant did not intend, in good faith, to carry out his contract of purchase at the time fixed for its completion, but endeavored to discover defects in plaintiff's title which would relieve him from his bargain. I find that there is no valid objection to plaintiff's title. Concededly, there were two mortgages outstanding on the property. But both these mortgages were past due, and payable, and the holders ready to receive their amounts, and satisfy the liens. By the contract the defendant was to pay in cash the whole purchase money, except the amount of the deposit previously paid. This sum was far in excess of the amounts due on the mortgages. The plaintiff was not bound to satisfy the liens previous to the delivery of the deed, and then wait to see if defendant would carry out his contract. The delivery of the deed with a title free and clear, and the payment of the money by the defendant, were by the contract

to be simultaneous transactions. It was, therefore, sufficient if the plaintiff were ready at the time to make her title clear if the defendant were ready to perform on his part. *Rinaldo v. Housmann*, 1 Abb. N. C. 312; *Hinckley v. Smith*, 51 N. Y. 21; *Jenkins v. Fahey*, 73 N. Y. 355. It may be that she should have had the holders of these mortgages present, ready to surrender and satisfy them, upon the defendant paying purchase money. But I find that the defendant was informed of the existence of the mortgages, and acceded to the proposal to retain their amount out of the purchase money. Further, when objection was raised to the title on this ground, the plaintiff forthwith paid them off, and on the same day tendered defendant her deed, with the satisfaction of the mortgages. Time was not of the essence of this contract; and, if the plaintiff were in default, equity would relieve her. But I find she was not in default in this respect. After the unqualified refusal to accept her title, the payment of these mortgages was wholly unnecessary.

"I shall now examine what are claimed defects in the plaintiff's title:

"First, it is objected that there is a right of way in favor of the public, along the easterly and southerly sides of the premises, varying from four feet to one foot in width, and that on such right of way a telegraph pole and a telephone pole have been placed. I do not think that the evidence establishes this claim. It is based on the fact that the fence maintained by the plaintiff on the easterly and southerly sides of her lot have been set within the correct boundary lines, the distances above mentioned. The adjacent lot is the property of the railroad, and has been thrown open, and traveled by the public. There is no evidence that it has been opened or accepted as a street, but the plot has been used by the railroad company for access to its road. I do not think that even as against the railroad company the public have an easement over this adjacent plot; and there is no evidence of any claim or occupation by the railroad company of the narrow strip outside the fence. There is no evidence that the poles were constructed, or are maintained, under a claim of right. But, assuming that the title is defective as to the strip beyond the fence, I think the language of the contract is a complete answer to the objection. By the contract, no dimensions are given; but the plot is described as "the same premises now occupied by myself and family," and is bounded by the lands of the adjacent owner. On the sides in question the lot was inclosed by a fence. These fences the defendant gave, and he was entitled to receive only the premises as occupied; that is, with the fences.

"It is next objected that proceedings have been instituted by the village (now city) of Middletown to open a street across the premises. Unless the plaintiff has been actually deprived of her title by those proceedings, I do not see that the objection is well founded. All property is liable to be taken for public use; and the chance that any particular piece may be taken, whether that chance is near or remote, does not constitute a defect in the title to the property. By chapter 46, Laws 1872, the trustees are authorized to lay out streets. The scheme for condemning land for such purposes is found in title 6 of that act. By that scheme the trustees may annul any report or award of commissioners, in which case a second commission may be had. The report of such second commission may also be annulled, in which case all the proceedings become utterly void. In case of confirmation by the trustees, either report becomes final and conclusive. It thus appears that, until a confirmation of the report by the trustees, the whole scheme is inchoate; all the proceedings may be entirely annulled. The land-owner can, therefore, have no claim to damages till the confirmation of report; and he certainly cannot be divested of his title until he has a vested right to compensation. The laying out of this street, therefore, worked no appropriation of the land. It is over fifteen years since the second commission made its report, and the trustees have taken no action thereon. I think that this lapse of time must be held an abandonment of the proceedings.

"There remains the covenant on the part of the former owner of the premises to maintain a fence along the line of the Erie Railroad. I shall assume that this covenant ran with the land. The only possible charge on the land, under the covenant, would be its share of the expense of maintaining the fence. As I figured the amount on the trial, the charge on these lands would be less than fifty cents a year. Such a trifle is no valid objection to the title, (*Winne v. Reynolds*, 6 Paige, 407;) and, even had the charge been substantial, equity would decree a performance, making compensation to the purchaser. This objection has not been removed by the release from the company. There should be judgment for the plaintiff, with costs."

Argued before BARNARD, P. J., and PRATT and DYKMAN, JJ.

Daniel Finn, (*William Vanamee*, of counsel,) for appellant. *W. F. O'Neill*, for respondent.

PRATT, J. This is an equity action praying for a specific performance of a contract for the sale of real estate in the county of Orange. Various defenses are interposed; but the trial judge has found, upon sufficient evidence, that there is no merit in the defense, and has written an opinion that covers the whole case. It is evident from a careful perusal of the testimony that the defendant did not intend in good faith to carry out his contract on the day specified for passing the title, and that he resorted to all means in his power to defeat the rights of the plaintiff under the contract. He claims that time was of the essence of the contract, and that on the day specified the title was not perfect, and hence he should be relieved from performance.

The objection that there were mortgages existing upon the premises was not valid, as money could be substituted for the mortgages, or deduction made from the purchase money. Besides, the defendant well knew of the existence of the mortgages, and that they were to be paid off by a part of the money to be paid on that day. Good faith required him to give notice, if he intended to rely upon that fact to refuse title. It is clear, however, that time was not the essence of the contract; and the evidence plainly showed that no change had taken place in the circumstances of the defendant which rendered a specific performance inequitable.

The objection that there was an incumbrance existing upon the property, in the shape of an obligation to maintain a fence, is too trivial to require notice; but, assuming it was a technical incumbrance, the change of circumstances arising from the fact that the growth of the city, so as to make this property within the limits of that part of the city laid out into public streets, rendered it so improbable that any fence could or would ever be required that it could form no substantial objection to the title. It is also answered by the fact that compensatory damages could be allowed for such defect. *Smyth v. Sturges*, 108 N. Y. 495, 15 N. E. Rep. 544. The same rule will apply to the suggestion that the title is bad for the reason that there is a right of way in favor of the public along the westerly and southerly sides of the premises, if any such claim existed. We think, however, that the trial judge was right in holding that no such claim existed. The court below, in its opinion, has discussed this question fully; and we concur in the views therein expressed. The land described in the contract was by streets and avenues, and as being the "same lands and premises purchased by me of Mrs. Ida Corwin; and how there could be failure of title as to quantity, without showing that some party other than Mrs. Keating owned a portion of that lot, cannot be readily seen. The fact that the fence had been set upon the lot, or that telegraph poles had been set thereon, without showing that some person claimed some right or title to the land, was immaterial. We are forced to the conclusion that the defense was without merit, and that the judgment must be affirmed, with costs.

WHITTEMORE v. JUDD LINSEED & SPERM OIL Co. *et al.*

(Common Pleas of New York City and County, General Term. June 2, 1890.)

1. INJUNCTION—WANT OF EQUITY—ASSIGNMENT OF JUDGMENT.

In a suit against plaintiff and another, on a partnership liability, a several judgment was entered against each. The creditor assigned for a valuable consideration its judgment against plaintiff's partner, reserving its rights against plaintiff. The assignee, without consideration, executed a release to plaintiff, who seeks to enjoin the collection of the judgment against him, claiming that the release was valid because the original judgment would be considered in equity as a joint judgment, and the assignment of a part carried the whole. *Held*, that plaintiff cannot be heard to complain that defendants seek to take advantage of the fact that it is too late to have the mistake in entering the original judgments corrected.

2. AMENDMENT—INCONSISTENT CAUSE OF ACTION.

Plaintiff towards the end of the trial sought to amend his petition so as to charge the assignee, on the ground of deceit, with indemnifying him in case he were compelled to pay the original judgment. *Held*, the application was properly denied as introducing an inconsistent cause of action, and therefore forbidden by Code Civil Proc. § 464.

3. SAME—LEGAL CAUSE OF ACTION.

The amendment was properly denied also, because, being based upon fraud, it was a legal and not an equitable claim, and one in which the defendant would be entitled to a jury.

Appeal from special term.

Suit by William L. Whittemore, as administrator of Henry Hubbell, deceased, against the Judd Linseed & Sperm Oil Company and George DeForest Lord, to enjoin the collection of a judgment against the estate of deceased. The complaint was dismissed, and plaintiff appealed.

Bristow, Peet & Opdyke, (William C. De Witt and Edw. A. Smith, of counsel,) for appellant. *Ecarts, Choate & Beaman* and *Lord, Day & Lord*, for respondent.

BOOKSTAVEN, J. In 1868 the defendant the oil company commenced an action against Henry W. Hubbell and Robert L. Taylor to recover a certain sum alleged to be due from them as copartners. Hubbell made default, and Taylor put in an answer denying his copartnership with Hubbell and his liability as such copartner. The issues thus raised were tried before the late Judge Ennis, as referee, who reported in favor of the oil company against Hubbell for \$40,950.29, and against Taylor for \$48,420.70. Upon this report the company, on the 27th of April, 1872, entered judgments against Hubbell & Taylor separately for the respective amounts above mentioned at the same time, and by means of the same record or judgment roll, although there can be no doubt that the cause of action alleged in the complaint, and found by the referee, was a joint liability on the part of both defendants as copartners. This action in equity was brought by Hubbell in his life-time to have that judgment declared satisfied and discharged, and to enjoin the defendants from enforcing or collecting the same from him or his estate. During the pendency of the action Hubbell died, and it was revived in the name of the present plaintiff, his administrator, etc. In October, 1867, Hubbell & Taylor executed assignments of their separate property and also an assignment of their joint property to John R. Gardner, Alexander P. Irvin, and Charles A. Sherman, and in February, 1868, the defendant herein, the oil company, and the assignees entered into an agreement by which the latter guaranteed to the former that, in case it established the liability of Taylor to pay its demands in the first-mentioned action, it should receive 50 per cent. of such demands as a separate composition on the part of Taylor, and in full satisfaction of all their claims and demands against him or his estate; and thereupon the company agreed, pursuant to the statute provided in such case, to release and discharge Taylor and his individual estate from all further claims, reserving for itself, however, anything that might remain due on its claims

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against Hubbell and his individual estate, and against the joint estate of Hubbell & Taylor. After the entry of the judgments above mentioned, and on or about the 15th of August, 1872, the oil company assigned to the defendant Lord, in consideration of \$16,750, all its claims and demands against Taylor individually, and against his individual estate, and all its right, title, and interest in the judgment before mentioned as entered against Taylor for the sum of \$43,420.70, and all its right, title, and interest in and to the moneys due, and to grow due, under the same from Taylor or his individual estate. The assignment then contained this clause, viz.: "And it is expressly understood that the said Judd Linseed and Sperm Oil Company are to retain, and do hereby expressly reserve, all their claims and rights of every nature against the joint property and estate of Robert L. Taylor and Henry W. Hubbell, and against the individual property and estate of Henry W. Hubbell; it being intended hereby to transfer only such and any such claims as they may have against the said Robert L. Taylor individually, and his individual estate, in whatever way the same may be made available for the payment thereof." On the 30th of September, 1873, the oil company released the assignees of Hubbell & Taylor from all claims and demands which it might have against them, which release expressly reserved the oil company's rights against Hubbell individually, or against any estate of his not then in the hands of the assignees. On the 8th of August, 1874, the defendant Lord executed, as owner and holder of the claims of the oil company against Taylor and Hubbell, a release thereof to Hubbell. In October, 1874, the oil company assigned to Lord all their claims and rights of every nature against the joint property of Taylor and Hubbell in the hands of their assignees under the before-mentioned judgment for \$43,420.70, giving Lord full power to ask and demand the same from the assignees of said joint estate, or from any person or persons whomsoever, excepting as against Hubbell and any individual or joint estate thereafter realized by him. In April, 1876, the oil company issued an execution against the property of Hubbell upon the before-mentioned judgment for \$40,950.29, claiming that the sum of \$25,060.20 was still due thereon. Thereupon the plaintiff's intestate commenced this action to prevent its collection.

The case was first tried in the equity term for November, 1876, before Chief Justice VAN BRUNT, then one of the judges of this court. He dismissed the complaint on the ground that the oil company never parted with its title to the judgment against Hubbell by reason of the assignments before stated, and that the defendant Lord did not have power to release Hubbell. The evidence upon that trial was substantially confined to the documents before referred to, and the learned chief justice substantially held that, inasmuch as the judgment was entered against Taylor and Hubbell severally, and not jointly, and as that judgment had never been modified, it was conclusive, and it was not worth while to discuss what would have been the effect of the papers which had been executed had the judgments been entered as a joint judgment; nor was it necessary to consider whether it ought to have been so entered, because, as he said, "in construing the various instruments which were executed, it is necessary to be governed by the actual condition of the record, and not by what I might think it should have been. * * *

The judgments being several, I can see no reason why the oil company was not at liberty to assign the judgment against Taylor, reserving all their rights against Hubbell. This, it seems to me, is all the oil company did by the assignment of August, 1872. * * *

By this assignment the defendant Lord could collect nothing whatever from Hubbell or from the joint estate of Hubbell & Taylor, but was restricted to the individual estate of Taylor." From the judgment entered on this decision the plaintiff appealed to the general term. Pending this appeal, and in January, 1877, Hubbell moved at the special term of this court, in the action of the oil company against him

and Taylor, to vacate the judgment entered against him, on the ground that judgments had been entered against him and Taylor as several judgments, whereas it should have been joint against both, or to amend it so as to make it a joint judgment. On this motion Hubbell introduced as a part of the proceedings the entire record in this action, down to and including the decision of Chief Justice VAN BRUNT. See bound volume Cases in Court of Appeals, Law Institute. The motion was denied, and Hubbell appealed from the order denying it. He also appealed from the original judgment. All these appeals were heard by the general term of this court in March, 1878, composed of Chief Judge CHARLES P. DALY and Judges VAN HOESEN and J. F. DALY. On the appeal from the judgment entered on the decision of Judge VAN BRUNT, separate opinions were written by each of these judges. Judge J. F. DALY was for reversal, on the ground that Hubbell and Taylor were in the original action sued as joint debtors, and a single judgment demanded against them. The complaint charged them as copartners. Hubbell admitted this by failing to answer, and on the issues raised by Taylor the referee had found he was jointly and severally indebted with Hubbell, and therefore a joint judgment should have been entered against both defendants and not separate judgments against each; that, notwithstanding the judgment had been so entered, it should in equity be regarded as a joint judgment against both, and therefore the assignment of the oil company to Lord of their claim under the judgment as against Lord was effectual to transfer the whole claim to Lord, and that consequently the release to Taylor was operative to discharge Hubbell from the whole. Chief Judge DALY and Judge VAN HOESEN in their opinions agreed with Judge VAN BRUNT that the judgment as entered was several and not joint, and they agreed that a new trial must be granted for the reason stated by Judge VAN HOESEN, that evidence had been improperly excluded. Judge VAN HOESEN concurred with Judge VAN BRUNT to the effect that the judgment could not be impeached collaterally in this action as a separate judgment, whether it ought to have been joint or not, and thus expresses himself on the question of a new trial: "Having carefully read all the testimony, I am very much dissatisfied with the result of the trial. It is very evident that the merits of the case have not been made to appear. * * * It appears to be more than probable that some understanding existed between the Judd Oil Company and Mr. Geo. de Forest Lord, which led Lord to believe that he had a right to give Hubbell a full and clear discharge. Mr. Lord is a man of character, and a lawyer of ability and experience. In August, 1874, he gave Hubbell a release from the judgment. From what did he derive power to execute such a release? The oil company would have the court believe from an assignment made in October, 1874. Is it to be supposed that Lord acted without authority in August, 1874? Did he execute the release in August without the right to do so? And did he, in the following October, procure an assignment from the oil company to cover and conceal his want of authority in August? Again, if the assignment dated October 6, 1874, were Lord's only authority for releasing Hubbell, how was it possible for him to believe that he was empowered to grant such a release, when the assignment in unmistakable words declares that the company reserves all its rights of every nature against Hubbell? These are matters which the trial did not clear up, and which the witnesses did not explain. Had a more liberal line of examination been fixed, it seems probable to me that evidence might have been elicited showing that Mr. Lord acted throughout in the best of faith towards all parties, and that the company, either by an oral assignment, or by some written instrument which has been lost or destroyed, gave to Lord, prior to August, 1874, ample authority to execute a release to Hubbell."

The appeal of Hubbell from the judgment in the original action was dismissed upon the ground that the judgment was regularly entered against

Hubbell upon his failure to answer, and that, so far as he was concerned, no appeal would lie, and that the remedy of a party in case of judgment entered against him by default was by motion to vacate or correct it. On the appeal from the order denying the motion to vacate or amend the original judgment, three separate opinions were also written. (19 Alb. Law J. 97;) Chief Judge DALY and Judge VAN HOESEN concurring in reversing the order, and in directing an order to be made correcting the judgment by making it a joint judgment against both; Judge VAN HOESEN holding that there was not merely the irregularity of entering a separate judgment against each defendant, but that there was the unauthorized act of entering judgment against one of the defendants for a larger sum than the plaintiff was entitled to recover; and the chief judge holding that the judgment was wrongly entered as a separate judgment, when it should have been entered as a joint judgment, for the amount found by the referee to be due, and in the course of his opinion, answering the point that inasmuch as Hubbell had filed his bill to restrain the prosecution by the oil company of proceedings against him, and must abide by the result of that action, said: "It appeared in the equitable action that the judgment ought to have been entered up as a judgment against both defendants jointly for the same amount; but the plaintiff failed because it appeared by the record that the separate judgments were entered up against each of the defendants for different amounts,"—and agreed with Judge VAN HOESEN that the entry of the judgment was unauthorized, and not irregular merely. Judge J. F. DALY in effect held that the judgment as entered was a joint judgment, and not several, and there was therefore no occasion to amend or correct it. He was therefore for the affirmance of the order appealed from. From this order made by the general term an appeal was taken by Hubbell to the court of appeals. In that court the order of the general term was reversed, and the order of the special term affirmed, (76 N. Y. 545;) all of the judges concurring except the chief judge, who was for a dismissal of the appeal. As before stated, the record of this action down to the trial and decision of Judge VAN BRUNT was before that court. The counsel for Hubbell took the express ground that the error in the judgment was not a mere irregularity, but a substantial error. The court in its opinion says: "As the judgment was rendered on the 27th of April, 1872, and the order did, in effect, set it aside, and was made on motion, notice of which was not served until January, 1877, it is apparent that it is necessary to determine whether the cause upon which the court acted was or was not an irregularity, and nothing more." The court then recited the proceedings in the cause up to judgment, and proceeds: "The plaintiffs at the same time, and by means of the same record or judgment roll, took judgments against the defendants separately, as stated in the order to show cause. This was clearly irregular, but we think it was nothing more. The plaintiffs did not adhere 'to the prescribed rule or mode of proceeding,' by which they were entitled to a joint judgment, and which a due and orderly conduct of the suit required them to take. But this defect was merely technical, and does not affect any substantial right of the adverse party. It does not in any way increase the liability of the defendant, for upon each partner rests an absolute liability for the whole amount of every debt due from the partnership; * * * and, although originally a joint contract, it may be separate as to its effects. Though all are sued jointly, and a joint judgment obtained, and a joint execution taken out, yet it may be enforced against one only. Each partner is answerable for the whole, and not merely for his proportionable part; and, as the judgments were taken against each partner for a partnership debt, the partnership property is bound to the same extent as if there had been but one judgment for the whole against both partners. * * * Nor does the form of the judgment in any way affect the debtor's relations with his copartner, for, if he pays the debt or judgment, he will be entitled to contribution or to

a credit for the sum paid in any accounting respecting the partnership affairs." Thereafter the case was retried by Chief Judge LARREMORE, and, as he says in his opinion, "a vast mass of evidence has been taken, much of it, as appeared to me when admitted, clearly immaterial, but it seemed better to allow plaintiff every opportunity to establish the parol assignment which the learned judges had suspected had been given. The result is that I shall make the same findings as on the former trial, there being no sufficient evidence to show that any assignment, either by parol or in writing, of the individual judgment against Hubbell, was ever made to the defendant Lord."

Upon this appeal it is unnecessary to determine whether or not a parol assignment of the judgment in question would be good and operative, as the learned justice who tried the case has found, and as we think on the evidence he was fully justified in finding, that no assignment either oral or written was proved. We agree with the learned chief justice that much, if not most, of the oral evidence admitted upon the trial was immaterial for the purposes of establishing an assignment, and at most it only went to prove that Mr. Lord was the attorney or agent of the oil company, and much of it was incompetent even for that purpose, as agency cannot be proved by the declaration of the agent, and the evidence referred to was merely evidence of what plaintiff's witnesses recollected of Mr. Lord's declarations. In order to make the release executed by Lord to Hubbell effective, it must have been founded upon some assignment, either oral or in writing. The release was under seal, and was required to be under seal in order to be binding, as the law only recognizes that method of wiping out a debt without payment. But it is clear that this evidence did not in any way injure the plaintiff, and no further consideration of it is necessary.

Inasmuch as four of the judges of this court and at least six of the judges of the court of appeals have held that the judgments in question were several and not joint, and as four of the judges of this court have held, either sitting together, or in individual opinions, that the record is conclusive against the parties in this case, and we feel bound to follow their opinions, it would be out of place for us to further discuss the question whether the judgment is or should have been joint and not several.

The plaintiff complains that a technical advantage is being taken in this action because the judgments were incorrectly entered as several judgments, and because it is now too late to correct such error. But the plaintiff is himself endeavoring in a court of equity to take advantage of a technical rule of law, by which he seeks to avoid the effect of a judgment without paying the just debts of Hubbell's estate. A court of equity is for the purpose of a shield, and not to put a sword in the hand of a suitor for such purpose. Had the judgment been originally entered as a joint judgment against Hubbell and Taylor, the release to the latter might have been executed, under the statute, without releasing Hubbell, or other means might have been found to effectuate what they really intended, and still to have held Hubbell's estate. Towards the end of the trial plaintiff's counsel moved for an amendment of the complaint, so that Mr. Lord might be personally charged with indemnifying the plaintiff if the injunction were dissolved, and plaintiff was obliged to pay the judgment held by the oil company. The court reserved its decision, which was not made until the whole case was decided. Testimony, however, was taken at some length bearing upon this question, and we think the court properly refused such amendment: *First*. Because the amendment sought to introduce an element in this action entirely inconsistent with the groundwork of the action, which is that the judgment was in fact discharged, and any claim such as made by the plaintiff against Mr. Lord must go on the theory that the judgment was not discharged. Causes of action against several defendants can only be joined when they are all of the same nature, and "are consistent with each other," and, "except as otherwise provided by law,

* * * affect all the parties to the action." Code, § 484. *Society v. Schermerhorn*, 60 How. Pr. 477. The exceptions alluded to relate to mortgage foreclosures and other cases where the mode of procedure is specially provided. Code, § 1627; *Vanderbilt v. Schreyer*, 91 N. Y. 392. *Second*. The claim thus sought to be introduced was one for damages for alleged fraud or misrepresentation, or for deceit, and therefore was a legal and not an equitable claim, and one in which the defendant Lord was entitled to a trial by jury. We have carefully read over the testimony on this subject, and agree with the learned chief justice in the conclusion to which he in his opinion apparently arrived, that the evidence was not sufficient to establish any cause of action against Mr. Lord on these grounds, and that his course throughout the transactions had been upright and honorable.

For these reasons, as well as for the reasons stated by the learned chief justice in his opinion, which we have not herein alluded to, we think the judgment should be affirmed, with costs to both respondents.

ROSS v. SIMON et al.

(Common Pleas of New York City and County, General Term. June 2, 1890.)

APPEAL—REHEARING.

In an action to enforce a mechanic's lien against the lessor and lessee of premises, the questions were as to whether the statement in the lien was sufficient as against the owner, and as to whether the allegations in the complaint that the lessor had full knowledge of, and consented to, the doing of the work, constituted a sufficient pleading of the facts. *Held*, that an authority which decided that, in order to bind the owner, the work must be done at his instance, or that of his agent, and that, in the absence of evidence that the lessor had some connection with plaintiff's contract, the latter can only enforce a lien against the interest of the lessee, goes only to the evidence, and does not affect the question of pleading.

Motion for rehearing. For former report, see 9 N. Y. Supp. 536.

Action by John B. Ross against John Simon, Ignatz Schmitt, and others, to enforce a mechanic's lien. Simon was the owner of the premises sought to be subjected to the lien, and Ignatz Schmitt had leased them. Defendant Simon demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against him, and from a judgment sustaining the demurrer plaintiff appeals.

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.
J. C. de Lamore, for appellant. Steph. Philsin, for respondent.

PER CURIAM. The appeal was from a judgment of the general term of the city court affirming a judgment upon demurrer. There were but two questions upon the appeal. The first was whether or not the statement in the lien was sufficient as against the owner; and the second was whether the allegations in the complaint that the defendant, the owner, had full knowledge of, and consented to, the doing of the work, was a sufficient pleading of the facts. The reargument is asked for on the authority of *Cornell v. Barney*, 94 N. Y. 394, which the respondent claims his counsel, through inadvertence, overlooked, and to which he failed to draw the attention of the court. But that case does not touch the question of the sufficiency of the notice of a lien in any way, and the sole question decided there was that, in order to bind the owner, the work must be done, or materials furnished, at his instance or that of his agent; and, in the absence of evidence that the lessor had some connection with plaintiff's contract, plaintiff is not entitled to have or enforce a lien against the interest of the lessor in the land or building, but only against that of the lessee. This does not affect the question of what is necessary to plead in the complaint in order to admit evidence to hold the lessor. It only goes as to what evidence would be required in such a case; and that distinction was expressly made by the general term.

which reversed the judgment in this case. The motion for a reargument, or for leave to go to the court of appeals, will therefore be denied, with \$10 costs.

LAWRENCE v. METROPOLITAN EL. RY. CO. *et al.*

(Common Pleas of New York City and County, General Term. June 2, 1890.)

APPEAL—REHEARING.

In an action for an injunction against the operation of an elevated railroad on the street in front of plaintiff's premises, and for damages caused thereby, a judgment for plaintiff was reversed because of incompetent testimony concerning the value of such premises. *Held*, that a rehearing would be granted; it not appearing that the admission of such testimony affected plaintiff's right to an injunction.

Motion for rehearing. For former report, see 8 N. Y. Supp. 326.

Action by Francis C. Lawrence against the Metropolitan Elevated Railway Company and another to recover damages caused by the operation of defendant's road in the street in front of plaintiff's premises, and for an injunction against the operation of the road. Judgment was given for plaintiff, and defendants appeal.

Argued before BISCHOFF and DALY, JJ.

Edward S. Rapallo and Brainard Tolles, for appellants. *John A. Weeks, Jr.*, for respondent.

BISCHOFF, J. The appeal herein was argued at the January general term, 1890, and reversal of the judgment was directed, (8 N. Y. Supp. 326;) the opinion of the chief justice, concurred in by all, being to the effect that alleged incompetent testimony concerning the fee value of the premises affected by this action was admitted upon the trial. The respondent thereupon moved at the March general term for a reargument. A careful consideration of the briefs submitted upon the last-mentioned motion shows a probable error in directing a reversal of the judgment appealed from in its entirety. The admission of such alleged incompetent testimony does not seem to affect the plaintiff's right to an injunction restraining the defendants from the further operation of their road in front of the plaintiff's premises, as directed by the judgment; and there is thus presented to this court a fair question as to whether so much of the judgment as directs the injunction should not have been affirmed, and the reversal limited to the award of the fee damages. I think, therefore, that the respondent has shown himself to be entitled to a reargument of this appeal, within the provisions of rule 16 of this court, and that such reargument should be ordered.

MAZET v. CROW *et al.*

(City Court of New York, Special Term. April 7, 1890.)

COSTS—ALLOWANCE OF SEVERAL BILLS—SEPARATE ANSWERS.

In an action by the indorsee against the maker and indorser of a promissory note the summons and complaint were served on one defendant on January 18th, and on January 24th his separate answer was served. The other defendant was served with the summons and complaint on March 11th, and he served his separate answer on March 18th. Both defendants appeared by the same attorney, but the answers were substantially different, and separate answers were necessary. *Held*, that on discontinuing the action, plaintiff would be required to pay two bills of costs.

Action by Robert Mazet against Moses R. Crow and Roland M. Hazard. Plaintiff moves for leave to discontinue the action.

Robert Mazet, for plaintiff. *A. Perry*, for defendants.

GIESERICH, J. The only question to be determined on this motion is whether the plaintiff should be permitted to discontinue the action upon pay-

ment of but one bill of costs. This action is on a promissory note, brought by the indorsee against the maker and indorser thereof. The summons and complaint were served on the defendant Hazard on or about January 18, 1890, and on January 24, 1890, his separate answer was served. The summons and complaint were not served on the defendant Crow until on or about March 11, 1890, and his separate answer was served on March 28, 1890. The defendants appear by the same attorney, but it is unquestioned that the answers of the defendants are substantially different, and that separate answers were necessary in the case. This case has not as yet been noticed for trial by either of the parties thereto, and the plaintiff now applies for leave to discontinue the action on payment of defendants' statutory costs to date, and he contends that, in view of the fact that both of the defendants appear by the same attorney, the application should be granted upon payment of but one bill of costs. The authorities, however, in view of the circumstances of the case, do not favor the position contended for. *Walker v. Russell*, 7 Abb. Pr. 452, note, 16 How. Pr. 91; *Lindsay v. Deafendorf*, 43 How. Pr. 90. In *Lindsay v. Deafendorf*, *supra*, the plaintiff had allowed a considerable space of time to elapse after his summons and complaint were served upon one of the defendants before he caused the same to be served on the other defendant, thus rendering it necessary that two answers should be prepared, although they contained substantially the same defenses, and were interposed by the same attorneys, who appeared for both of the defendants. After the trial of the action a motion was made to obtain an order allowing the defendants two bills of costs. HARDIN, J., in granting the same, at page 92, well states the rule as follows: "The general rule is doubtless not to allow but one bill of costs where several defendants appear by the same attorney, and put in separate answers, and in cases where different defendants appear by separate attorneys who are partners, as well as when an attorney appears for one defendant, and another defendant appears by an attorney who is the clerk in the office of the other attorney. * * * But in cases where there is no evidence before the court to prove, or circumstances to justify the presumption, that the appearance was for the purpose of increasing the costs, and double services have in fact been performed, the practice has been to allow double bills or additional bills to the extent of the increased services performed necessarily or properly in the cause." As it was necessary to interpose separate answers in this cause, which are substantially different, the rule above stated should prevail, and it follows that double bills of costs must be allowed. The motion to discontinue this action will therefore be granted upon the payment by the plaintiff to each of the defendants of their separate bills of costs.

In re STEWART'S WILL.

(Surrogate's Court, Kings County. May 26, 1890.)

WILLS—UNDUE INFLUENCE—EVIDENCE.

Seven years before his death, testator executed a will dividing his estate between his son and two daughters, with an annuity of \$100 to his housekeeper; appointing his son and two grandsons executors. By a subsequent codicil the housekeeper's annuity was increased to \$300. His son managed testator's business, and was highly esteemed by him. Three years later, testator, then 84 years old, was stricken down with paralysis, and his condition was such as to require great care from some one, which was given him by his housekeeper. By threatening to leave him, she so worked on testator's fears that he secretly married her. An attorney who was intimate with both testator and the housekeeper persuaded testator that his son had deceived him in some trivial business transaction, and testator became suspicious of him. After the marriage the treatment of the children by the attorney and the housekeeper was such that they rarely visited testator. Testator's son continued to transact some business for him; but the housekeeper and attorney dominated all testator's business affairs, and never permitted the son to see testator alone. *Held*, that a will executed without the knowledge of any of testator's children a few months after the marriage, and within 18 months of testa-

tor's death, by which he gave the housekeeper a one-fourth share in all his property, the two daughters each one-fourth, and by which he cut off his son with a life-interest in the other fourth, vesting the entire control of the estate in the attorney, would be set aside for undue influence.

On application for the probate of the last will and testament of James Stewart, deceased.

Jas. R. Allaben, (W. B. Mayben, of counsel,) for proponent. *D. W. Northrup, (W. D. Veeder, of counsel,)* for contestants.

ABBOTT, Sur. James Stewart died in September, 1888. Had he lived until November, he would have been 86 years old. He left surviving, his widow, Eleanor E. Stewart; one son, James C. Stewart, a married man of middle age, with a family of grown-up children; and two married daughters, Gilla Alma Gates and Lucretia A. Robinson, each with grown-up families. On the 16th day of November, 1881, deceased made a will by which he divided his estate equally between his three children, with an annuity of \$100 to Miss Ely, then his housekeeper, and afterwards his wife. He executed a codicil to this will on the 21st day of February, 1884, which increased the annuity to Miss Ely from \$100 to \$300. He appointed as executors of this will and codicil his son, James C. Stewart, and his grandsons, Charles Gates and Stewart A. Robinson. At this time, testator's relations with his children and their families were affectionate and friendly, as the provisions of this will and codicil indicate. His son, James C., managed the details of his business for him to his apparent satisfaction, and was trusted and highly esteemed by him. In the spring of 1884, shortly after making this codicil, he was stricken down with paralysis, from which he partially recovered; but he never again was as strong, physically or mentally. He was married four times. His third wife died in 1879, and a few months after her death he employed Miss Ely, a maiden lady of 60 years, as his housekeeper, to whom he was secretly married on the 9th day of December, 1886. James R. Allaben had been the attorney and intimate friend of testator for many years; but, after this sickness, he visited him more frequently. He was also on intimate terms with Miss Ely, the housekeeper. In June, 1886, a few months before testator's marriage, the proponent, Allaben, persuaded testator that his son had deceived him with reference to some trivial business transaction; and after this the testator became suspicious of his son, James C. These events, to my mind, mark the beginning of the undue influences which wrought the changes in the testamentary dispositions of James Stewart which followed. On the 12th day of March, 1887, he made another will, by which he evidently intended to divide his estate into four parts, although the language is somewhat ambiguous, giving to the widow and his three children one part each, except that, from the portion of Gilla Alma, \$3,000 was taken, \$1,000 of which was to be divided equally between the children of Lucretia, and \$2,000 was added to the share of James C. Stewart. The shares of Lucretia and James C. were then given in trust, the income to be paid to each quarterly. He also gave \$200 to a granddaughter, the eldest daughter of his son, James C., who had married against the wishes of her parents. He appointed as executors of this will his wife, Eleanor E. Stewart, his son, James C. Stewart, his grandson, Stewart A. Robinson, and James R. Allaben, his lawyer. He designated Allaben as the managing executor and sole trustee, and gave him control and custody of all the papers, books, and assets of the estate, and directed that no action should be binding unless approved by the said Allaben. By a codicil to this will, executed on March 10, 1888, his son, James C. Stewart, was removed as executor; and by a subsequent codicil, executed on July 2, 1888, he transferred the \$2,000 given to James C. from the share of Gilla Alma to this residuary estate. This will and these codicils were made without the knowledge of his children. The son, James C. Stewart, offered the will of 1881, and the codicil thereto, for probate; and the same day the

will of 1887, and the codicils thereto, were presented for probate by James R. Allaben, one of the executors named in the will. Eleanor E. Stewart, the widow, and one of the executors named in the will of 1887, objects to the probate of the will of 1881, and the codicil thereto, on the ground that they were superseded and revoked by the will of 1887, and the codicils thereto. James C. Stewart and his sisters object to the probate of the will of 1887, and codicils thereto, on the ground of lack of testamentary capacity, and that they were procured by the fraud, circumvention, and undue influence of the widow and James R. Allaben.

The contest in this matter was begun before my predecessor, and several hundred pages of testimony were taken before him, including the testimony of the subscribing witnesses; and I labor under the disadvantage of not having seen many of the witnesses, and of having lost the personal impression which is so valuable, oftentimes, to a judicial officer, in considering testimony. The trial was long drawn out, and the pages of testimony numbered thousands before its completion. Much of it was cumulative, and, when briefly epitomized, shows a family disruption, caused by the secret marriage with his housekeeper of a weak, parsimonious old man, somewhat addicted to the use of liquor, of decaying mental powers, who after his marriage changes his testamentary disposition towards his children to their prejudice and humiliation, through the covert machinations of his wife and legal adviser, who were unfriendly to his children. At the conclusion of the trial, it seemed to me that the evidence tended to prove that the testator probably had sufficient testamentary capacity to execute the last will and codicil, and that this objection could not prevail. My subsequent examination of the testimony confirms this view. I had the impression, however, that testator's mind was undoubtedly impaired to some extent, and was rendered feeble by paralysis and disease, and that, in executing the last will and codicils, undue influence had been brought to bear upon him by his wife and James R. Allaben, so as to prevent the exercise of his independent volition. This impression has deepened into absolute conviction that such was the case upon reviewing the evidence. It is a well-settled proposition that the acts and contracts of persons who are of weak understanding, and who are, therefore, liable to imposition, will be held void if the nature of the act or contract justify the conclusion that the party has not exercised his deliberate judgment, but that he has been imposed upon by cunning or artifice, or undue influence. 1 Story, Eq. Jur. § 238.

The testimony in relation to testator's mental and physical condition after his sickness in 1884 is conflicting; but, from the evidence, I am convinced that he declined in both respects from that time until his death. His condition was such as to require great care and attention from some one, which was given him by his housekeeper. She so worked upon the fears of the old man, however, by threatening to leave him, that, to make sure of the continuation of her services, he married her. She was the fourth wife of a feeble old man of 84 years of age, and I am bound to believe it was a marriage prompted by convenience rather than affection. After this time, his children and grandchildren did not often visit him. His son, James C., continued to attend to some business for him; but, under the surveillance and criticism of Mrs. Stewart and Allaben, his son found his labors very disagreeable. Mrs. Stewart and Allaben dominated all testator's business affairs, and were jealous of any interference. Testator had intrusted his business affairs to his son, and had the utmost confidence in him, until a short time before this secret marriage, and the frequent visits of Allaben began. Proponents attempted to show that the visits of Allaben were simply those of an old friend, interested in his welfare; but I am satisfied from the evidence that a different object prompted these frequent visits. The relations between testator's son, James C., and his housekeeper and Allaben, were not friendly for some time

before the marriage took place; and the son was never permitted to see his father alone after 1884. Allaben made the old man believe that his son was not conducting his affairs honestly, and the breach, once opened, was assiduously widened both by Mrs. Stewart and Allaben; and the will of 1887, and the codicils, are simply the history of their success in this respect.

The attempt on the part of the proponents to blacken the character, and prove the incompetency, of James C. Stewart, has, in my opinion, signally failed. I am convinced that at all times he was an able, upright, and competent man of business, of excellent standing in the community, as will be seen by reference to the testimony of the well-known, reputable business men introduced in rebuttal by the contestants.

The evidence discloses, in brief, that the testator secretly married his housekeeper on December 9, 1886. His family became isolated from him. A few weeks afterwards, on March 12, 1887, he makes a new will, in which he singles out a disobedient granddaughter for a legacy, then divides his property equally among his wife and children, creating a trust, however, as to the shares of his son and one daughter, and appointing James R. Allaben managing executor, and his wife, son, and grandson executors,—a totally incompatible combination. This will materially diminishes the interest of the son; and it also forces upon him as co-executor a man with whom he could not serve with any self-respect. After the marriage became known to testator's family, they evinced the desire of making the best of it; but their treatment by Mrs. Stewart and Allaben soon put an end to any friendly overtures. By a codicil made March 10, 1888, testator removed his son, James C., as executor; and four months later he made another codicil, still further depleting his son's share in his estate, which was his last testamentary disposition, as he died in the September following. I am thoroughly convinced that the influence which prompted these testamentary changes was not that of gratitude, love, or esteem for his wife or Allaben, but was undue, and was exercised by them over this feeble old man in his dotage, making him their instrument in carrying out their ill will and hatred towards his family, and particularly against his son, James C., for their own benefit and emolument. *Estate of Peck*, 10 N. Y. St. Rep. 698. Within three months after his marriage he made a new will, and cut off his son with a life-estate in one-quarter of his estate, and, in effect, gave Allaben the control of the estate. A few months later, he removed his son as executor, and, in reality, gave Allaben control; and, a few weeks later, he increased the wife's share at the expense of the son's. I have grave doubts as to the testator's capacity to clearly and entirely comprehend all the dispositions of this will and codicils, embodying, as it does, the statute of limitations, and other complex provisions.

The amount of undue influence which will be sufficient to invalidate a will must, of course, vary with the strength or weakness of the mind of the testator; and the influence which would subdue and control a mind naturally weak, or one which had become impaired by age, sickness, disease, intemperance, or any other cause, might have no effect to overcome or mislead a mind naturally strong. 1 Jarm. Wills, (Rand. & T. Ed.) 182. All these conditions pertained to this old man, which rendered the task of influencing him an easy one. "If it [the court] sees that any arts or stratagems, or any undue means, have been used; if it sees the least speck of imposition at the bottom; * * * if there be the least *scintilla* of fraud,—the court will, and it ought to, interpose." *Huguenin v. Baselay*, 14 Ves. 287. "It is impossible to define or describe with precision and exactness what 'undue influence' is. * * * Like the question of insanity, it is to some degree open and vague, and must be decided by the application of sound principles and good sense to the facts of each given case." *Lynch v. Clements*, 24 N. J. Eq. 434. Undue influence is not often the subject of direct proof. It can be shown by all the facts and circumstances surrounding the testator, the

nature of the will, his family relations, the condition of his health and mind, his dependence upon and subjection to the control of the person supposed to have wielded the influence, the opportunity and disposition of the person to wield it, and the acts and declarations of such person. *Forman v. Smith*, 7 Lams. 448; *Tyler v. Gardiner*, 85 N. Y. 559; *Reynolds v. Root*, 62 Barb. 250; *Martin v. Marvin*, 3 Abb. Dec. 192; *Lee v. Dill*, 11 Abb. Pr. 214; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *McLaughlin v. McDevitt*, Id. 213; *Demmert v. Schnell*, 4 Redf. Sur. 409; *Sears v. Shafer*, 6 N. Y. 268; *Lake v. Ranney*, 83 Barb. 49; *Clark v. Fisher*, 1 Paige, 171. This aged and infirm old man, with perceptions blunted and memory impaired, readily fell into a state of dependence upon the persons who surrounded him, and insensibly their will was substituted for his. I am of the opinion that the evidence in this proceeding clearly shows that undue influence was practiced upon the testator, and that the will of 1887, and subsequent codicils, should not stand. Let decree enter accordingly.

RYDER v. BUSHWICK R. Co.

(Supreme Court, General Term, Second Department. July 18, 1890.)

RUNNING OF STATUTE OF LIMITATIONS.

The statute runs against an action for the specific performance of a certificate entitling the holder to shares of the capital stock of a company on surrender of the certificate at the company's office, from the time the company delivers the certificate.

Appeal from special term, Kings county.

Action by Smith Ryder against the Bushwick Railroad Company for the specific performance of certificates dated March, 1868, entitling the holder to 30 shares of the capital stock of defendant company on surrender of the certificates at the company's office. Judgment for defendant, and plaintiff appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Charles S. Simpkins, for appellant. *Edwin W. Ivins*, (*Thomas S. Moore*, of counsel,) for respondent.

PRATT, J. The action is equitable. No demand was necessary before bringing suit. The present action could have been brought at once, on the delivery of the certificates. This action was barred by the statute in 10 years from the delivery of the certificates. The statute of limitations is therefore a good defense. Irrespective of that statute, we are of opinion that the origin of the certificates, and the consideration paid therefor, are not shown with sufficient clearness to justify the court in adjudging a specific performance. That relief is, to a certain extent, in the discretion of the court; and, where serious doubt surrounds a transaction, courts of equity often decline to aid a plaintiff, leaving him to his remedy at law. A remedy at law existed in the present case, as an action for damages might have been sustained for a refusal to issue stock. We think the meagerness of the proof of the origin and consideration of the certificates would justify the refusal to decree specific performance. Judgment affirmed, with costs. All concur.

COOPER v. UNITED STATES MUT. ACC. ASS'N.

(Supreme Court, General Term, Second Department. July 18, 1890.)

INSURANCE—ACTION ON POLICY—LIMITATION.

A certificate of membership issued by defendant association to plaintiff's husband provided that a certain amount should be paid plaintiff, should her husband die from an injury, and within 90 days from such injury. The policy also provided that proof of death must be furnished the association within six months from the accident, and that claims should be payable within 90 days after satisfactory proof.

Held, that the further provision that action should be begun within "one year from the time of the alleged accidental injury" meant not a year from the accident, but from the time when the right of action was complete.

Appeal from circuit court, Orange county.

Action by Frances E. Cooper against the United States Mutual Accident Association of the city of New York on a certificate of membership issued by defendant to Theodore H. Cooper, plaintiff's husband, which promised to pay to plaintiff \$5,000, should said Theodore H. Cooper die from an injury, and within 90 days from such injury. The policy provided that positive proof of death from causes covered by the certificate must be furnished the association within six months from the happening of the accident, and that claims under the certificate should be payable within 90 days after satisfactory proof. From a judgment for plaintiff, defendant appeals.

Argued before DYKMAN and PRATT, JJ.

Wm. B. Smith, for appellant. Lewis E. Carr, for respondent.

PRATT, J. The only point urged against the recovery is that the action was not begun within one year from the time the injury was inflicted that caused the death. The policy requires the action to be begun within "one year from the time of the alleged accidental injury." Defendant claims that the time began to run on December 10th, when the accident happened. Plaintiff argues that the time had not begun to run on January 2d, when death ensued, nor until the proofs were completed, and right of action complete. The action was begun December 29th,—less than a year after the death, but more than a year after the accident. In answer to the contention of defendant the plaintiff points out that, if it be acceded to, cases might well arise where, the death not occurring for nearly 90 days after the accident, and 90 days additional being allowed defendants after the proofs were made satisfactory to them before an action could be maintained, it would be easy for defendants, by raising objections to the proofs, to entirely deprive plaintiffs from having any time within which an action could be brought.

The clause upon which the defense depends is confused, and its meaning is perhaps uncertain. But the court will seek to find a meaning that will be reasonable, and adequately protect the rights of both parties. However it may have been with defendant, it is quite evident the insured could not have understood his rights to depend absolutely upon the good will of the defendant. He must have so interpreted the contract as to allow a reasonable time in which suit could be brought after the right of action was complete. In similar cases the courts have made rulings which authorize us to hold the time of the alleged injury to mean when the proofs are accepted, and the claim is in a condition to be sued. *Ames v. Insurance Co.*, 14 N. Y. 253; *Mayor v. Insurance Co.*, 39 N. Y. 45; *Hay v. Insurance Co.*, 77 N. Y. 235; *Steen v. Insurance Co.*, 89 N. Y. 315, 323. This is in accordance with the familiar rule that, where language is ambiguous, it will be construed so as to avoid a forfeiture. *Post v. Weil*, 115 N. Y. 371, 375, 22 N. E. Rep. 145; *Jacobs v. Spalding*, 71 Wis. 190, 36 N. W. Rep. 608. So, where a party to a contract seeks to destroy its obligation by reason of the breach of a condition, the terms of the contract must be clear and explicit in his favor. *Clinton v. Insurance Co.*, 45 N. Y. 464; *Morse v. Insurance Co.*, 30 Wis. 540. We think the authorities require us to hold that the plaintiff had 12 months to bring the suit after the right of action was complete. It follows that the judgment must be affirmed, with costs.

TEBO v. CITY OF BROOKLYN.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

MUNICIPAL CORPORATION—CITY LIMITS.

Land under Gowanus bay, within the county of Kings, and abutting on the city of Brooklyn, the successor to the town of Brooklyn, is within the city of Brooklyn.

Appeal from special term, Kings county.

Action by William M. Tebo to restrain the city of Brooklyn from selling plaintiff's land in Gowanus bay for taxes, and to compel the cancellation of the tax. Plaintiff contended that the land, on which was a pier, was not within the city of Brooklyn, because below low-water mark. From a judgment for plaintiff, defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Almet F. Jenks, (Richard B. Greenwood, Jr., of counsel,) for appellant.
Jesiah T. Mearns, for respondent.

PRATT, J. Respondent concedes that the lands under water in Gowanus bay form a part of the county of Kings, but claims that those lands fall within no town. To quote from respondent's printed argument: "The county of Kings includes such land under water, the line running from Red Hook point to the west, along the southern boundary of New York county, to the center of the main channel to the ocean, but the lands under water fall within no town." The idea that land may be within a county, and yet fall within no town, is so peculiar that clear evidence would be required to satisfy us that such has been the legislative intent. We do not find such evidence. On the contrary, section 1 of the charter of 1854 seems to assume that the city of Brooklyn is bounded by the bay of New York, clearly implying that Gowanus bay is included within the limits of Brooklyn. The description of the Twelfth, Twenty-Second, and Eighth wards of Brooklyn, as found in the charter of 1868, seems to assume that Gowanus bay is a part of Brooklyn. Respondent argues that a municipal corporation is not, like a town, a territorial subdivision of a state, for which reason its jurisdiction cannot exist unless clearly given. But Brooklyn was originally a town, and of that town the city is the successor. It follows that the tax was properly levied. The judgment appealed from must be reversed, and, as no benefit can result from a new trial, final judgment should be directed for the defendant, with costs of the special term appeal.

FERRIS v. ARMSTRONG MANUF'G Co.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

COUNTER-CLAIM—ARISING FROM INDEPENDENT TRANSACTIONS.

In an action for a wrongful arrest, defendant cannot set up as a counter-claim the judgment recovered by it in the action wherein plaintiff was arrested, as the judgment does not arise out of the wrongful arrest, the transaction set forth in plaintiff's complaint, nor is such judgment connected with the subject of plaintiff's action, within the meaning of Code Civil Proc. N. Y. § 501, which permits a counter-claim to be pleaded when it is based on a cause of action arising out of the transaction set forth in plaintiff's complaint, or when it is connected with the subject of the action.

Appeal from special term, Kings county.

Action by Francis J. C. Ferris against the Armstrong Manufacturing Company for a wrongful arrest and imprisonment. Defendant in its answer set up a judgment as a counter-claim, which judgment "was recovered in the same action in which the plaintiff was arrested." Plaintiff demurred to the counter-claim, and from a judgment sustaining the demurrer defendant appeals. For opinion in the action wherein plaintiff was arrested, see 4 N. Y. Supp. 610.

Code Civil Proc. N. Y. § 501, provides: "The counter-claim * * * must tend in some way to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff: * * * (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action."

Argued before DYKMAN and PRATT, JJ.

Franklin Bien, for appellant. *Remsen & Parsons*, (*Daniel S. Remsen*, of counsel,) for respondent.

PRATT, J. The case of *People v. Dennison*, 84 N. Y. 272, is conclusive in support of the decision below. The plaintiff's cause of action is based upon the wrongful arrest. The cause of action stated in the counter-claim is based on contract, and cannot be availed of in this suit. Judgment affirmed, with costs.

FERRIS v. NEW HAVEN WEB CO.

(Supreme Court, General Term, Second Department. July 13, 1890.)

Appeal from special term, Kings county.

Action by Francis J. C. Ferris against the New Haven Web Company for wrongful arrest and imprisonment. Defendant set up a judgment as a counter-claim, which judgment was recovered in the same action wherein defendant was arrested. From a judgment sustaining plaintiff's demurrer to the counter-claim, defendant appeals. For opinion in an action wherein plaintiff was arrested, see 4 N. Y. Supp. 610.

Argued before DYKMAN and PRATT, JJ.

Franklin Bien, for appellant. *Remsen & Parsons*, (*Daniel S. Remsen*, of counsel,) for respondent.

PRATT, J. This appeal presents the same questions as the case of this plaintiff against the Armstrong Manufacturing Company, (*ante*, 750,) and is controlled by *People v. Dennison*, 84 N. Y. 272. Judgment affirmed, with costs.

ROUGET v. HAIGHT *et al.*

(Supreme Court, General Term, First Department. June 6, 1890.)

1. CONTRACTS—PLEADING—WRITTEN OR VERBAL.

In an action on a sealed instrument, the answer alleged that it was agreed between plaintiff and defendant that plaintiff should advance certain money to be used by defendant in purchasing oil, the profits of which were to be shared by plaintiff; that, relying on this agreement, defendant purchased oil, but plaintiff refused to advance money with which to pay therefor; and that defendant, not being able to complete his purchase, was thereby damaged. *Held*, that it was not necessary for the answer to allege whether the agreement relied on was written or verbal.

2. PLEADING—MOTION TO MAKE DEFINITE AND CERTAIN.

Such averments sufficiently state the nature of the defense, though the items constituting it are not shown, and a motion to make more definite and certain, by stating the dates of purchase, the names of the sellers, and the quantities of oil purchased, and by showing wherein defendant was damaged, will be denied, as plaintiff has a complete remedy by motion for a bill of particulars.

Appeal from special term, New York county.

Action by Edward Rouget against Theodore Haight and Ellen J. Haight on an instrument under seal, as follows: "This agreement, made and entered into by and between Theodore Haight and Ellen J. H. Haight, his wife, of Irvington, Westchester county, New York, parties of the first part, and Edward Rouget, of Ridgfield Park, New Jersey, party of the second part, witnesseth: The said party of the second part hereby agrees to advance to said Theodore Haight from time to time sums of money, in all not to exceed the sum of ten thousand dollars; that said sum of ten thousand dollars, or such part thereof as shall be advanced by said party of the second part to the said Theodore Haight, shall become and belong to said Theodore Haight upon the decease of the party of the second part and his wife, Josephine P. Rouget. It is hereby covenanted and agreed on the part of the parties of the first part, in consideration of such advances and the agreement herein contained, they will pay to the said party of the second part the sum of fifteen per cent. per annum upon the sum so advanced, in equal monthly payments to the party of the second part during his natural life; and, in case the said Josephine P. Rouget survives the said party of the sec-

ond part, then said fifteen per cent. per annum upon the sum so advanced shall be paid to said Josephine P. Rouget during her natural life. It is further covenanted and agreed on the part of the parties of the first part, in consideration of the covenants and agreements herein contained, that, should the said party of the second part survive the said Theodore Haight, then, and in that case, the said sums of money so advanced as aforesaid shall be repaid to said party of the second part. It is further covenanted and agreed by and between the parties hereto that in case the parties of the first part shall fail to pay said fifteen per cent. as the same shall become due and payable, and should the same remain unpaid for thirty days, then, and in that case, this agreement shall become null and void at the election of the party of the second part, and the party of the second part shall be entitled to demand and collect from the parties of the first part the whole of the money advanced as aforesaid. It is hereby further covenanted and agreed that the covenants and agreements herein contained shall bind the heirs and legal representatives of the parties hereto. In witness whereof the parties hereto have hereunto set their hands and seals, this 9th day of July, A. D. 1887. THEODORE HAIGHT. [L. s.] ELLEN J. HAIGHT. [L. s.] ED. ROUGET. [L. s.]”

The ninth, tenth, and eleventh paragraphs of the answer were as follows: “*Ninth.* And defendant Theodore Haight, further answering, and for a separate and further defense, and as a counter-claim to the cause of action set out in the complaint, shows that at the time of the execution of the agreement set out in the complaint this defendant, Theodore Haight, was engaged in the business of buying and selling stocks, bonds, and oil, and doing a general brokerage, banking, and commission business, and that plaintiff well knew that defendant was engaged in such business. *Tenth.* That at or about the time of the execution of said agreement set out in the complaint it was mutually covenanted and agreed by and between the plaintiff herein and this defendant that, for the purpose of dealing in stocks, bonds, and oil for the joint benefit of the plaintiff and defendant Theodore Haight, said plaintiff should from time to time, as this defendant should request, advance to this defendant, for the purpose of buying stocks or bonds or oil, sums of money, in all not to exceed the sum of ten thousand dollars; and it was further agreed that on all such sums so advanced this defendant should pay said plaintiff interest at the rate of fifteen per cent. a year, and that such fifteen per cent. so to be paid was to be received by said plaintiff as and for his share in full of any profit that might arise on such purchases so to be made, and was to be paid to him, whether any such profit was made or not; and it was further agreed that all such purchases should be made in the name of said defendant Haight, and said Haight should do all the necessary work and labor in and about such dealings in stocks, bonds, and oil. *Eleventh.* That thereafter, and relying upon said plaintiff's promise and agreement to advance such sums of money as in the tenth paragraph of this answer set out, and in order on his part to carry out said agreement, this defendant made certain purchases of oil, and agreed and bound himself to pay the price thereof when the same were delivered on a day fixed; that, having so agreed to purchase said oil, this defendant informed plaintiff that he had so agreed to purchase the same, and requested plaintiff to advance, in accordance with his said agreement so to do, a sum of money not exceeding ten thousand dollars with which to pay for said oil; that said plaintiff thereupon neglected and refused so to do, and did not advance said moneys to this defendant; that on account of said plaintiff refusing to advance any sum of money as requested, as he had agreed to do as set out in the tenth paragraph of this answer, defendant was unable to obtain the amount required to complete the purchase of said oil, and to pay for the same, and therefore was unable to get possession of the same, and was thus forced to abandon his contract to purchase said oil, to his damage in the sum of \$8,000.”

Defendants were required to amend their answer by showing whether this agreement was a written or verbal one, and to make the eleventh paragraph of the answer more definite and certain by stating the dates of purchase, the names of the sellers, and the quantities of oil purchased, and by showing wherein defendant suffered damage, *i. e.*, the items of damage, and they appeal.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
Wyatt & Trimble, for appellants. *Samuel Cohen*, for respondent.

BRADY, J. The defendant was not obliged to state whether the agreement upon which his counter-claim rests was in writing or not. In the language of the court of appeals, it was sufficient for him to allege the contract and breach, without any specification of the evidence thereof. *Tuttle v. Hannegan*, 54 N. Y. 686. The plaintiff in the case sought to recover damages for a breach of a contract, and on the trial offered in evidence a written instrument in the form of a bond containing the agreement. It was objected that the action should have been brought thereon, but the court admitted it. It was held that no error was committed, and for the reason stated.

The purchases and sales alleged to have been made under the agreement are not stated in detail, but nevertheless the cause of action is stated with sufficient definiteness to make apparent what the defendant claims. It is stated generally, it is true, and in such a mode as to show that there are items constituting it. That, however, does not give the right to the remedy which may sometimes be invoked of making the averment more definite and certain. It can only be sought when the allegations are so indefinite that the precise nature of the charge or defense is not apparent. Here there is no doubt of the nature of the defense. The plaintiff is not, however, remediless, inasmuch as he may ask for the particulars, and obtain them. *Tilton v. Beecher*, 59 N. Y. 176. In this case the border line between these remedies seems to have been reached, and illustrates how slight a difference may exist between the conditions requiring the application of the one or the other. It appears to be settled that, if the charge or defense be definitely stated, although the statement involves details, it is sufficient to put the party to an application for a bill of particulars, and compels him to resort to that remedy, although the result of either application would be the same. See *Jackman v. Lord*, 9 N. Y. Supp. 200; *Tilton v. Beecher*, *supra*. The order appealed from should for these reasons be reversed, with \$10 costs, and the disbursements of this appeal. All concur.

STEPHENS v. HALL *et al.*

(*Supreme Court, General Term, First Department. June 6, 1890.*)

PRACTICE IN CIVIL CASES—NOTICE OF MOTIONS.

Code Civil Proc. N. Y. § 799, providing that where a party has appeared a notice or other paper required to be served in an action must be served on his attorney, is imperative, and a defendant who appears in the action is entitled to notice of a pending motion to strike his name from the complaint, though the motion was noticed for hearing before he appeared.

Appeal from special term, New York county.

Action by Melvin Stephens against Dorothy Humphries, Robert Lewis Humphries, Margaret E. Humphries, his wife, Mary Elizabeth Hall, Thomas Hall, her husband, and Matthias Trimmer. Defendant Thomas Hall moved to vacate an order striking his name from the complaint, and from an order denying such motion he appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
J. E. Berry, for appellant. *Smith & White*, for respondent.

v.10N.Y.s.no.9—48

BRADY, J. This is an action of foreclosure in which it is claimed that the defendant Thomas Hall was inadvertently made a party. He appeared, however, but not until after a motion had been noticed to have his name stricken from the complaint as a person having no interest in the controversy, and one against whom no claim was made. At the time, however, the motion was made, the court was advised of the appearance, not by the counsel for the plaintiffs, but by the advocate of one of the other defendants. No notice was taken of this, for aught that appears, and the motion was granted. This was followed, as might well be expected, by a motion on behalf of Hall to vacate the order granted on the plaintiff's motion as wholly unauthorized, which was denied. Section 799 of the Code, however, provides that, where a party has appeared, a notice or other paper required to be served in an action must be served upon his attorney; but, if he has not appeared, service of a notice or other paper in the ordinary proceedings in the action need not be made upon him, unless he is actually confined in jail for want of bail. The plaintiff should have notified the defendant Hall and the court, at the hearing of the pendency of the motion, to strike his name from the complaint after his appearance and answer, and the court would then have had the whole subject within its grasp. He did not do so, but went on as if there were no possible objection to the proceeding affecting Hall without notice to him. This he could not do. The Code is imperative,—the notice must be served. The object of the provision relating to this subject in the case is expressly designed to prevent proceedings without notice to the party to be affected by them. The initiation of the motion before the appearance did not dispense with notice to the defendant Hall, inasmuch as his appearance was regular. It might and would doubtless have affected the terms upon which the discontinuance would have been allowed, as it was really unnecessary. The plaintiff seems to have been remiss also in not serving, under section 423 of the Code, a notice of the object of the action, and that no personal claim was made against the defendant Hall. It should be remarked that, if the notice to Hall had been given after his appearance of the pending motion, there would in all probability have been no necessity for an appeal, and its expense avoided. The tendency to create reasons for appeals which should not become necessary in conducting actions, as contemplated by the Code, is increasing, and the general term subjected to an amount of labor quite unnecessary. There are many meritorious appeals, of course. It is not against them that ought can be said but praise for the professional devotion that prompts them, but the vexatious appeals resting on speculation alone, and with no chance of success, are to be censured. Here it is perfectly patent that the defendant Hall was entitled to notice, under the circumstances, and it is so substantially conceded by the respondent, and yet the appeal is resisted, and thus justified, although the whole trouble and delay could by a proper concession have been avoided. The order appealed from was wrong, and must be reversed, with \$10 costs and disbursements of this appeal. The case of *Bank v. Whitmore*, 7 N. Y. St. Rep. 456, which the respondent thinks sustains the order appealed from, is not at all in point. There the party was allowed to appear, and was heard and concluded by the result; here he was not heard. All that was done was a suggestion by one of defendants' counsel, and as an *amicus curia*, that the defendant Hall had appeared. Ordered as suggested. All concur.

COTANCH v. GROVER.

(Supreme Court, General Term, Fourth Department, July, 1890.)

MUNICIPAL CORPORATIONS—APPOINTMENT OF OFFICERS—COMMISSION.

Where the record of the proceedings of the village trustees shows that a street commissioner was appointed at a meeting of the trustees, and took the oath of of-

file, and filed a bond, as required by Laws N. Y. 1870, c. 291, under which the village was incorporated, it cannot be objected to the validity of his appointment that no commission was issued, as the act does not provide for a formal commission.

Appeal from Tompkins county court.

Action instituted before a justice of the peace by Isaac H. Cotanch against William H. Grover. The complaint alleged that the plaintiff is the owner of certain premises therein described, situate in the village of Freeville, in the town of Dryden, on the north side of the highway running east and west in said village; and that the "premises are adjacent to and facing the said road, but on a slight elevation, which was sustained by a natural grade or slope to the said street; that the defendant, on or about the 1st of September, 1888, and at divers times prior and subsequent thereto, wrongfully dug up, and caused to be dug up and carried away, from plaintiff's premises, within the limits of said street, large quantities of soil and dirt, for a distance of eight or ten rods or thereabouts, in front of these premises, and cut down a deep excavation the whole length of the premises, and about three or four feet deep, leaving a gully there to within about three or four feet of the plaintiff's fence; that the said soil and earth was carried to places in said village a long distance from plaintiff's premises, and used for private individuals as well as for the highways; that it was not necessary to take away plaintiff's soil and earth, and damage his property, there being other accessible dirt that was nearer by; that the aforesaid excavation and carrying away of plaintiff's earth and soil has caused large damage to his premises, rendered them inconvenient by way of ingress and egress, and lessening the value thereof." The answer contained a denial, and alleged that the defendant at all the times mentioned in the complaint "was the street commissioner of the village of Freeville, a domestic municipal corporation duly organized and created under and by virtue of the laws of the state of New York; that the premises and the highway mentioned in said complaint are both within the corporate limits of the said village of Freeville; that whatever the defendant did in working on said highway, and in moving earth and gravel thereon, and in front or near the premises described, at the time and times mentioned in said complaint, he did while he was the duly appointed and qualified street commissioner of said village of Freeville, and in his capacity as such commissioner, and under the authority and direction of the trustees of said village of Freeville, and not otherwise." There was a verdict for plaintiff in the justice's court. Defendant then appealed to the county court, where the cause was tried *de novo*. Judgment was entered on a verdict for plaintiff, and a motion for a new trial was denied, and defendant again appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Almy & Bouton, for appellant. *Lester D. Mallery and S. D. Halliday*, for respondent.

HARDIN, P. J. Whether the defendant was a street commissioner of the village of Freeville at the time of making the excavations referred to in the pleadings or not was made a conspicuous question upon the trial of the issue. The defendant insisted he was *de jure* commissioner, and he also asked the court to hold that he was *de facto* street commissioner. The plaintiff claimed the converse. The court declined to charge that "the defendant, in doing the work complained of, was the *de facto* street commissioner of the village of Freeville, and acted under the lawful direction of the board of trustees of the said village." Defendant took an exception to the refusal to charge. The court charged "that he was not an officer under the law as it stands." Upon the trial the clerk of the village was called as a witness, and he identified the books of records, kept by him as such clerk, of the proceedings of the board of trustees of the village of Freeville. The minutes were put in evidence, and from them it appeared that William H. Richardson, Orson Luther,

George T. Card, and Byron Brewer were elected, respectively, president and trustees on the 2d day of July, 1887. There was a meeting of the trustees held on the 5th of July, 1887, at the office of President Richardson, when Brewer and Luther were present as trustees, and at that meeting G. M. Watson was unanimously chosen clerk, and the board adjourned to the 6th day of July; and the minutes indicate that trustees Brewer, Luther, and Card, having duly qualified, were present, and President Richardson was in the chair. After transacting some business, the board adjourned to the 11th of July. On the 20th of March, 1888, a regular annual election was held, and W. H. Richardson was elected president, and Hill and Grover were elected trustees. On the 27th of March, 1888, the first meeting of the board of trustees was held in the office of the president, and Hill, Grover, and Card were present, and the president was in the chair. By the minutes of that meeting it appears that "E. F. George was appointed clerk, and William Grover was appointed street commissioner. * * * Motion made and carried that the president and clerk be authorized to give commissioner orders on treasurer for such amount as he needs from time to time." April 2, 1888, another regular meeting of the board of trustees was held, and the minutes of the preceding meeting were read and approved; and it appears by the minutes kept of the meeting held on April 2, 1888, viz.: "Motion made and carried that the bonds of N. H. Thompson and William Grover be accepted." Another regular meeting was held on May 7, 1888, and the minutes thereof contained the following entry: "Minutes of last meeting read and approved." Defendant offered in evidence a bond executed by him and George M. Watson as surety, which bond was in the penal sum of \$400, and the condition of said bond was as follows: "The condition of this obligation is such that, if the above-bounden William M. Grover, who has been appointed street commissioner of the above-named village, does faithfully perform the duties of said office without fraud or delay, then the preceding obligation to be void; otherwise to remain in full force and virtue." The defendant also put in evidence a bill of Grover as street commissioner of the village of Freeville, filed September 11, 1888, which contained items for labor performed and materials furnished during the months of June, July, August, and September. The verification of the said account, among other things, contained the following language, viz.: "W. M. Grover, being duly sworn, says he is street commissioner of the village of Freeville; that the within report of labor performed on the streets in said village is in all respects correct. * * *" The affidavit was subscribed. "W. M. GROVER, Street Commissioner," and sworn to the 11th day of September, 1888, before Edgar F. George, village clerk.

Edgar F. George was called as a witness, and among other things testified: "I kept these minutes on this page 89. It simply says: 'William Grover was appointed street commissioner.' I do not recollect whether it was done by motion or otherwise. * * * I was acting as clerk of that meeting." George T. Card was called as a witness, and testified that: "I have been trustee of the village for two years, beginning in the spring of 1887. The other trustees for 1888 were John S. Grover and O. H. Hill. Only two elected that year. Think I was present at the first meeting of the board after the election of 1888. Was present when Mr. Grover was appointed street commissioner. There was a motion made and a vote taken to appoint Mr. Grover, and it was pronounced carried by the president. Think I was present when Mr. Grover's bond was presented. Can't positively recollect in regard to the bond; my impression is that it was presented and approved." Thereupon Edgar F. George was recalled, and testified: "Mr. Grover's bond as street commissioner was filed with me as clerk of the village, April 2, 1888." Thereupon George T. Card was recalled as a witness, and testified, viz.: "After the appointment of Mr. Grover as street commissioner, his taking the oath of office, and filing his bond, the board of trustees took action in regard to this excavation of the

street in front of Mr. Cotanch's place. Can't recollect the date, but should think it was in May. All the trustees, Hill, Grover, and myself, were present. William Grover was present also. What we did in reference to the highways in general was that Mr. Hill took his two-seated Democrat wagon, and his horse, and took the other trustees and myself and William Grover, and started from about the center of the village over the roads, to see where there were places that needed repairing, and to instruct the commissioner what to do in different places, and we went down to this place in front of Mr. Cotanch's house, and looked that road over. There was a knoll there in the road commencing about in front of the church, and slowly raising to in front of Mr. Cotanch's house, and then sloped off towards the railroad to the west. We were there in the wagon, and I can't remember just the words that each one said to the other. I can remember the general decision of the three as we were together, but can't remember the exact words. I told them how I thought the dirt ought to be taken out to improve the road, about how wide, and about how long; where to begin, and where to end. We had a tape line, and we measured to get the width of the road at that point, and I told them about where I thought it ought to be taken out to make the road better at that point, and that we could use the dirt in filling up in other places. * * * After I had made this statement to the other trustees as to what my judgment of the improvement to be made was, they said they thought that would be an improvement to the road, and that we could use the dirt we took out of that place to fill low places or other places in the road, and be a general improvement. We showed Mr. Grover about how deep to take the dirt out, and about how wide. I don't think we told him just what place to begin. I think we told him how much dirt to take, and how deep to take it, and how deep to leave it after it was finished. * * * I saw the work during its progress. Mr. Grover commenced near the corporation line, and ploughed on the south side of the road; plowed quite a little wider than the beaten path, clear to the edge of the bank. There was quite a steep bank on that side, slanting off towards the swamp. * * * After the completion of this work, Mr. Grover was paid by the village for his work and the money he had expended there."

1. Freeville was incorporated under "An act for the incorporation of villages," passed April 20, 1870, (chapter 291, Laws 1870.) In title 2, § 1, of the act, it is provided, viz.: "The officers of a village incorporated under this act shall be as follows, unless otherwise herein directed: A president, three trustees, a treasurer, a clerk, a collector, and a street commissioner." Section 3 provides: "The clerk and street commissioner shall be appointed annually by the board of trustees." Section 5 provides: "All officers elected or appointed under this act shall hold their respective offices one year, unless sooner removed or disqualified, and until their successors shall be elected or appointed and qualified." Section 7 provides, viz.: "Every person elected or appointed to office under this act, who shall neglect to file the oath of office hereinafter required for five days after personal notice, in writing, from the inspectors of election or the village clerk, of his election or appointment, shall be deemed to have declined the office, and his place may be filled as in case of a vacancy." Section 11 provides that the street commissioner, before entering upon the duties of his office, shall "execute and file with the village clerk a bond to the village, in such a sum and with such sureties as the board of trustees shall approve;" and section 12 provides for the oath of office. Section 25 of title 8 confers upon the trustees power "to keep the roads, avenues, streets, lanes, public buildings, and public places of the village in good repair, order, and condition." In title 8, § 13, it is provided as follows: "The board of trustees shall cause to be kept a record of its proceedings." The act nowhere prescribes a commission to be issued to a street commissioner. We are inclined to think that there is no custom in municipalities organized under

that statute to issue a formal commission. The action of the board of trustees, evidenced by resolution appointing such subordinate officers, seems to be regarded as sufficient authority for commissioners to act, after the oath of office and bond are made and given as prescribed by the act.

Our attention is called to *People v. Murray*, 70 N. Y. 521, which is to the effect that an appointment of excise commissioners verbally is not sufficient. That case contains an intimation that the appointment of civil officers may not be made verbally, save where permitted by the terms of the statute conferring the appointing power, and that, in the absence of such permission, there must be a commission,—a formal writing signed by the official with whom the power of appointment rests, showing clearly his intention to appoint the person named. We think that case does not sustain the contention of the plaintiff. The evidence in that case disclosed the fact "that the only action of the mayor was a verbal nomination of the relators to the common council for the appointment to the office. The vote of the common council and the record of their action upon the nomination must be laid out of view as *ultra vires*, and without efficiency. They add nothing to the verbal declaration and statement of the mayor, and the claim is that such nomination was a verbal appointment of the persons named to the office,—the completed act of the mayor making the appointment; that an appointment by parol without writing is a valid exercise of the power to appoint; and this proposition must be sustained; or the respondents cannot hold their judgment." In the course of the opinion delivered in that case, ALLEN, J., refers to *Johnston v. Wilson*, 2 N. H. 202, which was a case relating to an elective office, and in deciding that case WOODBURY, J., says: "On general principles, the choice of a person to fill an office constitutes the essence of his appointment. After the choice, if there be a commission, an oath of office, or any ceremony of inauguration, these are forms only which may or may not be necessary to the validity of any acts under the appointment, according as usage and positive statute may or may not render them indispensable." We think in the case before us the clear evidence of the defendant's title to the office and right to administer the same were made apparent by the resolution adopted by the board of trustees appointing him, by his oath of office, and his bond duly approved by the trustees, and filed with the records of the corporation. We are also of the opinion that the plaintiff cannot successfully question the defendant's title to the office upon the evidence furnished upon the trial. *Foot v. Stiles*, 57 N. Y. 399; *Dolan v. Mayor*, 68 N. Y. 274; *Morrison v. Sayre*, 40 Hun, 465.

2. If the removal of the earth in front of the plaintiff's premises was made for the purpose of improving the street or highway by the village authorities, and for no other purpose, and they acted in good faith in such removal with a view to benefit the public, their action was within their corporate powers; however, if they made such removal for the purpose of obtaining the earth and soil and gravel, and appropriated it to their own use or the use of the corporation in other localities, their action in so doing cannot be justified. In *Robert v. Sadler*, 104 N. Y. 229, 10 N. E. Rep. 428, the rule is stated as follows: "Where the public have taken an easement for a street or highway, and the surface of the land is above the grade of the highway, so that, in order to reach the grade line, it is necessary to remove the superincumbent material, this may be used on other portions of the road, on the premises of other land-owners; but the public easement justifies only the taking of earth and soil which the process of construction or repair requires, and necessarily compels to be removed." That case was followed in *Ladd v. French*, 6 N. Y. Supp. 56, in which latter case it was said: "Gravel cannot be dug from between the traveled part of a public highway and the fence of an adjacent owner for the purpose of improving the road at the spot other than that from which it is taken." There was a conflict in the evidence in

respect to the purposes in view in making the removal of earth and gravel. Some of the evidence quite clearly indicates that it was removed from the plaintiff's premises for the purpose of improving the highway. Some of the evidence quite clearly indicates that it was removed for the purpose of appropriating the material by the corporation through its officers to the use of other streets. . We forbear to express any conclusion upon the weight of the evidence, as the views we have already expressed in respect to the appointment of the street commissioner renders another trial necessary. We think the ruling of the court at the trial, and the positions taken in the charge upon the requests, and refusal to charge upon the subject of the defendant's title to the office of street commissioner, were prejudicial to the rights of the defendant. We are therefore of the opinion that the judgment and order should be reversed, and a new trial ordered. Judgment and order reversed, and a new trial ordered, with costs to abide the event. All concur.

ROSENBERG v. FLACK. ADLER *et al.* v. SAME. EGGERBRECHT *et al.* v. SAME. BOLEY v. SAME.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

REPLEVIN—DISCONTINUANCE—MOTION TO SET ASIDE.

Where replevin against a sheriff to recover goods levied on as the property of the execution debtor is discontinued by plaintiff without returning the goods to the sheriff, the discontinuance will be set aside, and the execution debtor allowed to contest the claim of plaintiff in replevin.

Appeal from special term, New York county.

Four actions by Charles Rosenberg, Alfred Adler and others, Carl Eggerbrecht and others, and Morris Boley, respectively, against James A. Flack, to recover goods seized by defendant as sheriff under execution against John Brandt. Orders of discontinuance in the several actions were set aside, and the execution debtor, Brandt, was made a defendant therein, and plaintiffs appeal.

A. H. Bewick, for appellants Rosenberg and Boley. *Leonard Bronner*, for appellants Adler and others. *Shafer & Gottgetreu*, for appellants Eggerbrecht and others. *Abram Kling*, for respondent Brandt.

DANIELS, J. Louis Tobias, in the early part of November, 1889, recovered a judgment against John Brandt, and issued an execution thereon to the sheriff of the county of New York, who levied upon the goods in the store of the debtor. After that levy, and in the early part of the same month, the plaintiffs in these four actions commenced their suits in replevin to recover portions of the property levied upon by the sheriff. The judgment creditor was requested to indemnify the sheriff against these actions, and he failed to do so, and, by an agreement between the attorney for the sheriff and the attorney for the plaintiffs in these four actions, they were discontinued, and the property appears to have remained in the possession of the plaintiffs in the four actions, without any part of it having been returned to the sheriff as a consequence of the discontinuances. And an application was made on behalf of Brandt, the debtor in the execution, to be made a party to these actions, for the purpose of contesting the title of the plaintiffs in them to the goods affected by the proceedings in replevin. This motion was in the first instance made without any unreasonable delay, but it was denied because of the fact that Brandt himself had not by his own affidavit supported the application. Leave, however, was reserved to the debtor to renew the motion; and that was done early in February, 1890, and resulted in the order from which the appeal has been taken.

The period was quite brief between the denial of the first motion, and the making of the second,—so much so as to exclude the imputation of want of

diligence of the party in whose behalf it was made; and even the short delay which intervened is explained by the circumstance that it was desirable to bring the second motion before the court held by the justice presiding when the first was made, on account of his acquaintance with the facts, acquired on the hearing and disposition of the first motion. The proceedings by which the actions in replevin were discontinued were quite unusual; for the result of their discontinuance, legally, would be to place the property affected by the actions in replevin again in the custody of the sheriff under the execution, for no trial or investigation whatever took place in those actions, determining the right of the respective plaintiffs to the recovery of the possession of the property in those actions. The natural, as well as the legal, effect of the discontinuance of the actions, under these circumstances, would be the abandonment of the claims made, and the surrender of the property to the sheriff, in whose custody it was at the time when the proceedings in replevin were taken; and this was a statutory part of the action, as it was regulated and provided for by the Revised Statutes, for, where the defendant recovered judgment by discontinuance, a part of that judgment, necessarily, was for the return of the goods and chattels replevied to him, unless he elected to waive such return, and take judgment for the value of the property. 3 Rev. St. (6th Ed.) p. 836, §§ 16, 18. But these provisions appear to have been repealed by section 1, subd. 3, c. 245, Laws 1880. But notwithstanding their repeal the principle maintained in their enactment is still applicable to litigation of this description; for it must necessarily follow, when the action in replevin is discontinued, that the claim of the plaintiff to the property affected by it will be abandoned. That this was not the effect given to the discontinuance of these actions is a strong circumstance indicating that to have been conclusive, and for the purpose of securing to the plaintiffs in the replevin suits an advantage over the judgment debtor which they were not entitled to claim, and in judgment of law could not be maintained. The judgment debtor claims to be the owner of this property, and that the plaintiffs in the replevin suits were not entitled to obtain its possession. The property affected by the actions in replevin was the subject of those actions; and, by section 452 of the Code of Civil Procedure, when this debtor applied to be made a party to those actions, he was entitled to that relief, for this section has provided that, where a person not a party to the action has an interest in the subject thereof, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment. That is what the order did in this case, in addition to vacating the discontinuance of these actions in replevin. The part of the order making Brandt a party is supported by this section of the Code, and that part of it vacating the discontinuance of the actions, by the circumstance that it was not authorized upon any other terms or conditions than the return of the property to the sheriff; and the fact of this having been dispensed with is decisive evidence of a conclusive arrangement resulting in the discontinuance. The court owed it to itself, as well as the party affected by that proceeding, to vacate the discontinuance, and restore the actions to such a condition as will enable Brandt to contest the plaintiffs' right to recover the property in the actions of replevin. The order should be affirmed, with \$10 costs, and the disbursements. All concur.

NEWMAN v. STUCKEY *et al.*

(*Supreme Court, General Term, Fourth Department. July 1, 1890.*)

1. NEGLIGENCE—JOINT LIABILITY.

Where two persons together owned a stallion, and had agreed to divide his earnings between them, and to use him in serving plaintiff's mare, both were liable for the negligence of one in so doing, whereby the mare was injured.

2. COMPROMISE—EFFECT.

Where two persons were jointly liable for an injury caused by the negligence of one in carrying out a joint enterprise, an agreement entered into with one of them whereby his note was accepted, together with a promise to deliver certain property, as full settlement of the claim, operated to discharge the other.

2. SAME—RESCISSIO.

Where an agreement of settlement of the claim sued on had been made, and in pursuance thereof, among other things, defendant had given his note to plaintiff, it was error, on a question whether the agreement was rescinded at a certain time, to refuse a charge that the fact that plaintiff did not then return the note was to be taken into consideration in determining the question.

Appeal from Onondaga county court.

Action for damages by William W. Newman against George Stuckey and William Stuckey. Verdict for plaintiff for \$95, and motion on judge's minutes for new trial denied, from which, and from the judgment entered on the verdict, defendants appeal.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Lyman & James, for appellants. *Baldwin & Kennedy*, for respondent.

HARDIN, P. J. It appears by the evidence that the stallion was owned by both of the defendants. George Stuckey testified, viz.: "I and my son owned this horse together over a year;" "kept the horse for my own use, and for others that wanted to use it; and had been so during all the time that I and my son owned it." "He took care of the horse, and had one-half of the horse's earnings, and I had the other half. That arrangement was made when we bought the horse in the spring of 1888, in April, and continued down to the time of the death of the mare." It is not important to inquire or to determine whether there was a partnership between the defendants. Each was part owner of the stallion, and they had entered into a contract to divide the earnings of the horse, and they had together agreed with the plaintiff to use the horse in serving the mare of the plaintiff. If, by the negligence of one in the carrying out of the undertaking made by both, injuries resulted to the plaintiff's animal by reason of a breach in the undertaking to use reasonable care, both were liable. They had entered into a contract between themselves as to the manner in which the business in which they were engaged with their stallion should be conducted. The case of *Stroher v. Eitting*, 97 N. Y. 105, is in point. In that case, DANFORTH, J., says: "They undertook to engage together in a money-making occupation, to which one contributed as capital the horses, harness, and wagon, and food and care of the team, and the other his personal services. The reward of each was to be derived from the avails of the business as such, and not by way of compensation either for services or use of property. As to third persons, therefore, within rules too well settled to permit discussion, each became the agent of the other in the prosecution of the common enterprise, and liable for his omissions or faults in regard thereto. *Champton v. Bostwick*, 18 Wend. 175; *Leggett v. Hyde*, 58 N. Y. 272; *Roberts v. Johnson*, Id. 613." That case was followed in *McCarragher v. Gaskill*, 42 Hun. 451. The complaint of the plaintiff seems to be founded on the alleged agreement of the defendants. It is averred that the "defendants * * * agreed to exercise due care;" also that the "defendants undertook on said day and at said place." Following these allegations is an averment of negligence on the part of Will Stuckey. There is no averment in the complaint of any negligence of the other defendant. The injuries complained of to the plaintiff's mare are alleged to have occurred on the 26th day of June, 1889. From the evidence it appears that the defendant William Stuckey had a negotiation with the plaintiff on the 8d day of July, 1889, and in that negotiation a compromise and adjustment of the alleged liability, by reason of the occurrence of the injuries complained of, took place, and in pursuance of that arrangement or agreement entered into between William Stuckey and the plaintiff, and as a part thereof, the defendant William Stuckey

made and executed and delivered his promissory note to the plaintiff in the following figures and words:

"\$100.

SOUTH ONONDAGA, July 8, 1889.

"One year from date, for value received, I promise to pay to W. W. Newman, or bearer, one hundred dollars, and interest. WILL STUCKEY."

In addition to the delivery of the note of \$100 by the defendant William Stuckey, he agreed to make up to the plaintiff the sum of \$50 more by delivering to him the "Hotchkiss colt," which was to be kept until it was four months old, which was to be taken by the plaintiff at the sum of \$25; and the defendant surrendered a claim of \$18 for past services rendered on the 1st of May, and agreed to deliver other services to the extent of \$7, thus making up, with the note and these three items, the sum of \$150. The plaintiff received the note, and agreed upon the terms already stated as a settlement and compromise of the claim which he had made for the injuries occurring to his mare. While that adjustment and settlement remained, plaintiff held the note given thereunder payable to himself or bearer, having a year's time to run. Any remedy he might otherwise have had for the injuries occurring, was suspended and postponed. Such agreement operated to discharge the other joint contractor from the liability alleged. *Waydell v. Luer*, 3 Denio, 410; *Millard v. Thorn*, 56 N. Y. 402. It was said in *Luddington v. Bell*, 77 N. Y. 141, viz.: "When, therefore, a creditor agrees to release a joint indebtedness by the acceptance of the note or any other obligation of one of his debtors in payment, he receives a consideration which may be more valuable to himself than the original claim. Whether it is in fact so is wholly immaterial. The slightest consideration is sufficient to support the most onerous obligation. *Oakley v. Boorman*, 21 Wend. 588. Indeed the additional obligation assumed by one of its debtors by becoming responsible severally for the entire debt would of itself render it a valid agreement." This case has recently been approved and followed in *Allison v. Abendroth*, 108 N. Y. 472, 15 N. E. Rep. 606; and, in referring to *Luddington v. Bell*, *supra*, ANDREWS, J., says: "It is held that the acceptance of a creditor of the individual note of one of the members of a copartnership after dissolution for a portion of the copartnership debt was a good consideration for the creditor's agreement to discharge the maker from further liability." To avoid the force of the settlement and adjustment it was claimed upon the trial by the counsel for the plaintiff that there had been a rescission of the contract of settlement prior to the commencement of this action. The evidence offered for the purpose of establishing the rescission, or waiver, more properly speaking, of the agreement, is very slight and unsatisfactory. When stated by the plaintiff, it is to the effect that he held an interview with William Stuckey in which he said that he had learned that his father, George Stuckey, refused to consent to the delivery of the Hotchkiss colt upon the agreement; and, according to the testimony of the plaintiff, he then said to William, viz.: "Then, as you cannot carry out the agreement as you made it, doesn't that put the matter just as it was before we made the agreement?" He answered: "Yes; I suppose so." In his cross-examination upon that subject, he states as follows: "'Well,' I says, 'you cannot carry out the agreement that we made. Does not that place the matter as it was before we made the agreement?' He said, 'Yes; I suppose so.'" Plaintiff's witness Leamy narrates the interview on that subject in the following words: "Then Mr. Newman says: 'If you won't give me the service of the mare or the Hotchkiss colt that leaves the matter just as it was before we commenced.' 'Yes,' says Mr. Stuckey; and me and Mr. Newman started for the house." It is to be borne in mind that the plaintiff did not then and there return the promissory note which he held executed by William Stuckey. He did not by word or act expressly inform Stuckey that he would recede from the agreement that had been made between the parties. It is very doubtful whether William Stuckey understood on that occasion that

the inquiry addressed to him called for any response in respect to whether the settlement should be given up or not. It is more probable that he understood that, so far as his liability was concerned, it rested in the terms of the agreement which he had made with the plaintiff. Surely that would be a reasonable version as long as the plaintiff continued to hold the promissory note which he had taken from William Stuckey. However, we fail to find in the evidence anything to indicate that George Stuckey ever waived the agreement or settlement which had been made, the effect of which we have already seen was to discharge him from liability. It was the duty of the plaintiff, if he would make a valid rescission, to restore that he had received in virtue of agreement. As was said in *Francis v. Railroad Co.*, 108 N. Y. 97, 15 N. E. Rep. 192: "The plaintiff cannot rescind if he retains in himself, or withholds through another, any fruit of the contract. * * * He who would rescind must rescind wholly, and leave no right flowing from him outstanding which imperils the completeness of the rescission." See, also, *Gould v. Bank*, 86 N. Y. 75; *Allison v. Abendroth*, 108 N. Y. 475, 15 N. E. Rep. 606.

The trial court was asked to charge "that if this matter was adjusted and settled between William Stuckey and plaintiff that it ended the cause of action for negligence as against these defendants." The court declined to thus charge, and there was an exception. Nor do we think the refusal was cured by the qualification which was given in the following words: "If there was a settlement, an executed agreement to settle, then it ended the matter; but on the evidence it was an executory agreement, and therefore didn't settle if they afterwards chose to rescind." As already observed, there was no direct evidence that George Stuckey had at any time consented to rescind or waive the agreement; nor is there any evidence of any authority of William to waive the settlement. We think the trial court ought to have yielded to the request made to charge the jury "that the fact that the plaintiff did not deliver the note in question to the defendant William Stuckey on the 17th or 27th of July, whichever date it may be that they had the conversation, that that is a fact which may be taken into consideration by the jury in arriving at the question whether or not there was a rescission of the contract." We think the fact embraced in the request was very important, and that it was a fact which the jury might very properly be instructed to consider in determining whether or no the plaintiff and defendant William Stuckey mutually agreed to waive the settlement theretofore made. After the settlement was made, if the defendant William Stuckey failed to deliver the Hotchkiss colt, or to render the services stipulated for in the agreement, doubtless he would have been liable in an action to the plaintiff thereon for a breach of that part of the agreement which related to those two items. However, the complaint in that case does not count upon the agreement, and therefore the plaintiff is not in a situation to recover for any alleged breaches of the agreement on the part of the defendant William Stuckey. These views lead to a new trial. Judgment and order reversed on the exceptions, and a new trial ordered in the county court of Onondaga county, with costs to abide the event. All concur.

FARNSWORTH *et al.* v. HALSTEAD *et al.*

(Supreme Court, Special Term, New York County. March 5, 1890.)

PLEADING—ANSWER—MOTION TO STRIKE OUT AS SHAM.

An answer in an action against the members of a partnership on a firm liability which pleads in bar a judgment against some of the defendants on the same cause of action rendered on an offer by them will not be stricken out as sham.

Action by Ezra Farnsworth and others against William M. Halstead and others constituting the firm of Halstead, Haines & Co., for goods sold and delivered. Defendants admit the allegations of the complaint, and plead in

bar a former recovery by plaintiffs on the same cause of action. Plaintiffs move to strike out the answer as sham.

John J. Adams, for plaintiffs. *Shipman, Larocque & Choate*, for defendants.

O'BRIEN, J. This action is brought to recover the sum of \$4,842.68 for goods sold and delivered to the defendants as copartners. The defendants admit all the allegations of the complaint, but allege that plaintiffs recovered a judgment against the defendants for the same cause of action, and this they plead in bar. The judgment referred to was upon an offer signed by three of the defendants as copartners. It is by this motion sought, pursuant to section 538 of the Code, to strike out the answer as sham. Under our practice such a motion cannot prevail. In *Webb v. Foster*, 45 N. Y. Super. Ct. 312, it is held that an affirmative defense cannot be stricken out as sham upon affidavits. It is true that to determine when an answer is sham the essential element is its falsity, the words "sham" and "false" in this connection being substantially synonymous. A pleading, however, to be stricken out, must be false in the sense of being a mere pretense set up in bad faith, and without color of fact. *Kiefer v. Thomass*, 6 Abb. Pr. (N. S.) 42; *Hadden v. Manufacturing Co.*, 1 Daly, 888. These considerations would be sufficient to justify a denial of the motion. But, apart from these, in view of the substantial question of law involved, a more deliberate mode of procedure must be resorted to to determine such a question than by motion, as here made, to strike out the pleading as sham. My attention has been called to the case of *Kantrowitz v. Kulla*, 13 Civil Proc. R. 74, wherein it was held that section 1278 of the Code of Civil Procedure, which provides in terms for the entry of judgment upon confession against one of several joint debtors, applies equally to judgment rendered upon offer. In *Garrison v. Garrison*, 67 How. Pr. 272, it is said that "section 1278 relates to confessions of judgment, not to offers." This latter would seemingly be the correct view if we keep in mind that the section itself expressly confines its applications to judgments by confession; that there is a difference in form and name, at least, between judgments by confession and judgments upon offer; and that the provisions of the Code having reference to the two forms of judgment are separate and distinct. However near, therefore, we may liken in principle the one to the other, the rule that *expressio unius, est exclusio alterius*, is seemingly applicable. Prior to the enactment of this section a judgment against one joint debtor operated to merge the debt so as to bar an action against the other joint debtors, whether the judgment was recovered by sanction or upon confession. This fact furnishes an additional reason in favor of the construction, excluding judgments except upon confession. Admitting that the provision is remedial in its nature, and that no good reason can be advanced why a difference should be made between judgments upon offer and by confession, we are met in this line of argument by the provisions of the section itself, which in terms applies only to judgments by confession. The answer, then, to the statement that it should apply, is that it is not so written. This question, however, will be disposed of upon the trial, and the purpose sought by the views herein expressed is to show that the question itself is not so free from difficulty, or the pleading containing the defense so palpably false, that it should upon motion be stricken out. The motion is therefore denied, with costs to abide the event.

PEOPLE *ex rel.* WESTON v. MCCLAVE *et al.*, Police Commissioners.

(Supreme Court, General Term, First Department. June 6, 1890.)

1. MUNICIPAL CORPORATIONS—DISCHARGE OF POLICEMAN—SPECIFICATIONS.

Relator was charged with conduct unbecoming an officer, and the specification was that, being a police sergeant, he engaged in an altercation at the station-house

with a fellow-sergeant. The evidence showed an unprovoked assault by relator. Held, that an objection that the specification did not sustain the charge was untenable.

2. SAME—REVIEW ON APPEAL.

Where, in proceeding before the police commissioners, the evidence is conflicting, their action cannot be reviewed, though some injustice may have been done.

3. WITNESS—EXAMINATION—SELF-CRIMINATION.

The provision of Const. N. Y. art. 1, § 6, that "no person shall be * * * compelled in any criminal case to be a witness against himself," does not apply to an investigation by police commissioners of a charge against a police sergeant for conduct unbecoming an officer. DANIELS, J., dissenting.

Certiorari to review the action of the police commissioners in dismissing the relator, Cornelius Weston, from the police force.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Louis J. Grant, for relator. J. J. Delany, for respondents.

BRADY, J. The charge against the relator was conduct unbecoming an officer, and the specification was that, being then a sergeant of police, and attached to the eighth precinct, he engaged in an altercation on the 22d of May, 1889, at the station-house of that precinct, with Sergeant Myron Allen. He was regularly tried before the commissioners, adjudged guilty, and sentenced to dismissal. It is urged by the relator's counsel that the specification did not sustain the charge, inasmuch as an altercation does not amount *per se* to conduct unbecoming an officer, as it might result from an assault committed upon him by another, and which would naturally and justly inspire all the violence necessary for self-defense. Here, however, the evidence shows that an unprovoked assault was committed by him on Allen.

It is objected that the relator was called upon to testify at the beginning of the investigation as the first witness, and on the proposition that no person should be compelled in a criminal case to be a witness against himself, as declared by the constitution. But this is neither a criminal prosecution nor in the nature of a criminal prosecution, and therefore not within the provision of chapter 678 of the Laws of 1869. It is really a matter of discipline, which the board of police have a right to establish, and is consistent with the necessary rules and regulations of the department, and one by which the purposes of its organization can be carried out and investigations made without the application of strict legal rules. *People v. Police Com'rs*, 93 N. Y. 97. In that case the court said: "The action of the board of police in such instances must be considered, having in view the special powers conferred and the purposes for which their organization was intended, and not confined by the application of strict legal rules which prevail in reference to trials and proceedings in courts of law." The charge against the relator was of conduct unbecoming an officer, the specification being that he engaged in an altercation with another sergeant. The question presented, therefore, was whether he did so engage in an altercation as to be guilty of conduct unbecoming an officer and a gentleman. This, as already stated, is a pure matter of discipline, the object of which was to sustain the *morale* of the force, a very important feature in promoting its efficacy and insuring for it public dependence and respect. The relator, when he appeared to answer the charge in accordance with the notice given him, did not deny the charge. At least a denial appears upon the record. It is probable that it was this circumstance which determined the action of the board of police commissioners in favor of his immediate examination, and which they proceeded to take against the objection of his counsel. This it would seem they had a right to do, under the decision *supra*, which is regarded as controlling, for the reasons assigned. This mode of procedure appears to be harsh, but that view doubtless results from a prejudice against it arising from judicial experience, and the familiarity and importance of the rule that a man should not be called upon to testify against himself in any matter which may have serious

results until a case is made out against him, at least *prima facie*; but such a proceeding as this is not, as we have seen, within that rule.

It is also insisted that the testimony as to the origin of the trouble is directly in conflict, and that Allen's testimony when he was proceeded against was discredited, having been contradicted by four witnesses, and his charge that he was attempting to arrest the relator herein was disproved, and therefore his testimony should not be accepted as sufficient to sustain the charge against the relator. The commissioners, however, were vested with all the authority necessary to dispose of that question, and the conclusion, if it were reached in the prior prosecution of Allen, that he was not worthy of belief furnishes no conclusive reason why he should not be believed herein. As was said in the case of the *People v. Police Com'rs*, *supra*, "assuming the rule to be that the facts involved in the determination are satisfactorily supported by the evidence, so that the verdict of a jury finding such facts could not be set aside as against the weight of evidence, we are unable to see how it can be claimed that the decision of the commissioners was not justified." And again, in *People v. French*, 110 N. Y. 494, 18 N. E. Rep. 133, it is said: "The government of a police force assimilates to that required in the control of a military body, and the interference of an extraneous power in its practical control and direction must always be mischievous and destructive of the discipline and habits of obedience which should govern its subordinate members." Both parties were assailants, each charging the other with having commenced the fracas without provocation, and both, by the result of the dismissal here appealed from, are punished. This naturally suggests that some injustice may have been done, inasmuch as it rarely happens that violence is used by two antagonists at the same instant. But this can make no difference in the application of the rule imposing upon the commissioners the duty, and conferring upon them the power, to determine a question presented upon conflicting evidence. No reason has been discovered calling upon us to interfere with the dismissal appealed from, and it must be affirmed.

VAN BRUNT, P. J. I do not think that the point as to the relator's examination is well taken. He did not object upon the ground that he could not be examined because his testimony might tend to criminate him, but he simply objected to being examined until a case had been made against him, which objection was properly overruled. If he had objected to being examined upon the ground that his evidence might tend to criminate him, then the question discussed by Mr. Justice DANIELS might have arisen, but it does not arise upon this record. I concur in the conclusion arrived at by Mr. Justice BRADY.

DANIELS, J., (*dissenting*.) The relator held the position of sergeant in the police force, and was charged with conduct unbecoming an officer, the specification of which was that, on the 22d of May, 1889, he engaged in an altercation with Sergeant Myron Allen in the eighth precinct station-house at the termination of his tour of duty. Precisely what was meant by this charge that he had engaged in an altercation did not appear from the specification; but it was developed by the evidence taken upon the hearing that these two persons had engaged in a wrangle and wordy contest, followed by an assault and battery committed by one upon the other, which was a criminal offense. The charge was in this manner extended and tried before the commissioners, and evidence was given which tended to establish the fact that the relator had committed an assault and battery upon Allen. When the hearing commenced the relator was called as a witness before the commissioner, who took the testimony, and it was objected in his behalf to his giving evidence until a case had been made against him; and, when he was asked what had occurred between himself and Sergeant Allen, the objection was made more specific,

and the ground was taken that he could not be called upon to testify against himself until a case was made out against him, and witnesses called to sustain the charge. This was overruled, and an exception was taken on behalf of the relator, and he was then required to proceed, as he did, in giving his version of what had taken place between himself and Sergeant Allen, and his evidence disclosed the fact that personal violence had been made use of both by himself and by Allen; but his statement substantially was that the violence made use of by him was in his own defense. This, however, was unimportant, if he was not liable to be required to take the stand and swear as a witness in support of the charge which had been made against him.

The constitution of the state of New York, by section 6, art. 1, has declared that "no person shall be * * * compelled, in any criminal case, to be a witness against himself;" and the legality of the ruling made by the commissioner depends upon the construction which this prohibition of the constitution should receive. It is true that it was no part of the object of the proceedings to punish the relator for the commission of a criminal offense, but its object was, as it turned out to be, to prove him to have been guilty of what was a criminal offense, and for that reason to forfeit his office, and justify his removal. And, in case an adverse result should be reached under the charge made against the relator, then the consequences would be so serious to him as to be in the nature of punishment for a crime; for a forfeiture of his office, with its salary and prospective advantages by way of a final pension, was as serious to him as personal confinement and punishment could be; and this forfeiture depended, as the charge was construed and tried before the commissioners, upon proof of what the law maintains to be the commission of a criminal offense. It is true that it was not serious in its results, being no more than an assault and battery. But the constitution does not permit any discrimination in this respect between grave and trifling offenses. Its prohibition applies alike to all, that no person in a criminal case shall be compelled to be a witness against himself.

A like provision is contained in the constitution of the United States, and its effect was discussed and considered in *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. Rep. 524. There the charge was, by way of information, and not of an indictment for a crime, that plate-glass had been imported into the United States in violation of the revenue laws, and was liable to forfeiture for that violation. A claim was made on behalf of the importer to this property based upon a denial of the violation of the revenue laws, and he was required to produce the invoices of the glass to support the proceedings taken against the property on behalf of the United States. This requirement was made by an order held at the time to be warranted by an act passed on the 22d of June, 1874, providing that in other than criminal proceedings the defendant or claimant might be required to produce his books, invoices, or papers in court as proofs relating to the subject-matter of the charge. Under this order or notice the claimant produced the invoices of the glass, and they were allowed, against his objection, to be proved in support of the prosecution upon the trial of the cause; and, after an adverse result to the claimant of the property, the case was taken to the supreme court of the United States, where it was held, inasmuch as the act charged in the information was a criminal act, although the proceedings had for its object no more than the forfeiture of the claimant's property, that he could not be obliged to produce his books or papers to aid the United States in prosecuting the action against and for a forfeiture of his property. The decision was in part placed upon article 4 of the amendments to the constitution of the United States, declaring that the right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and it was held by the majority of the court that this part of the article had been violated by requiring the claimant to produce these papers, and their use upon the trial. So it was

also held by the entire court that so much of article 5 as declared that no person shall be compelled in any criminal case to be a witness against himself had also been violated by obtaining and using the invoices in this manner. And this decision is a direct authority in support of the objection which was taken in behalf of the relator before the commissioner; for the proceedings there could result in no more than a forfeiture of the property itself against which it had been instituted. Still, as the violation of the revenue laws was of itself a crime, although not alleged to be such in the information, and as a crime was incapable of being tried in that form of proceeding, the court held that the claimant was entitled to the protection of this provision of the constitution; and for equal reason the same protection should have been afforded to this relator. For, while the object of the proceeding was to secure no more than the forfeiture of his office and his removal therefrom, yet the right to make that removal depended, as the proceeding was carried on, upon the ability to establish the fact that the relator had committed an assault upon Sergeant Allen, which was a criminal offense. There is no substantial distinction between the application of the constitution as it was made in the case already mentioned and the application which should have been made of it in the case of the relator. If he had been guilty of an act justifying his removal from his office it was a criminal act, although not charged as such. While it was no part of the object of the proceedings to inflict criminal punishment upon him, it was to forfeit his office, and all his prospective rights and privileges under it, because he had committed an act which in another mode of proceeding might result in his criminal punishment. The objection which was taken in his behalf should not have been overruled. He should not have been required to be a witness in behalf of the prosecution against him. The provision of the constitution is highly salutary, and it should be liberally applied to promote the result which it was designed to maintain. In this respect his constitutional right was violated, and the proceedings should be reversed.

BUTLER v. CITY OF OSWEGO *et al.*

(*Supreme Court, General Term, Fourth Department. April, 1890.*)

1. TAXATION—NON-RESIDENTS.

Rev. St. N. Y. (7th Ed.) p. 989, § 2, as amended by the act of 1851, provided that "land occupied by a person other than the owner may be assessed to the owner or occupant, or as non-resident lands." Laws 1878, c. 153, amended the section to read that "lands occupied by a person other than the owner may be assessed to the occupant as lands of non-residents, or, if the owner resides in the county in which such lands are located, to such owner." *Held* that, prior to the act of 1878, lands could not be assessed to a non-resident of the city where the assessment was made, and that, under such act of 1878, lands cannot be assessed to a non-resident of the county where the assessment is made.

2. TRIAL—FINDINGS.

In an action to recover back taxes paid, on the ground that they were illegally assessed to a non-resident, plaintiff requested the court to find the fact of non-residence in connection with other facts. *Held* that, as the evidence did not support a finding of the other facts, the court properly refused to find the fact of non-residence, especially as the evidence in support of such finding was not satisfactory.

MARTIN, J., dissenting.

Appeal from a judgment entered upon a decision by the court at the Oswego special term, November, 1888, dismissing plaintiff's complaint, with costs.

The action was brought to set aside an alleged illegal assessment upon real property, and to recover back taxes and other moneys paid out on account thereof. The findings of fact by the trial court are in accordance with the evidence in the case, and are substantially as follows: The assessment was made in 1864, upon real estate in the Second ward of Oswego, to and in the name of one William Averill, and the tax levied thereon. The amount of

the tax was not paid, but was returned as unpaid. The property was advertised and sold for the payment of the tax, amounting to \$8.25, on the 28th October, 1865. The defendant Whitney bid in the property, paid the amount of the tax, and received the usual certificate. In 1867, plaintiff's wife purchased the property of one Charles H. Bonnell; and since then she and her husband have occupied the premises personally or by tenants. In April, 1885, notice of the tax-sale, and a requisition to redeem within three months, signed by defendant Whitney, was served upon Lewis, a tenant; and he sent it to plaintiff, who was until then ignorant of the assessment and sale. In May or June, 1885, the plaintiff sent his agent, Hamilton, \$33, with which to settle the tax-claim of defendant Whitney, and Hamilton paid Whitney from these moneys \$27; and thereupon, August 12, 1885, Whitney surrendered the certificate of sale to the city clerk, with direction to cancel the same of record, and the same was canceled, accordingly, on the same day. The evidence did not show whether the property, when assessed, was occupied or unoccupied, who the owner then was, or whether such owner was a resident or non-resident of the city. In the spring or summer of 1888 the plaintiff first discovered the facts upon which he claims the assessment was illegal, and then he demanded of Whitney repayment of the money that had been paid him, which was refused; and this action was brought September 6, 1888. The court was requested, in behalf of plaintiff, to find other facts, but declined to do so. The only requests which seem to be material to the questions involved upon this appeal are the first and sixth, which read as follows: "(1) That under the evidence the property was erroneously assessed to one William Averill as the owner or occupant thereof, and as resident property, as appears by the assessment rolls, for \$8.25;" "(6) that William Averill was not in the year 1864, nor at any time, either the owner or occupant of the property, and was not at any time a resident of the city of Oswego." The decision was based upon the legal propositions that the plaintiff had the burden of showing the assessment and tax were illegal, and had failed to make such proof.

Argued before HARDIN, P. J., and MARTIN and WILLIAMS, JJ.

W. H. Gardener, for appellant. *Thomas H. King*, for city, respondent. *Charles Rhodes*, for Whitney, respondent.

WILLIAMS, J. The only ground upon which the plaintiff, under the evidence, could claim the assessment to be illegal, was that William Averill, to whom it was made, was a non-resident of the city of Oswego. There was no proof that the person to whom it was assessed was not the owner, and it was not shown whether the property was occupied or not. The mere fact that it appeared to have been twice assessed on the same roll did not show this was the invalid, and the other the valid, assessment. Nor did the fact of the payment of the tax levied upon the other assessment show that was the valid, and this was the invalid, assessment. In order to determine which was the valid assessment, it would need to be shown who was the owner or occupant of the property, and such evidence was not given. There seems to be no ground upon which the assessment could have been held invalid, unless it be that Averill, to whom it was assessed, was a non-resident. It was held in *Johnson v. Learn*, 30 Barb. 616, (decided in 1859,) that land occupied by a person not the owner could be assessed to the owner, though a non-resident, the court saying: "Before the amendment of 1851, section 2 read as follows: 'Land owned by a person residing in the town or ward where the same is situated, but occupied by another person, may be assessed in the name of the owner or occupant.' Since such amendment, it reads as follows: 'Land occupied by a person other than the owner may be assessed to the owner or occupant, or as non-resident lands.' The change in this section is significant and important.

* * * It is obvious that the statute as amended empowers the assessors

of a town to assess lands therein situated, occupied by a person other than the owner, though owned by a non-resident, to the owner or to the occupant, or as non-resident lands. * * * This leaves to the assessors a reasonable discretion in such cases, to be exercised with a view to the mode most likely to insure the prompt and certain collection of the tax." In *Buffalo, etc., R. Co. v. Supervisors*, 48 N. Y. 101, (decided in 1871,) EARL, J., says, with reference to these provisions of statute: "Section 2 provides that land occupied by a person other than the owner may be assessed to the owner or occupant, or as non-resident land. This section undoubtedly means that when the owner and occupant both reside in the town where the land is situated the land may be assessed to either. When the owner does not reside in the town, and the occupant does, it must be assessed to the occupant; and, when neither of them resides in the town, it must be assessed as non-resident land. * * * Taking all these provisions of the statute together, it seems to me quite plain that there is no authority for placing upon the assessment roll, for a tax *in personam*, the name of any person not an inhabitant of the town." In 1878, by chapter 152, this section 2 was amended so as to read as follows: "Lands occupied by a person other than the owner may be assessed to the occupant as lands of non-residents, or, if the owner resides in the county in which such lands are located, to such owner." In *Hilton v. Fonda*, 86 N. Y. 347, (decided in 1881,) FOLGER, C. J., says, with reference to the provisions of the statute in question: "It is now seen that the assessors of a town have no power by law to assess lands, though lying in their town, to one who is not a resident of that town or of their county. They have no jurisdiction of his person whereby they can lawfully initiate a charge against him personally for a tax because of lands owned by him in their town. They have jurisdiction to value the lands, none to value them against him. The jurisdiction to value the lands as those of a non-resident does not give jurisdiction to assess them to the owner, he being a non-resident." In *Stewart v. Chrysler*, 100 N. Y. 382, 3 N. E. Rep. 471, (decided in 1885,) FINCH, J., says, with reference to these provisions of the statute: "Before the amendment of 1878, c. 152, the proper construction of the enactment had been determined in this court. *Buffalo, etc., R. Co. v. Supervisors*, 48 N. Y. 93. It was ruled that, when the owner and occupant both reside in the town where the land is situated, it may be assessed to either; where the owner does not reside in the town, but there is an occupant who does, it must be assessed to the occupant; and, when neither of them reside in the town, it must be assessed as non-resident land. The statute as amended [in 1878] passed under our review in *Hilton v. Fonda*, 86 N. Y. 346. The result of that review was stated to be 'that the assessors of a town have no power by law to assess lands, though lying in their town, to one who is not a resident of that town, or of their county.'"

The law must, therefore, be regarded as settled that property cannot be assessed to a non-resident, and prior to the act of 1878 could not be assessed to a person unless he was a resident of the city in which the assessment was made. The doctrine laid down in 30 Barb. was incorrect. So that in this case the assessment was invalid if William Averill, the person to whom it was made, was not a resident of the city of Oswego. The plaintiff, however, had the burden of proving the fact of non-residence. There was some evidence given on the trial upon this question by plaintiff, but it was not very satisfactory. At one moment, he seemed to be testifying from what Averill had told him, and at another from his own knowledge. The trial court did not find the fact of non-residence. The plaintiff only requested the fact to be found in connection with other facts. There was no request as to this fact alone. The court could not, under the evidence, find the other facts as requested, and therefore properly refused to find the whole, to which an exception was taken. It cannot be said such an exception raises the question of error in refusing to find as to the fact of non-residence alone. But, even if

does, I should be unwilling to reverse the judgment in the case because the trial court refused to find this fact upon the evidence. The credibility of the witness, and the effect to be given to his evidence, was for the trial court; and the court might well have refused to credit the knowledge or truthfulness of the witness. I think, as found by the trial court, there was no case made out, showing the invalidity of the assessment, and the complaint was properly dismissed with costs. The judgment should be affirmed, with costs.

MARTIN, J., (*dissenting*.) While I concur with my Brother WILLIAMS in his conclusion that the assessment in question was invalid if Averill was a non-resident, and that the burden of establishing that fact was upon the plaintiff, I am unable to concur in that portion of the opinion which results in the conclusion that the judgment should be affirmed. It is quite manifest that the learned trial justice misapprehended the law applicable to this case; that, by reason thereof, he deemed the non-residence of Averill as insufficient to render the assessment invalid; and for that reason alone, and not because he discredited the plaintiff's evidence, he failed to find upon the question of Averill's non-residence. His opinion clearly shows this, as he says: "The evidence authorizes a finding that Averill was a non-resident, but that is not enough." Again he says: "The plaintiff was bound to also show either that the lands were unoccupied, and therefore non-resident, if Averill was the owner, or that Averill was not the owner." The proof of Averill's non-residence was wholly undisputed. It is true this was proved by the testimony of an interested party, and the court was not bound to refrain from exercising its judgment, or to blindly adopt his testimony. But, when the court says that the evidence authorizes the finding that he was a non-resident, it becomes clearly manifest that the testimony was considered worthy of credit, and that the court would have so found but for its misconception of the law. It may be that no exception was taken by the appellant which pointedly raised his question; but, be that as it may, this court has the power, and it is its duty, upon an examination of the whole case, to determine whether the decision was against the weight of evidence, and contrary to law and justice, and, if of the opinion that it was, to grant a new trial. *Whittaker v. Canal Co.*, 3 N. Y. Supp. 576; *Mandeville v. Marvin*, 30 Hun, 282, and cases cited in opinions. I am of the opinion that justice requires a reversal of the judgment, and that a new trial be granted.

OLIVER & WALTER HEYWOOD CHAIR MANUF'G CO.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

ATTACHMENT—FOREIGN CORPORATIONS—JURISDICTION.

Under Code Civil Proc. N. Y. § 1780, providing that "an action against a foreign corporation may be maintained by a resident of the state * * * for any cause of action," but that such action "may be maintained * * * by a non-resident in one of the cases following only: * * * (3) Where the cause of action arose within the state,"—an attachment against a foreign corporation for a cause of action which does not appear to have arisen in the state will be vacated where the affidavit therefor fails to show that plaintiff is a resident of the state.

Appeal from special term, New York county.

Action by Harvey E. Oliver against Walter Heywood Chair Manufacturing Company. Plaintiff appeals from an order vacating an attachment in his favor against defendant, on the ground that it was a non-resident corporation. Code Civil Proc. N. Y. § 1780, provides as follows: "An action against foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: (1) Where the action is brought to recover damages for the breach of a contract made within the state, or re-

lating to property situated within the state at the time of the making thereof. (2) Where it is brought to recover real property situated within the state, or a chattel which is replevied within the state. (3) Where the cause of action arose within the state."

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
Abram Kling, for appellant. *Billings & Cardozo*, for respondent.

PER CURIAM. The power of the court to reach by its process the property of a foreign corporation within the limits of this state depends entirely upon statutory enactment, and does not proceed from any inherent or general jurisdiction which the court possesses. Therefore, where such right is created by statute, the conditions therein attached to its exercise must be fulfilled, and they must appear before the court obtains jurisdiction. In the case at bar the defendant is a foreign corporation, and an attachment was issued against its property for a cause of action which did not appear to have arisen in this state, and therefore it was necessary, in order that the court should acquire jurisdiction, that it should appear that the plaintiff was a resident of the state. The papers are silent upon this point. Where the statute, as a preliminary to jurisdiction, requires facts to exist, they cannot be presumed. The order should be affirmed, with \$10 costs and disbursements.

WATERS v. SHAYNE.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

DISCOVERY—EXAMINATION OF DEFENDANT BEFORE TRIAL.

In an action wherein it was sought to impeach defendant's discharge in bankruptcy for fraud in the conveyance of land, an order for defendant's examination before trial was obtained on an affidavit stating it to be material and necessary for plaintiff to ascertain whether defendant retained any interest in the property conveyed, or whether the conveyances were not made to protect the property as against creditors or the claim sued on. *Held*, that the order was properly vacated, the conveyances being matters of record, and no reason appearing for directing the examination before, rather than at, the trial.

Appeal from special term, New York county.

Action by Winfield Waters against Christopher C. Shayne. Plaintiff appeals from an order vacating an order for the examination of defendant as a witness before trial.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

W. J. Oppenheim, (*Theodore B. Gates*, of counsel,) for appellant. *Blumenthal & Hirsch*, for respondent.

DANIELS, J. This action is upon a bond executed by the defendant in June, 1875, for the payment of the sum of \$900. A discharge in bankruptcy issued in 1881 has been presented by the answer as a defense. The plaintiff proposes to impeach this discharge for fraud in the conveyance of land in the state of New Jersey by the defendant to a grantee, who immediately thereafter conveyed the same premises to the wife of the defendant. These conveyances preceded the filing of the petition in bankruptcy, and the consideration mentioned in each deed is the sum of one dollar. All these facts are matters of record, and no necessity exists for examining the defendant as a witness to prove them. But the affidavit of the counsel for the plaintiff, on which the order was made for the examination, states it to be material and necessary for the plaintiff to ascertain whether the defendant retained any interest or equity in the premises, or whether the conveyances were not made to cover or protect the property conveyed against the claims of creditors, or the claim on which this action has been brought. But why that may not be as well ascertained by the examination of the defendant on the trial has not been stated. The inference warranted by the facts is that the defendant's ev-

idence can be secured by obtaining his attendance as a witness at the trial, and that it is not necessary for the plaintiff to obtain it before that time. And where the facts are of that description it is not the practice of the courts to direct the party to submit to an examination as a witness, at the instance of his adversary, before trial. *Williams v. Folsom*, 5 N. Y. Supp. 211. This defect in the plaintiff's case, without considering the other objections urged against the appeal, requires that the order should be affirmed, with \$10 costs and the disbursements. All concur.

BROOKS v. MAYOR, ETC., OF THE CITY OF NEW YORK.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

1. JUDGMENT—COLLATERAL ATTACK.

An order, entered by consent, denying an application to vacate an assessment for a street improvement, is a bar to a subsequent action to have a portion of the assessment declared invalid, and to recover back money paid thereon by plaintiff, and parol evidence that the denial of the application was consented to because it was discovered that the assessment had been paid is not admissible in such action.

2. SAME—REMEDY BY APPEAL.

The court having acquired jurisdiction over the parties and subject-matter in a proceeding, error, if any, committed therein can only be corrected by appeal.

Appeal from circuit court, New York county.

Action by James Brooks against the mayor, etc., of the city of New York. The court directed a verdict for plaintiff, and from the judgment entered thereon defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

William H. Clark, (*G. L. Sterling*, of counsel,) for appellant. *C. C. Higgins*, for respondent.

VAN BRUNT, P. J. This action was brought to have an assessment for paving declared invalid to the extent of five-twelfths thereof, and to recover that proportion of the assessment on his property which had been paid by the plaintiff. Among other defenses set up was that the plaintiff had previously presented his petition, under and in pursuance of chapter 338 of the Laws of 1858, and the amendments thereof, to a judge of this court, to have the said assessment adjudged irregular and void, and vacated; that such proceedings were thereupon had that the application of the petitioner was denied. This defense was proved upon the trial, and its effect was sought to be avoided by parol proof that the denial of the application was consented to, so far as it affects the property in question, because it was discovered that the assessment upon this property had been paid. The court permitted this evidence to be introduced, although duly objected to, and gave the plaintiff judgment. I cannot see how an adjudication, upon its face an adjudication upon the merits of a controversy, can be shown by parol evidence in a collateral proceeding to have been otherwise.

The application of the plaintiff in respect to these lots appears, after a hearing, to have been denied. It was not dismissed, but the merits seem to have been passed upon. The fact that the order recites that it was entered by consent in no way alters its validity or effect. After hearing, the plaintiff confessed judgment. That is all that this consent amounts to, and no record can be impeached by parol in a collateral proceeding. It is, however, claimed that the adjudication is void because the court had no power to entertain the application, (*In re Lima*, 77 N. Y. 170,) the assessment having been paid. The court had the power to decide whether or not it had jurisdiction in the proceeding. It had acquired jurisdiction of the person and subject-matter, and if error was committed it could only be corrected by appeal. In the case of *Jones v. Mayor*, 87 Hun, 513, where this question of jurisdiction was raised by the present defendants, the court said: "The court, as it now appears, if

this fact was before it, erred in the application of the statute, but there was no such want of jurisdiction as would justify the ruling that the proceedings themselves are void. An error on the part of the court in the administration and enforcement of the law will not be entertained with this result. *People v. Brooklyn*, 49 Barb. 136, 141. It is only where there is an absence of jurisdiction, either over the party or the subject-matter, that judicial proceedings can be held to be inoperative in another action. The remedy * * * is by way of appeal. * * * The defendant was brought before the court in the plaintiff's proceedings to answer the application, and it had authority to hear it under the provision of the statute. It accordingly had jurisdiction over the party and the subject-matter, and made the order upon a state of facts which was deemed to bring the application within the scope and extent of the statute. It is now too late to question its authority." If the court had acquired jurisdiction in the case cited, it had also in the proceedings now under consideration. It seems to us that the judgment in the proceedings under the statute denying the plaintiff's application are a bar to the present action, and that parol evidence cannot be admitted in this action to impeach that record. The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

RYAN & PORTER MANUF'G Co., Limited.

(Supreme Court, General Term, Fourth Department. July 1, 1890.)

1. EVIDENCE—DECLARATIONS AS TO SUFFERING.

In an action for personal injuries it was error to admit evidence of declarations made by plaintiff to his mother, more than a month after the accident, as to the pain he was then suffering.

2. INJURY TO SERVANT—ASSUMPTION OF RISK.

Where the danger is obvious, and the servant is capable of noting it, and has sufficient opportunity to do so, he cannot recover when he voluntarily continues in the employment.

Appeal from county court, Onondaga county.

A verdict was rendered for the plaintiff for \$750 damages. An order was made in that court denying a motion made upon the judge's minutes for a new trial. Appeal from the judgment and order. The action was brought to recover damages for the alleged negligence of defendant in so constructing the floor in its boiler shop in Syracuse that, upon November 21, 1881, the leg of the table crushed through the floor, thereby causing some boiler sheets to slide off, and strike the plaintiff, who was then one of defendant's employes, breaking his leg, and causing other injuries to him. The defendant denied any negligence, and alleged that plaintiff was fully acquainted with the construction of the floor, and assumed all the risks incident thereto, and to the work at which he was engaged at the time of the accident; and also alleged that the plaintiff and his co-employees directly contributed to the accident by their negligence in improperly loading the table. The building where the accident occurred had been built about a year preceding the occurrence, and the ground inclosed by the building was uneven, and a contract had been made by the defendant with one Martin to fill in and level up the ground, and also a subsequent contract to build a floor. Martin was a contractor and builder, capable, and was intrusted with entire charge of the work, and he proceeded to level up the place with dirt and ashes, and to lay on top of them a hemlock plank two inches thick upon stringers 4x4 and 4 feet apart, and ashes being back of and around the stringers. In March, 1881, the floor and foundation, where the injuries were received, were placed. The latter flooring and foundation were built under a contract made by the defendant with one Fairchild, who had had experience in such matters, and whose competency was not questioned upon the trial. The form and method of construction,

including the foundation underneath, and the selection of workmen and material, were left to his judgment and skill. Plaintiff had been in the employ of the defendant, at the time of the injury, for about eight months, and had been about the floor with opportunity to see how the floor and foundation were constructed. When the injury occurred he and five co-employees were bringing sheets of boiler iron, weighing about 290 pounds per sheet, from the yard into the shop, and piling them on a "laying-out table." This table had a top about 7x8½ feet, and was supported by four legs, each about 4x6 inches at the base, where they rested upon the floor in plain sight of the plaintiff and his co-employees. The sheets were not piled evenly upon the table, and their attention was called to it, but they continued to pile the iron as before, although some evidence indicates that the floor had begun to sag, and that fact was noticed, and although there were other tables on which it might have been piled. After an accumulation of about 35 sheets, one leg of the table crushed through the plank, and the iron slid off, and the plaintiff received the injuries complained of. Upon the leading questions of fact involved in the case the evidence is quite extensive, and considerably conflicting. A verdict had been obtained in a former trial in favor of the plaintiff, and the judgment entered thereon was brought into this court, and reversed on account of erroneous rulings made at the trial.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Frank H. Hiscock, for appellant. *Thomas Hogan*, for respondent.

HARDIN, P. J. 1. It appears that after the plaintiff received the injuries he was taken home and placed in bed. His mother, who was called as a witness, testified, viz.: "His suffering was bad; very hard. I guess I know. He complained of great suffering. I was up day and night with him." Thereupon the following question was propounded to her: "Question. You may state what complaints of bodily pain he made during the time he was confined in bed, if any." This question was objected to as immaterial and improper and inadmissible. Thereupon the court remarked: "The question is too broad." Then the plaintiff propounded the following question: "Q. Well, commence at the early part, just as he was placed in bed and being taken home, and state what complaints of bodily pain he made, or what you observed as to his condition of suffering." Similar objections to those already stated were made to this question, and they were overruled, and the defendant took an exception. The witness answered: "Answer. Well, he complained of his back in the first place, and pain in his leg." Thereupon the defendant moved to strike the evidence out. The court denied the motion, and the defendant took an exception; and thereupon the plaintiff propounded the following question: "Q. What complaints did he make? Tell the jury, so that they can hear you, how bad he suffered. A. Well, he complained many times that they hurt him so that he didn't know that he could live through." The defendant moved to "strike out the evidence upon same grounds as stated in last objection." The motion was denied, and the defendant excepted. The witness stated that he was "taken up and helped on the lounge Christmas morning." Thereupon the following question was propounded to her: "Now, did he complain of suffering during that time?" The answer was: "Yes, sir. Not much. Not as much as he had nine or ten days the worst of his suffering. The first nine or ten days were the worst of his suffering." In *Olp v. Gardner*, 48 Hun, 169, in an action which was brought to recover damages for injuries sustained by the plaintiff, "her husband was allowed, against the objection and exception of the defendant's counsel, to testify as to complaints made by his wife, after the day of the accident, of being dizzy-headed, of a great roaring in her head, and of pain in the back of her eyes. Held, that the evidence should not have been received. * * * The evidence of statements made long after the injury as to the effect of the injury, or as to the sufferings endured

therefrom, is not competent." In delivering the opinion, the court refers to *Roche v. Railroad Co.*, 105 N. Y. 294, 11 N. E. Rep. 680, in which case the court of appeals held as follows: "In an action to recover damages for alleged negligence causing a personal injury, declarations of the party injured, made some time after the injury, simply to the effect that he is suffering pain, when not made to a physician for the purpose of professional attendance, are not competent as evidence." We think the rulings made by the trial judge, tested by the cases to which we have just referred, were erroneous. Respondent calls our attention to *Hagenlocher v. Railroad Co.*, 99 N. Y. 196, 1 N. E. Rep. 536. As we understand that case it is only an authority for holding that it is "competent for plaintiff to prove exclamations indicative of pain made by such person at the time of the injury." We think it does not justify all the evidence which was received in the case before us. Our attention is invited to *Lewke v. Railroad Co.*, 46 Hun, 286, where a witness was permitted to testify that he "saw the plaintiff picked up from the spot where he received the injury." The plaintiff immediately went to the store of the witness, and the witness "noticed the condition of his clothes, and that his left leg seemed to be swelling. It was at this time that he complained of pain in his limb." And it was stated by the court in this case, viz.: "And it would seem that the complaint in the present case, made so soon after the accident, and while plaintiff's injured leg was visibly swelling, was so closely allied to mere exclamation as to justify the reception of the evidence." If we were to give full effect to all that was decided in this case, it would not justify the reception of all the evidence received in the case before us. The opinion contains no reference to *Roche v. Railroad Co.*, *supra*. In the latter case, PECKHAM, J., said: "Her declaration that 'it pained her very badly' is mere hearsay, and should not have been permitted." Applying that rule to the case before us, we think some of the evidence given by the plaintiff's mother was inadmissible, and erroneously received.

2. The case states, viz.: "During the summing up to the jury, counsel for the plaintiff stated to the jury that he would 'read to them the law applicable to this case as it had been laid down by the court of appeals,' and commenced to read to them authorities." Thereupon the counsel for the defendant objected. The court permitted the authorities to be read, and the defendant took an exception thereto. While we do not propose to examine the question involved in the exception, and place our decision upon the ruling made in respect to the right of counsel to read authorities to the jury, we may observe in passing that it was the duty of the trial court to instruct the jury as to the law of the case, and we may call attention to the appropriate remarks of BRADY, J., in *Lesser v. Perkins*, 39 Hun, 343, in dealing with a similar question. He says: "The practice of reading to the jury, as done here, has been condemned by a number of adjudged cases. *People v. Anderson*, 44 Cal. 70; *Tuller v. Talbot*, 23 Ill. 357; *Sprague v. Craig*, 51 Ill. 288; *Reich v. Mayor, etc.*, 17 Wkly. Dig. 141; *Allaire v. Allaire*, 39 N. J. Law, 118; *Koelges v. Insurance Co.*, 57 N. Y. 638. Perhaps in this state it may be done where the matter read is the law of the case, and can by no possibility prejudice the adverse party. (*Koelges v. Insurance Co.*, *supra*;) but, nevertheless, it must be said that it is a custom more honored in the breach than in the observance, and, further, should not be allowed as long as the jury are required to accept for their guidance the legal rules pronounced by the court. If the counsel desires to call the attention of the court to rule, doctrine, or maxim, and to illustrate by treatise or adjudication, it is proper to do so; but the jury, if addressed on the subject by counsel, may confuse the construction and the reading, and thus obstruct, if they do not defy, the administration of justice." The observations made by the learned judge meet with our approval, and accord with the general practice which has come under our observation.

8. Defendant requested the court to charge the jury, viz.: "That if the

jury find that it was negligent for Dee, plaintiff's foreman and co-employee, to continue piling up iron on the table in question after he saw the floor sag thereunder, and that such negligence caused the accident, then plaintiff cannot recover." The court refused to give the charge as requested, but did charge the same, adding thereto the words: "Provided defendant had performed its duty in the construction of the groundwork and floor in question." The defendant also asked the court to charge "that, if the jury find that plaintiff, prior to the accident, knew of and appreciated the manner in which defendant's floor was constructed, then he assumed the risk of the defect, if any, and its construction." This request was refused, and the further request was made "that, if the plaintiff was capable, and had the opportunity, by knowing thereof, prior to the accident, of judging of the propriety of the form of construction of defendant's floor, then, having continued in its employ, he cannot recover." This request was refused. In *Shaw v. Sheldon*, 108 N. Y. 668, 9 N. E. Rep. 183, it was held by the court of appeals, viz.: "The majority of the court are of opinion that this judgment should be reversed, for the reason that the facts established beyond dispute that the injured employee entered upon the service and remained in it with a full knowledge and appreciation of the risk and danger resulting from leaving the coupling uncovered. The fact was entirely obvious, the resultant peril plain at a glance, and the injured servant a skilled workman, a foreman of the rollers, accustomed to the machinery and the service, and having the capacity and ability to fully appreciate the consequences of leaving the couplings uncovered. Within the rule applicable to such cases, the plaintiff's intestate took upon himself the risk of injury from the observed and obvious omission." We think the trial judge did not keep within the principle laid down in the case from which we have just quoted. Judgment and order reversed on the exceptions, and a new trial ordered in the county court of Onondaga county, with costs to abide the event. All concur.

BENJAMIN v. ROGERS.

(*Supreme Court, General Term, Fourth Department. July 1, 1890.*)

1. ACCOMMODATION NOTE—USURY.

The fact that an accommodation note at a legal rate of interest was sold a day or two after its date by the principal debtor for its face value, and by mistake or inadvertence no allowance was made for the interest then accrued, did not render the note usurious.

2. SAME—LIABILITY OF SURETY.

Where the sureties upon an accommodation note payable to the payee or bearer supposed, when they signed it, that it was to be delivered to the payee, and the money upon it obtained from her, but there was no agreement to that effect, the fact that the principal debtor sold it to another did not constitute a diversion thereof; and the fact that the buyer, who paid full value, knew that they signed with that expectation, did not affect his *bona fides*, nor his right to recover from them.

Appeal from special term, Cortland county.

Action by Horace Benjamin against Henry L. Rogers, as executor of the last will and testament of Hiram Crandall, deceased, upon a promissory note. Verdict at the Cortland circuit for plaintiff. A motion for a new trial was made upon case and exceptions at a special term at Binghamton, which was denied. Judgment was entered in Cortland county for plaintiff. The note read as follows:

"\$4,000. Jointly and severally we promise to pay Nellie Petit, or bearer, four thousand dollars, with use, one year from date, for value. Dated January 5, 1880.

LEMAN CALKINS.

"CALVIN L. HATHAWAY.

"HIRAM CRANDALL, as surety."

At the close of the evidence the defendant asked the court to hold as matter of law "that this note was not received by the plaintiff in the regular

course of business." The defendant also asked the court to allow the defendant to go to the jury—*First*, "on the question as to whether there was any restriction of the purpose of which the note was made; and, *second*, whether the plaintiff did or did not have notice of the restriction; *third*, whether there was a diversion of the note." The court refused, and the defendant excepted. Thereupon the court "declined to hold that the note was not received in the regular course of business." To that the defendant excepted. The defendant "then asked to submit to the jury the question whether the note in suit was received in the regular course of business; and also to submit to the jury the question whether the plaintiff is a *bona fide* holder without notice, claiming that he was not, and that he had notice;" and the court thereupon ruled as follows: "I have decided that he did have notice, and as the evidence now stands I should say to the jury as a matter of law that he did have notice, and, if this note was diverted, he knew it was diverted. I hold that there is no evidence in this case that the note had been fraudulently diverted. That is what I hold, and for the lack of that element there is no question to go to the jury upon that branch of the case." The defendant excepted. The defendant then asked to go to the jury upon the question of whether there was a restriction. Thereupon the court observed: "I say there is no evidence of any restriction to submit to the jury. I do not hold whether there was in fact or not. I say so far as the evidence in this case is concerned there is none to disclose that there was in fact a restriction." Defendant excepted. The defendant then asked the court "to hold that the plaintiff obtained the note for less than the amount actually due by its terms, and that therefore it was usurious." The court refused so to rule, and the defendant excepted. The court thereupon directed a verdict for \$5,780.32; and to that direction the defendant excepted.

Argued before HARDIN, P. J., and MERWIN, J.

M. M. Walters, for appellant. L. B. Kern, for respondent.

HARDIN, P. J. 1. Plaintiff's complaint alleges that the note in suit was made for \$4,000, on the 5th day of January, 1880, and "that before the said note became due, and in due course of business, the said note was for value sold and delivered to this plaintiff, who is now the owner and holder thereof," while the defendant does allege in his answer that Calkins never delivered it to Nellie Petit, and that it did not have any inception "until the same was by said Leman Calkins delivered to the plaintiff in this action." It is then alleged that it was transferred by Calkins "to the plaintiff for an amount less than the amount due upon the note, and by its terms at the time of said transfer." It then alleges that it was transferred upon a usurious consideration of at least \$5; and it is alleged, "said transfer was void for usury, and the note is invalid in the hands of the plaintiff, and he has no right of action thereupon by reason of the same upon a contract void under the statute of usury." Under this somewhat indefinite answer no evidence was given to establish a corrupt agreement to take and receive more than lawful interest for the loan of money. The trifling interest of one day or so, which may have accrued upon the note when it was taken by the plaintiff, may not have been taken into account by the parties at the time the note was taken by the plaintiff. There is no evidence, however, to indicate the omission to consider it was by reason of a usurious corrupt agreement, or that any devise or trick was resorted to for the purpose of exacting usury. The mistake or inadvertence did not constitute usury, and under the pleadings and evidence the court did not err in holding that no usury was established, and in refusing to submit the case to the jury in that regard. *Insurance Co. v. Sturges*, 2 Cow. 664; *Marvine v. Hymers*, 12 N. Y. 231. The learned counsel for the defendant calls our attention to *Marvin v. McCullum*, 20 Johns. 288, and upon an examination of that case we find the trial court, upon proof being given

but the defendant was an accommodation maker, who offered evidence that it was "bought at a discount from the sum due thereon at the time of the purchase, rejected the evidence which was offered to prove the note usurious;" and the court, in review of the rulings, held it was erroneous, "as the defendant offered to prove the agreement between Hudson (the purchaser) and the maker was usurious, and the note was first given to H. as security for a usurious loan." We think the case does not sustain the contention of the defendant here. We think *Hall v. Wilson*, 16 Barb. 554, does not sustain the defendant's position. In that case Biglow became the owner of the note upon a usurious consideration expressly agreed upon as he took the note of \$120 or \$115, and ALLEN, J., says at page 554: "The agreement upon which he obtained the note was usurious and void." Bundy had stolen the note, and it had no inception until he sold it to Biglow upon a usurious agreement, and the plaintiff had no better rights in the note than Biglow acquired by such usurious agreement, and therefore could not recover. Under the facts disclosed in that case, "the note never had an inception so as to enable any person to become a *bona fide* holder of it." In *Eastman v. Shaw*, 65 N. Y. 528, DWIGHT, C., approves of the position just stated when considering a case where the note was old at a usurious rate, and the note was therefore void for usury. We think here was no evidence to show any reservation beyond the legal interest upon a mutual agreement between the parties, and that the trial judge properly disposed of the question as to the alleged usury. *Mattheus v. Coe*, 70 N. Y. 442; *Guggenheimer v. Getzler*, 81 N. Y. 293; *Morton v. Thurber*, 85 N. Y. 566; *Bevier v. Corvill*, 87 N. Y. 54.

2. Defendant's evidence of what took place between the plaintiff and Leman Calkins when the plaintiff became the owner of the note in suit rests largely upon the admissions made by plaintiff in his interviews with the defendant and his attorney and another witness. Considering the same in the most favorable light allowable, it appears that the plaintiff parted with value when he became the owner of the note. One of the witnesses says that the plaintiff stated that he got the note "the next day, or the second day after it was dated;" and that the plaintiff stated that he paid \$4,000 for it; that the \$4,000 was "made up in part of past-due paper of Calkins, and part in money, and he couldn't tell the exact amount of the notes and the exact amount of the money that was delivered over at the time to Calkins, but he thought it was about half and half." It clearly appears that whatever old notes represented "one-half" thus paid over were given up and surrendered, and the other half was paid in cash for the note in suit. Such surrender and payment by the plaintiff entitled him to be considered a *bona fide* holder for value of the note taken before maturity. *Coddington v. Bay*, 20 Johns. 686; *Insurance Co. v. Church*, 81 N. Y. 218; *Lombard v. Bank*, 4 N. Y. Supp. 740; *Oates v. Bank*, 100 U. S. 239. It may be assumed that the note was executed by the makers when they had a supposition that Calkins was to take it to Nellie Petit, and obtain the money upon it, and that she declined to advance the money upon it when it was offered to her. And it may be assumed that information was given to the plaintiff at the time he took it that such had been the hope and expectation of the parties. But the note was payable to her, or to bearer, and in that condition was executed by all the makers. There is abundant evidence to indicate that it was the expectation of all the makers when the note was executed that Calkins would receive the avails of the note. There is nothing in the case to show any agreement that there was an express restriction of the mode in which the note should be used by Calkins. It was not signed to take up a prior note on which any of the makers were liable. It does not fall within the case of *Comstock v. Hier*, 73 N. Y. 269; nor the case of *Ayres v. Doying*, 42 Hun. 632. In the latter case there was an agreement with the defendant that the note should be used "to protect a creditor of her contractor," and after such agreement the plaintiff took the note "thus restricted and

diverted only as collateral to, and in settlement of, an antecedent debt." We find nothing in the evidence in the case before us to indicate an express agreement that the note in suit should be used with Mrs. Petit only, nor that the intestate was especially restricted in having the note negotiated to Mrs. Petit, or that it was a fraud upon the rights of the intestate to negotiate the same to the plaintiff. In *Bank v. Penfield*, 69 N. Y. 502, it was held, viz.: "Where a promissory note is made for the accommodation of the payee, but without restriction as to its use, an indorsee taking it in good faith as collateral security for an antecedent debt of the payee and indorsee, without other consideration, occupies the position of a holder for value, and can recover thereon against the maker. The precedent debt is a sufficient consideration for the transfer, and no new consideration need be shown. It is only where the note has been diverted from the purpose for which it was intended by the payee, or where some other equity exists in favor of the maker, that it is necessary that the holder should have parted with value on the faith of the note in order to enforce the same." The doctrine of *Bank v. Penfield*, *supra*, was reasserted in *Bank v. Townsend*, 87 N. Y. 8. These cases reaffirm the same doctrine stated in *Bank v. Neass*, 5 Denio, 386, affirmed 3 N. Y. 442; and, in connection with the doctrine, the court said in its opinion in 5 Denio that "every person who becomes a party to an accommodation note or bill does so for the purpose of giving it credit and value, and he will not be permitted to deny against a *bona fide* holder for valuable consideration that he put his name on the paper for value actually received." In *Wheeler v. Allen*, 59 How. Pr. 118, an indorser set up a somewhat similar defense to the one attempted here. It was overruled, and the plaintiff was held to be a *bona fide* holder. In dealing with it the court remarked: "If, however, he [the indorser] has no interest in the way in which the proceeds of the note are to be used, it is no defense to him that he was told that the note was to be discounted by a bank, though it was in fact the intention of the maker, whom he accommodated, to use the note in paying an antecedent debt, and though the note be so used." In *Bank v. Corey*, 1 Hill, 513, indorsers sought to defend upon the ground that their indorsement was obtained "for the purpose of enabling Borst, the maker, to get it discounted at the Albany City Bank to raise money to buy barley." The court remarked, viz.: "But it does not appear that the indorsers had any interest in having it discounted by the Albany City Bank, or that the use which Borst should make of the money was in anyway important to them," (the indorsers.) In *Montross v. Clark*, 2 Sandf. 118, it appeared that when the note was loaned by one brother to another the borrower told the brother he "wanted to get the note discounted at the Albany City Bank, but there was no positive agreement that it should be discounted there." In dealing with the point made, the court said, viz.: "To expose negotiable paper to the objection of a diversion from the use to which it was to be applied, an agreement as to the manner in which it was to be used must be shown. A mere intimation of the party accommodated that he 'wants or expects to get it discounted at a particular bank' is slight evidence indeed of such an agreement, especially when the note was given for the general purpose of helping him out of difficulty. Judge Story (1 Story, Bills, § 191) says: It is no defense or bar that the bill was known to the holder to be an accommodation bill between the other parties if he takes it for value *bona fide* before it has become due. The reason is, the remarks, that the very object of every accommodation bill is to enable the parties thereto, by a sale or other negotiation thereof, to obtain a free credit and circulation thereof; and this object, he says, would be wholly frustrated unless the purchaser or other holder for value could hold such a bill by as firm and valid a title as if it were founded in a real business transaction. In short, the parties to every accommodation bill hold themselves out to the public by their signature to be absolutely bound to every person who shall take the same for value to the

same extent as if that value were personally advanced to them, or on their account, or at their request." We think the fact that plaintiff had notice or information that the parties to the note supposed it was to be passed to, or discounted by, Nellie Petit does not prevent him from recovering. In dealing with a like question in *Powell v. Waters*, 17 Johns. 179, the court said, viz.: "If the plaintiffs knew when they received the note that it was intended to be discounted at the Bank of Newburgh, and had been refused, it would not affect them or establish any fraud." In *Bank v. Hyde*, 4 Cow. 573, the court said: "Nor is the validity of the note affected by the circumstance that it was drawn for the purpose of being discounted at the Bank of Chenango. It was made to raise money on. It did not change the responsibility of any of the parties to it that the money was advanced by Birdsall instead of the bank." The case of *Denniston v. Bacon*, 10 Johns. 198, does not aid the appellant. There was an agreement, evidenced by a letter, which was clearly violated, and the note "was not discounted on the terms stated in the letter." See opinion of SUTHERLAND, J., 4 Cow. 573. As we have before stated, we think the evidence falls short of a defense. It does not establish a restrictive agreement. The slight evidence bearing upon the subject is indefinite and uncertain, and not sufficient to overcome the terms of the note, and the presumption arising upon its production. In *Van Duzer v. Howe*, 21 N. Y. 538, DENIO, J., said: "The maker who, by putting his paper in circulation, has invited the public to receive it of any one having it in possession with apparent title is estopped to urge the actual defect of title against a *bona fide* holder." These views lead us to the conclusion that the trial judge committed no error in directing a verdict for the plaintiff for the amount due upon the note in suit. Judgment and order affirmed, with costs.

CROSS et al. v. UNITED STATES TRUST CO. et al.

(*Supreme Court, Special Term, New York County. June, 1890.*)

CONFLICT OF LAWS—WILLS—TRUSTS OF PERSONALTY.

Where a testatrix dying in Rhode Island creates in a New York corporation certain trusts relating to personalty, which are valid under the laws of testatrix's domicile, but void under the laws of New York, though not on account of the incapacity of the beneficiaries to take, the courts of the latter state will not assume jurisdiction in the premises, but the trusts must be administered and their validity determined under the laws of Rhode Island.

Edward C. James, for plaintiffs. *Stewart & Sheldon* and *M. T. McMahon*, for defendants.

O'BRIEN, J. This action is brought to obtain a judicial construction of certain provisions of the will of Phebe Jane Cross, deceased, which creates certain trusts in the defendant over \$700,000 of railroad mortgage bonds, now in the hands of the trust company. The testator had her domicile in Rhode Island. She made her will there, and it is in all its provisions valid by the law of that state. When the testatrix died, in 1878, her will was probated in Rhode Island, and for seven years the plaintiff executors themselves administered these trusts under the supervision of the courts of that state. It is conceded that the trusts, though valid under the laws of Rhode Island, are in part or wholly void under the laws of the state of New York. The fund, consisting entirely of personal property, is in the possession of the trust company, a New York corporation. Is the validity of the provisions of the will, as to property thus held, to be governed by the laws of this state or those of Rhode Island?

It may be stated as a general rule of law, sustained by numerous decisions, that the law of domicile governs in the disposition of personal property. In the case of *Chamberlain v. Chamberlain*, 43 N. Y. 424, the question was whether a charitable bequest of personal property by a citizen of New York

to a corporation of Pennsylvania, upon a trust to be administered in Pennsylvania, was void because contrary to the law of New York, where the testator was domiciled and the will was executed. ALLEN, J., in delivering the opinion of the court, says: "The law of the testator's domicile controls as to the formal requisites essential to the validity of the will, as a means of transmitting property, the capacity of the testator, and the construction of the instrument. Personal property has no locality, and therefore the law of the domicile of the owner governs its transmission either by last will and testament or by succession in case of intestacy. But, if within the *lex domicilii*, a will has all the forms and requisites to pass the title to personalty, the validity of the particular bequests will depend upon the law of the domicile of the legatee, and of the government to which the fund is, by the terms of the will, to be transmitted for administration, and the particular purposes indicated by the testator. Whatever may be the law of Pennsylvania, a testator domiciled in that state cannot establish by bequests of personalty to citizens or corporations of this state a charity in trust to be administered here, inconsistent with the policy or the laws of this state. * * * So far as the validity of bequests depends upon the general law and policy of the state, affecting property and its acquisition generally, and relating to its accumulation and a suspension of ownership, and the power of alienation, each state is sovereign as to all property within its territory, whether real or personal." This language is broad enough to apply to all testamentary dispositions of personal property, and, so considered, would work a substantial modification, if not an entire abrogation, of the well and long established rule that the law of the testator's domicile governs the disposition of personal property, and, so considered, would be conclusive of the questions here involved. Subsequent decisions, however, expressly recognize the former cases, reannounces the original rule, and thus confine the *Chamberlain Case* to stated conditions. When, therefore, we take the point actually decided in that case apart from the language used, we find that the questions involved were charitable bequests and the capacity of a legatee to take. The capacity of the legatee to take must necessarily go to, and affect the validity of, a bequest. If made to one incapable of taking, the will, so far as that legacy is concerned, must fail, and such a question must be judged, not by the laws of a testator's domicile, but by those of the legatee's, for by the latter alone is his capacity created, limited, and defined. Applied to charitable bequests, when we recall the jealousy with which they are watched, the restrictions imposed by statute, and the disabilities and limitations placed on charitable association, or corporations to take, the reason for the application of the rule that the law of the domicile of the legatee must govern is apparent. That the *Chamberlain* decision is to be thus limited is shown by the cases of *Manice v. Manice*, 43 N. Y. 387-389; *Draper v. College*, 57 How. Pr. 269; and *Mapes v. Society*, 33 Hun, 360. In *Manice v. Manice*, *supra*, there was a bequest by a citizen of this state of \$5,000 to Yale college, to be accumulated as a trust fund for a purpose invalid under the laws of New York. The court, however, held the bequest effectual so far as requiring the payment of the fund to the legatee in Connecticut. As to the questions arising upon the validity of the trust, the court says: "These are questions, however, which must necessarily be determined by the courts of the state in which the corporation's legatee is situated. The fund is to go there, and be there administered. The will of the testator, so far as the courts of this state can act upon it, is fully executed when the money is paid to the proper officer of the foreign corporation."

In *Draper v. College*, *supra*, Justice VAN VORST says of the bequests to the trustees of the college: "The college being legally authorized to take the gifts, the question as to the validity of the directions and conditions imposed by the testator as to holding, investing, accumulating, and applying

is for the consideration of the courts of Massachusetts, by whom their validity under the laws of that state is to be determined." In *Mape v. Society*, *supra*, (general term, second department,) it is said: "A testator, domiciled at the time of his death in the state of Connecticut, left a will by which he gave one-third of his residuary estate to the American Home Missionary Society. This was an association of persons organized for charitable and religious purposes, domiciled in the state of New York, but unincorporated at the time of the testator's death. By the laws of the state of New York the bequest was void; by the laws of Connecticut it was good. Held, that the bequest was governed by the laws of New York, and was therefore void." BARNARD, P. J., says: "The general rule is that, while the execution of the will and the capacity of the testator, and the construction of the instrument, is governed by the law of the domicile of the testator, yet the law of the domicile of the legatee governs the validity of the bequest." This rule, peculiarly applicable to charitable bequests, when applied to bequests to individuals with capacity to take, fails, because the reason and the foundation upon which the rule itself is supported are wanting. In the present case the beneficiaries are in law capable of taking. The property is personal. No charity is created by the trust. No principle or policy is involved which can be urged against the application of the old established rule of *lex domicilii*. In this connection the distinction between real and personal property must always be observed, as clearly pointed out in *White v. Howard*, 46 N. Y. 144. In that case the testator was a resident of Connecticut, and GROVER, J., says: "The validity of the bequests of his personal property, and all questions of succession thereto, or rights therein, must be determined under the laws of that state and by the courts of that state. * * * In addition * * * the testator was seized of real estate situated in the city of New York. The validity of the devise of the latter property * * * must be determined by the laws and courts of New York." See, also, *Moutrie v. Hunt*, 28 N. Y. 394.

The trust here involved, as before stated, relates solely to personal property, and was created in Rhode Island, pursuant to the laws of that state, by one domiciled there, who appointed as her trustee a New York corporation. Although the trust is valid in Rhode Island, it is claimed that as the provisions thereof contravene our statute against perpetuities, and the fund and trustee are here, it becomes necessary to declare the same void, and decree a distribution under the laws of New York. It would seemingly be a harsh rule of law that a citizen of another state, who had made a valid will according to the law of that state, should, by selecting a trustee in another state, to whom the personal property was sent, render the will void, and entail the penalty of having the property distributed, not according to the terms of his will, but under the laws of the foreign state, as though he had died therein intestate. That the courts of this state will not administer the estate of a foreign citizen here, in contravention of the laws of this state, is true, and, from reasons of policy and principle, will apply its own laws to questions affecting real estate here is equally true; but, in reference to personal property and the testamentary disposition thereof, it will remit all questions relating thereto, and, in case of necessity, the property itself, to the domicile of the testator, to be there dealt with under the *lex domicilii*. It will be thus seen that I do not agree with plaintiffs' contention that the case of *Chamberlain v. Chamberlain*, *supra*, is controlling upon the case at bar.

This case, both in its facts and in principle, is more like *Despard v. Churchill*, 53 N. Y. 198. As therein said: "The testator had his domicile in the state of California. He made his will there. No question is made but that it is in all its provisions valid by the law of that state. It, however, by its terms, disposes of certain property in this state, and by provisions which are invalid here, inasmuch as they run counter to our statute law. 1 Rev. St. p.

723, § 15; *Id.* p. 773, § 1. The statute law here referred to embodies the policy of this state in relation to perpetuities and accumulations. As this sovereignty will not uphold a devise or bequest by one of its citizens in contravention of that policy, it will not give its direct aid to sustain, enforce, or administer here such a devise or bequest made by a citizen of another sovereignty. *Chamberlain v. Chamberlain*, 43 N. Y. 424. Yet it is no part of the policy of this state to interdict perpetuities or accumulations in another state. *Id.* 434. * * * Personal property is subject to the law which governs the person of its owner, as to its transmission by last will and testament; and this principle, though arising in the exercise of international comity, has become obligatory as a rule of decision by the courts. And, as a general rule, the distribution of personal property, wherever made, must be according to the law of the place of the testator's domicile. As has been stated, the courts of this state may not directly aid in carrying out here a bequest which is in violation of its statute law and contrary to a policy of which it is tenacious. And yet they may not hold the bequest void when it is valid by the law of the state by which the disposition of the property is to be governed. The one would be to transgress the written law of this state; the other would be to disregard an unwritten rule of law, well settled, and of extensive and frequent application." While, therefore, the courts of this state will not directly aid in carrying out here the trust which is in violation of its statute law, no valid reason is presented why it should assume jurisdiction over the property and the persons interested, and give a construction of the provisions of the will which will render void the testamentary disposition of property, which was valid in the state where the testatrix was domiciled. The only illegality or disability in this case is not as to any inherent illegality in the trusts themselves, but rather to the disability of the trustee to take and administer the trust. By the charter terms of the defendant trust company it is incapable of executing any trust not valid by the laws of New York; but it is a well-settled principle that equity never wants any trustee, or, in other words, as stated in *Perry on Trusts*, (4th Ed. § 38,) "If a trust is once properly created, incompetency, disability, death, or non-appointment of a trustee shall not defeat it." The selection, therefore, of the defendant as trustee, which cannot, under its charter, execute the same because not a valid trust under the laws of this state, is no reason for holding the trust itself invalid. I have been referred to no authority in which it has been held that the incapacity of the trustee, from either private domicile or personal or corporate disability, destroys the trust itself. In this very case the trusts were carried out for more than seven years without the intervention of the trustee designated. An account of the administration of the trusts during those seven years was rendered to, and passed upon by, the Rhode Island court, and, had it been so desired by plaintiffs, the very question now presented could have been passed upon in that state. In my opinion, therefore, the proper course for the court here to take is to refuse to assume jurisdiction, and to remit the property, and, if needs be, the persons, to the Rhode Island courts, to the end that the law of the testator's domicile may be applied in determining the validity of the will as a means of transmitting property, and to the construction of the instrument itself. There should be judgment, therefore, in favor of the defendants, dismissing the complaint.

FOULKES v. FOULKES *et al.**(Supreme Court, General Term, Second Department. July 18, 1890.)*

JUDGMENT—RES JUDICATA—JURISDICTION OF SURROGATE.

Plaintiff, as a residuary legatee of his father, filed objections to the accounts of the executors on the ground that they charged him with \$26,000 advanced to him by testator, but instead of introducing evidence before the referee to show the invalidity of the accounts, the issues raised by the objections were, by consent of his counsel, reserved for argument before the surrogate. *Held*, that decrees of the surrogate overruling the objections and directing a distribution were conclusive against plaintiff, until reversed upon appeal, and a bar to a subsequent action to recover his distributive share of his father's estate, his right to which depended upon whether he had been properly charged with the \$26,000.

Appeal from circuit court, Kings county.

Action by John W. Foulks against Thomas Foulks and others, executors of William Foulks, deceased, and others. From a judgment dismissing his complaint the plaintiff appeals. For report of general term opinion affirming an interlocutory judgment overruling a demurrer to the complaint, see 6 N. Y. Supp. 112; and for denial by the surrogate of a motion to vacate decrees theretofore rendered, see *ante*, 515.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Goodrich, Deady & Goodrich, for appellant. *Lawton & New*, for respondents.

DYKMAN, J. This action was commenced for the recovery of the distributive share of the plaintiff in the estate of William Foulks, deceased. William Foulks, who was the father of the plaintiff, John W. Foulks, died on the 26th day of August, 1886, leaving a last will and testament in which the defendants were appointed executors. The will was proved, and the defendants qualified as the executors thereof. The provision of the will involved in this action is this: "*Second*. As soon as possible after my decease, my executors shall sell and dispose of all of my real estate then remaining, and the proceeds thereof, and of such real estate as shall have been theretofore sold, together with all my personal property then remaining, my executors shall divide (and I do hereby give and bequeath the same) equally to and among my children, share and share alike, and if either of my children shall have died before my decease, leaving issue them surviving, such issue shall take the same share which its parent would have taken if living. I, however, expressly provide, as to the foregoing division of my estate, that whatever advances have been made by me, or shall hereafter be made by me, to either of my sons or daughters during my life-time, as the same shall appear on my book of account, showing such advances, shall be charged to such sons and daughters respectively, and deducted out of their respective shares of my property upon the final division by my executors as above directed."

In April, 1888, the executors petitioned the surrogate for a final settlement of their accounts, and, in the accounts which they filed, the plaintiff in this action was charged with the sum of \$26,000 for advancements made to him by his father in his life-time. That charge was made by reason of the following entry upon the account-book of the deceased: "Account with John W. Foulks, September 10th, 1882. Money lent on different times to San Francisco and New York, as near as I can tell at present, is twenty-six thousand, (\$26,000.)" Having been cited to appear on such accounting the plaintiff filed objections to the accounts, and the objections appertaining to the question now involved were as follows: "*Seventh*. In that by said account it appears John W. Foulks has been advanced \$26,000 by said testator during his life-time. *Eighth*. In that said accounts charged said John W. Foulks with the sum of \$26,000, claimed to have been advanced to him during the life-time of said deceased." Thereupon an order of reference was made referring the

accounts of the executors to a referee for examination. The parties appeared before the referee on the 28th day of May, 1888, and the plaintiff in this action was sworn as a witness, and examined as follows: "*Question.* Mr. Foulks, what was your relation to the decedent here? *Answer.* He was my father. *Q.* In the accounts of the executors here, as presented, is statement that during your father's life-time \$26,000 was advanced by him to you, is that true? *Mr. Lawton.* Objected to on the ground that that is not a matter within the province of the referee on this accounting." The counsel for John W. Foulks offers to prove that at the time of the alleged advances Mr. Foulks and his father were partners in business, and that said alleged advances were not advances, but were contributions by said decedent as his share in said partnership. The parties consent to an adjournment of the reference for one week, with the understanding that the executors are not to be further examined in reference to the accounts; Mr. New to go over the books with the counsel for the contestant previous to the adjourned day, and when he can do it he is to admit such evidence without being examined orally in reference thereto.

Such were the proceedings before the referee so far as they are disclosed by the record before us, and on the 13th day of June, 1888, the referee made his report, in which he passed upon the accounts, and which contained this statement: "That the issues raised under and by the seventh and eighth objections filed by said John W. Foulks, contestant, have been, by consent of the attorneys for said John W. Foulks, and said executors and executrix, reserved for argument before the surrogate of Kings county, and for his adjudication thereon." Upon the coming in of such report of the referee an order was made by the surrogate which contained the following statement: "And now having examined said report, and the proofs and allegations of the parties, and maturely considered the same, and the parties having agreed that, out of the assets in the hands of said executors, said executors shall reserve in kind a part or portion thereof not less in value than \$15,000 to meet or cover the claim or interest (if any there be) of said John W. Foulks, the contestant herein, and a further summary statement being hereto annexed and forming part of this decree, and to be recorded herewith, the surrogate proceeded to settle the said account in accordance with such summary statement, and said report of said referee." And then the surrogate, among other things, ordered "that of the remainder of the assets in their hands the said executors reserve so much, and such part in kind, as shall equal in value fifteen thousand dollars, to be held by them until the decision and final determination of the questions raised under objections seven and eight, filed as aforesaid on the contest of this account, and the motion made and argued herein on the fourteenth day of June, 1888, or of or upon any appeal that may be duly taken therein or therefrom, to any court or courts." Afterwards, and on the 23d day of November, 1888, the surrogate made a decree in which he recited the objections numbers 7 and 8 of John W. Foulks, and the reservation of the sum of \$15,000 by his order of July 12, 1888, and then stated that after hearing counsel in support of, and in opposition to, such objections, and the testimony offered in that behalf under the same, it was ordered that the motion be denied, and that the executors proceed with, and distribute the remainder of the property and assets of the estate in their hands according to the terms of the will, and on the 27th day of November, 1888, a supplemental decree was made and entered, of substantially the same purport. After the decrees of the surrogate were made, the plaintiff commenced this action for the recovery of the sum of \$26,000 so charged against him as advances, and allowed as such by the surrogate, and the defendants have set up the proceedings and decrees of the surrogate as a bar to the action. The cause was tried at the circuit and the complaint was dismissed, and the plaintiff has appealed from the judgment entered against him.

There was no dispute about the facts so far as they have been recited, but the plaintiff controverts the finality of the surrogate's decrees because he possessed no jurisdiction to make them. Our conclusion, however, is adverse to such contention for several reasons. Upon the settlement of the accounts of the executors, it was competent and essential for the surrogate to make a decree for the final distribution of the property and money, remaining in the hands of the executors, among the persons entitled to the same, and that could not be done in this case until the validity of the charges against the plaintiff for advances had been determined. Such charges were controverted by the plaintiff by his seventh and eighth objections, and, instead of introducing testimony to show their invalidity before the referee, the issues raised by such objections were, by the consent of counsel for the plaintiff and the executors, reserved for argument before the surrogate, and for his adjudication thereon. The plaintiff thus abandoned his litigation over the charges for advances upon the facts, and as legitimate accounts against him individually, and acquiesced in the submission to the surrogate for his decision and questions raised by his seventh and eighth objections to the executors' accounts, and thus by the consent of all the parties the surrogate was clothed with jurisdiction and authority to decide the questions presented by the plaintiff. It was entirely competent for the plaintiff to show, either before the referee or the surrogate, that the account against him in his father's books was erroneous, or false, or spurious, or inadmissible for any reason, but he made no effort in that direction, and waived his privilege to do so by the submission of the entire question to the surrogate upon the undisputed facts as they were presented to that officer. The charges upon the books of the deceased for advances to the plaintiff as they were contained in Schedule G of the executors' accounts were undisputed, and the determination of their validity was left to the decision of the surrogate, and he overruled the objections against the same raised by the plaintiff. Having such jurisdiction, the decrees of the surrogate were conclusive against the plaintiff until reversed upon appeal. Aside from that, however, the plaintiff was permitted to attack the decree, and to show the invalidity of the charges against him for advances, but he failed in his efforts, and his complaint was dismissed. We think the judgment should be affirmed, with costs. All concur.

PEOPLE *ex rel.* SCRAFFORD *et al.* v. STEDMAN *et al.*, Commissioners of Highways.

(Supreme Court, General Term, Fourth Department. July 1, 1890.)

1. HIGHWAYS—ESTABLISHMENT BY STATUTORY PROCEEDINGS—CERTIORARI.

Since the appeal from commissioners of highways to the county judge allowed by 2 Rev. St. N. Y. (7th Ed.) p. 1246, § 84, only authorizes a review of the merits involved in their order, *certiorari* will lie to review the regularity of their proceedings.

2. SAME—POSTING NOTICES.

2 Rev. St. N. Y. (7th Ed.) p. 1259, § 59, requires every person applying for the laying out of a highway to cause notices in writing to be posted in three of the most public places in the town, specifying as near as possible the proposed route of the highway, etc. *Held*, that it is not sufficient to deposit such notices in the mail, addressed to the persons whose land is to be affected by the proposed highway.

3. SAME—WAIVER OF DEFECTS.

The appearance by one claiming to be the attorney of the land-owners, and his argument against the necessity of the highway, are not sufficient to waive the failure of the commissioners to comply with the statute in the preliminary proceedings.

Certiorari directed to the commissioners of highways of the town of Owego, Tioga county, N. Y., to review an order made by said commissioners, January 14, 1889, laying out a highway in said town, on the application of John F. Holden, through the lands owned and occupied by John Scrafford, Sarah Scrafford, Mary A. Scrafford, and others. November 24, 1888, John F. Holden

presented a written petition to the commissioners of highways, of the town of Owego, to lay out a highway through the lands of John Scrafford, Sarah Scrafford, and others. No notice was given by the petitioner to the commissioners of the time and place of drawing the jury. The jury was drawn on the 4th of December, 1888, by the town clerk, and a summons was issued by a justice of the peace, directed to a constable, to summon the jurors so drawn. It appears affirmatively that no notices were posted stating the time and place of the meeting of the jury; nor was any notice given to the owners and parties of the land through which the proposed road was to be laid of the meeting of the jury. December 15, 1888, the jury met, and certified to the necessity of the road. However, after viewing the premises, they refused to sign a certificate that the road was necessary or proper in the place and upon the route mentioned in the petition; and, upon certain representations being made to them by the commissioners to the effect that the road should not be laid in the place described in the petition, and that the commissioners would lay the road south-west of the place described in the petition, they signed and delivered their certificate. Thereafter, on January 14, 1889, the commissioners made an order laying out a highway through the lands of John Scrafford, Sarah Scrafford, and Mary Scrafford, and others, but at a place other than that described in the petition, and other than the place certified and recommended by the jury, and at a point northerly from the place described in the petition. No notice was given to the owners or occupants of the premises of the meeting of the commissioners on January 14th, and only two commissioners signed the order. Notice of the meeting of the commissioners to decide upon the application was given for January 12, 1889. The relators, questioning the jurisdiction of the commissioners, and complaining of the irregularities in their proceedings, applied to a special term, and obtained a writ of *certiorari*, and an argument thereon has been had before this court.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

C. A. & H. A. Clark, for relators. D. T. Easton, for respondents.

HARDIN, P. J. 1. Defendants contend that the writ of *certiorari* should be quashed because the relators had the right to appeal from the order of the commissioners of highways laying out the road. Attention is called to the provisions of section 2122 of the Code of Civil Procedure. That section provides as follows: "Except as otherwise expressly prescribed by a statute, a writ of *certiorari* cannot be issued in either of the following cases. * * *

(2) Where the determination can be adequately reviewed by an appeal to a court, or to some other body or officer." We are of the opinion that the proceedings leading up to the order, and the determination evidenced thereby, cannot "be adequately reviewed by an appeal to a court, or to some other body or officer." The appeal given to the county judge by section 84, p. 1246, 2 Rev. St. (7th Ed.), only authorizes a review of the merits involved in the order. *People v. Harris*, 63 N. Y. 391. In the opinion delivered in the case just cited, the case of *People v. Cline*, 23 Barb. 197, (cited to us by the defendants,) was referred to, and disapproved. We are of the opinion that the relators have the right to review the proceedings of the commissioners by a writ of *certiorari*. *People v. Harris*, 63 N. Y. 391. The case of *People v. Parker*, 45 Hun, 432, is an authority for holding that, under a writ of *certiorari*, the title to the office of assessor may not be inquired into, even under the act of 1880, c. 269, as to illegal assessments; but nothing in the case aids the contention of the defendants here.

2. Section 59, p. 1239, 2 Rev. St., (7th Ed.), requires every person who shall apply for the laying out of a highway to cause notices in writing to be posted in three of the most public places of the town, specifying as near as may be the route of the proposed highway, and the time and place at which the free-

holders will meet to examine the ground. Every such notice shall be posted at least six days before the time specified for the meeting of the freeholders. Chapter 696 of the Laws of 1881 does not in terms repeal or modify section 59 of the Revised Statutes. The petitioner or applicant for the road gave no notice of the time and place of drawing the jury to the commissioners or to the land-owners; nor was any notice posted, as required by section 59, of the time and place of the meeting of the jury. The notices given by the town-clerk of the time and place of the meeting of the jury contained no specification, as near as might be, of the route of the aforesaid road. It did not in that respect comply with the requirements of section 59, nor was such notice posted up at least six days before the time specified therein for the meeting of the freeholders. The notices were served by depositing the same in the mail, addressed to the land-owners at Owego, N. Y., with the exception of one addressed to Eugene Ferguson, at Flemingville, N. Y. The post-office address of some of the land-owners is "Gaskill Corners, Tioga County, N. Y." Section 62, p. 1241, Id., requires the commissioners before they shall determine to lay out the highway, after the certificate is made by a jury, to cause notices in writing to be given to the occupants of the land through which the road is to run of the time and place at which they will meet to decide on the application. The notice is to be served three days before the time of meeting. The affidavit of John F. Holden, made January 18, 1889, states that the service was made of such notice on the 7th of January, 1889, on "Mary A. Scrafford, by leaving with Etta Ketta, her daughter, at her residence at Owego, N. Y." It does not state that Mary A. Scrafford was absent from her residence. The affidavit does not bring the service within the exceptional provision of section 62.

3. The description of the road in the order of the commissioners is quite different from that found in the application made by Holden on the 24th of November, 1888. While it is not needful generally to pass upon the power of the commissioners to make such a great departure from the route proposed by the applicant, or from the one stated in the certificate of the jury, it may be observed that such departure seems to be beyond their power. *People v. Carman*, 47 Hun, 880. But it is insisted in behalf of the defendants that the irregularities have been waived. The return states that at the time and place that the jury was drawn "Martin S. Lynch, Esq., counselor at law, appeared, and claimed to represent the Scraffords mentioned in said proceedings; and, on the drawing of such jury, and as the names were drawn, made objections to several of the jurors whose names were drawn, such objections being allowed." The return also states that he "made an argument before said jury against the necessity of laying out said highway." There is nothing further in the return or other papers before us to indicate that Mr. Lynch had any authority from the land-owners to appear for them, or to make any waiver of any of the statutory requirements. The proceedings to lay out a road must comply with the requirements of the statute in respect thereto. We think no such waiver or consent was shown as should be held sufficient to confer jurisdiction and to validate the proceedings. *People v. Village of Whitney's Point*, 32 Hun, 508; affirmed, 102 N. Y. 81, 6 N. E. Rep. 895.

4. It seems that Reuben Fraser did not own any lands directly affected by the proceedings brought under review, and that he has no such interest as would authorize him to sue out a writ of *certiorari*. *People v. Schell*, 5 Lans. 352. The writ as to Fraser should be quashed, with \$10 costs. The order of the commissioners of highways is annulled, with \$50 costs and disbursements. Section 2148, Code Civil Proc.

MARTIN, J., concurs. MERWIN, J., concurs in the result.

STELZ v. SCHRECK et al.

(Supreme Court, Special Term, New York County. June, 1890.)

DIVORCE—PROPERTY RIGHTS—TENANCY BY ENTIRETY—TENANCY IN COMMON.

Where husband and wife are seised of a tract of land by the entirety, and a divorce *a vinculo* is granted on the ground of the wife's adultery, they are thereafter seised as tenants in common.

G. H. Kraacht, for plaintiff. L. S. Goebel, for defendant.

PATTERSON, J. On April 28, 1886, certain lands and premises were conveyed to William Stelz and Minnie Stelz, his wife, and by force of the deed the grantees became seised as tenants by the entirety. On June 20, 1888, by decree of the supreme court of the state of New York, the marriage of the parties who were the grantees in that deed was dissolved, and an absolute divorce was allowed the husband, on the ground of the adultery of the wife. On October 18, 1888, William Stelz married the plaintiff, and on the 8th day of February, 1889, he died, leaving the plaintiff his widow. His former wife (the defendant Minnie Schreck) also survived him. During his life-time, she married one Schreck. The plaintiff now sues claiming dower in all the land and premises, and asking that such dower be admeasured, and for the ordinary decree in such cases. She contends that, by the judgment of divorce and the dissolution of the marriage between her husband and his first wife, for the adultery of the first wife, all estate and interest of that first wife in the premises ceased, and was forever ended. The first wife claims the whole premises under the grant, notwithstanding the severance of the marital relation. On behalf of certain infant devisees under the will of Stelz, it is claimed that the decree of divorce operated to sever the estate, and that Stelz and the defendant Minnie Schreck were thenceforward seised as tenants in common, and that the plaintiff's right is limited to dower in a moiety only of the land and premises.

It was at one time quite generally supposed, and it was decided by the general term of the supreme court in the second department, (*Peely v. Buckley*, 28 Hun, 451; see, also, *Mesker v. Wright*, 76 N. Y. 262,) that since the passage of the act, (chapter 90 of the Laws of 1860,) a conveyance of real estate to husband and wife, without qualifying terms, vested the property in them as tenants in common, and that they did not take an estate in entirety; but that view was expressly overruled in *Bertles v. Nunan*, 92 N. Y. 152, and the decision in that case was reaffirmed in *Zornitath v. Bram*, 100 N. Y. 13, 2 N. E. Rep. 388. It must be regarded as the settled law of this state that by a conveyance such as that in this case the grantees become seised *per tout*, and not *per tout et per my*. That which vested in them under and by the deed was an estate by the entirety, with the incidents pertaining to that estate at common law, the principal characteristic of which was that the entire ownership passed to the surviving husband or wife. The question now before the court is, what becomes of the estate and the title when the marriage relation is dissolved, not by death, but by a decree of a court of competent jurisdiction granting a divorce *a vinculo* between parties seised of an estate by the entirety? The tenure by which the parties held was purely one of the common law, founded altogether upon the identity of the husband and wife as one legal person, and therein consisted the difference between that estate and a joint tenancy. *McCurdy v. Canning*, 64 Pa. St. 39. The grantees did not, and could not, take by moieties, because of their marriage relation and their legal unity and identity, and partition could not be made, although that may now be done in New York, under chapter 472 of the Laws of 1880. The effect of that statute is not to change the legal character of the estate unless the parties make partition according to its terms. As the estate in its creation under the form of the deed, as affected by the relation of the

grantees to each other, by which relation their interests in the subject of the grant were controlled, arose out of the existence of a marriage between them, so the continuance of that estate depended on the maintenance of that relation, for the whole estate would vest absolutely in a surviving husband or wife. If that relation ceased during the life-time of both parties, the principal element of the estate ceased, namely, that of ownership of husband or wife as such. But the dissolution of the marriage did not necessarily destroy all property right of the one against whom the decree was pronounced, for there is no condition fairly to be implied as annexed to the estate that infidelity to the marriage vow, even when a divorce is judicially ordered, shall have that effect, and determine the whole interest of the guilty party in the grant. No such feature is mentioned in the books as annexed to the estate, and there is no authority in the courts to resort to equitable considerations to add incidents to common-law tenures not known or declared to belong to them by the common law itself, or not necessarily connected with them, nor to apply the supposed analogy of statutes even as ancient as that of Westminster II., taking away dower in certain cases from an adulterous wife.

The question now presented has received consideration from text-writers, (2 Bish. Mar. & Div. § 716; Freem. Co-ten. § 76,) and it is stated by them that the effect of an absolute divorce on an estate in entirety is to convert that estate into one of tenancy in common. Both these judicious writers seem to base their statement of the law on this subject on what was decided in *Ames v. Norman*, 4 Sneed, 696. In that case the court says: "If the rights of husband and wife, in relation to an estate held by entireties, are not altered by the decree declaring the divorce, what becomes of the joint estate? What are their respective rights in the future in regard to it? They are no longer one legal person. The law itself has made them twain. They are no longer capable of holding by entireties. The relation upon which that tenancy depended has been destroyed. The one legal person has been resolved by judgment of law into two distinct individual persons, having in the future no relation to each other, and with this change of their relations must necessarily follow a corresponding change of the tenancy dependent upon the previous relation. As they cannot longer hold by a joint seisin, they must hold by moieties. The law, by destroying the unity of persons between them, has by necessary consequence destroyed the unity of seisin in respect to their joint estate, for, independent of their matrimonial union, this tenancy cannot exist." In *Lash v. Lash*, 58 Ind. 528, it is said: "Tenancy by entireties originated in the marital relation, founded on the idea of the unity of husband and wife, rendering them but one person in law. The continuance of such tenancy in a given case depended upon the continuance of the marital unity. The dissolution of that unity before death, whereby two actual persons were restored to their natural severalty, operated to divide the title to the estate held by them while husband and wife by entireties equally between them, making them tenants in common thereof. When there was nothing in the deed of conveyance controlling the matter, the effect of the divorce was to simultaneously destroy the tenancy by entireties." To the same effect is also *Harrer v. Wallner*, 80 Ill. 197. The doctrine announced by the text-writers and in the cases referred to is applicable to this cause. The question does not seem to have arisen in this state, nor can I find any case of authority at variance with those cited. The plaintiff is entitled to dower in one-half the premises, and to the interlocutory decree or order of reference usual under the Code of Civil Procedure in like cases.

PEOPLE *ex rel.* STEELE v. FRENCH *et al.*, Police Commissioners.*(Supreme Court, General Term, First Department. June 6, 1890.)***MUNICIPAL CORPORATIONS—DISCHARGE OF POLICEMAN.**

On the trial of relator for conduct unbecoming a police officer, in being absent from roll-call, and not reporting until some time thereafter, when he was so much under the influence of liquor as to make him unfit for duty, his excuse was that on being relieved from his post he boarded a car to return to the station-house, and was seized with so violent a pain in his back that he could not leave it, and rode to the end of the line, and, there being no car returning, had to walk back. A physician testified that he had some talk with relator in the car in respect to his illness, and that relator was not under the influence of liquor, and in this respect he was corroborated by the driver of the car. Two police sergeants, who were at the station-house when relator came in, testified that in their opinion he was under the influence of liquor, and gave their reasons for so believing, among which was that his breath smelled strongly of liquor. *Held*, that relator's dismissal from the force would not be disturbed.

Certiorari to review the action of police commissioners in dismissing relator, James Steele, from the police force of the city of New York.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

John M. Tierney, for relator. J. J. Delany, for respondents.

VAN BRUNT, P. J. The charge against the relator was conduct unbecoming an officer, the specification being that he was absent from roll-call, and did not report until some time thereafter, when he was so much under the influence of liquor as to be unfit for duty. That he was absent the relator admitted, and he seeks to excuse his absence by stating that on being relieved from his post he got on board a car to return to the station-house, and that when the car arrived at the street in which the station-house was situate he had so severe a pain in the back that he could not get off the car; that he rode to One Hundred and Twenty-Fifth street, the end of the line, found that there was no car returning to One Hundredth street, and was compelled to walk back the entire distance to the station-house, arriving there at 1:15, when he should have been there at 12:30. The evidence against the relator was that of two sergeants who were at the station-house when the relator came in. They stated that he was examined, and in their opinion was under the influence of liquor, and they gave reasons why they so believed, among which were that his breath smelled strongly of liquor. It is true that certain evidence on the part of the relator was offered of persons who were on the car with the relator upon the night in question, one a physician, and the other the driver of the car. The physician testified that he was going up with him in the car, and had some talk with him in respect to his illness, and that he was not under the influence of liquor; and in this respect he was corroborated by the driver of the car. Here seems to have been a conflict of testimony which the commissioners were called upon to decide. It might be suggested that it is difficult to see how it was possible for this relator to have walked back, as he says he did, from One Hundred and Twenty-Fifth street to the station-house, if he was so ill as to be unable absolutely to leave the car when it stopped at One Hundredth street. It is further to be borne in mind that the excuse which he gave for being late at roll-call was absolutely and confessedly untrue. Under these circumstances, we do not see that any excuse was given sufficient to account for the condition in which the relator manifestly was upon his arrival at the station-house, and to overcome the strong testimony of the sergeants who saw him upon his arrival. The proceedings should be affirmed and the writ dismissed. All concur.

BEACH v. MAYOR, ETC., OF THE CITY OF NEW YORK *et al.*

(Supreme Court, General Term, First Department. June 26, 1890.)

MUNICIPAL CORPORATIONS—REMOVAL OF OFFICERS.

Plaintiff, an apportionment clerk in the dock department of the city of New York, received a notice signed by the president of the dock board that a resolution had been adopted by the board that plaintiff's continuance as apportionment clerk was wholly unnecessary, and there was no present use for him as an *attaché* of the department, and that "there be but one apportionment clerk employed in this department, and that until the work of the department shall require further clerical assistance the said George O. Beach [plaintiff] be and he is hereby suspended and relieved from further duty or service in this department, and that his name be taken from the pay-roll thereof during such suspension." Held, that the resolution disclosed an intention to discharge, and not merely to suspend, plaintiff, and that therefore his claim for salary on the ground that the board's power to remove did not include a power to suspend could not be sustained. *Distinguishing Gregory v. Mayor*, 21 N. E. Rep. 119.

Exceptions from circuit court, New York county

Action by George O. Beach against the mayor, etc., of the city of New York to recover his salary as an apportionment clerk in the dock department for the period commencing December 12, 1886, and ending November 19, 1888. Verdict was directed for plaintiff, exceptions to be heard in the first instance at general term.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Phillips & Avery, for plaintiff. *William H. Clark*, (*D. J. Dean*, of counsel,) for defendants.

VAN BRUNT, P. J. The plaintiff, prior to December 11, 1886, was one of the apportionment clerks in the dock department. On that day he received a notice signed by the president of the dock board to the effect that on the 8th of December, 1886, a resolution was adopted by the board that the continuance of the said George O. Beach as apportionment clerk was wholly unnecessary, and there was no present use for him as an *attaché* of this department, and "that until further ordered there be but one apportionment clerk employed in this department, and that until the work of this department shall require further clerical assistance the said George O. Beach be and he is hereby suspended and relieved from further duty or service in this department and that his name be taken from the pay-roll thereof during such suspension. This resolution to take effect from and after December 11, 1886." On the receipt of this notice the plaintiff went to Mr. Stark, the president of the dock board, who referred him to Commissioner Matthews. On three or four occasions he reported to Mr. Stark for duty, and each time received an answer referring him to Commissioner Matthews. The plaintiff, as far as the case shows, did not report to Commissioner Matthews. Upon this state of the case the defendants' counsel moved to dismiss the complaint upon the ground that the transaction shows a discharge, and upon the ground that it shows an acquiescence so far as any reporting or claiming of the place by the plaintiff to the dock commissioners is concerned. This was denied, and the court directed the jury to find a verdict for the plaintiff for the salary attached to the position which he occupied. To this ruling the defendants excepted, which brings up the only question necessary to discuss upon this motion. The plaintiff relies upon the case of *Gregory v. Mayor*, 113 N. Y. 416, 21 N. E. Rep. 119, and claims his salary upon the ground that the dock board had no power to suspend the plaintiff, although they had a power of removal. The court said, in *Gregory v. Mayor*, "in such a case the power of removal is to be exercised, if at all, at once and finally. It was not meant that the commissioners should have power to arbitrarily suspend without pay." We think, however, that the plain intent to be gathered from the resolution upon the part of the board was to abolish the position held by the plaintiff, and to remove him as an ap-

portionment clerk. The resolution shows that the work for the doing of which he had been appointed had been completed; that the continuation of his services was wholly unnecessary, and he was thereupon suspended and relieved from further duty or service in the department. It is true that the words "during such suspension" are used; but it was the evident intention of the board to remove him from his office, and that it would require a reappointment in order to entitle him to any salary. This it appears to us was the intention plainly to be gathered from the wording of the resolution, although there may be phrases in it inconsistent with such construction. Under these circumstances, the case of *Gregory v. Mayor* does not apply, and the plaintiff was not entitled to the salary for which a recovery was had. The motion for new trial should be granted, with costs to the defendants to abide the event. All concur.

PEOPLE *ex rel.* FOX *v.* HAYDEN, Police Commissioner.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

MUNICIPAL CORPORATIONS—REMOVAL OF BOILER INSPECTORS.

Boiler inspectors in the city of Brooklyn are not within the protection provided for members of the police force, and cannot demand a trial before their removal.

Certiorari to review the action of Henry L. Hayden, police and excise commissioner of the city of Brooklyn, in removing relator, Richard Fox, from the position of boiler inspector in said city. Relator contends that he is not subject to removal except in the manner provided by law for the removal of uniformed members of the police force.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Sidney Williams, for relator. *F. A. McCloskey*, for respondent.

DYKMAN, J. This is a proceeding by *certiorari* to bring before the court for review the action of the commissioner of police of the city of Brooklyn in the removal of the relator from the position of boiler inspector in that city. The relator received his appointment under and in pursuance of the provisions of section 52, tit. 11, c. 863, of the Laws of 1873, for the purpose of carrying into execution and practical operation the provisions of the three preceding sections respecting the location and operation of steam-boilers in the city of Brooklyn. These provisions and the mode of appointment of the boiler inspectors were somewhat modified by section 54, tit. 11, c. 583, of the Laws of 1888, but the office and the powers and duties of the officer remained the same. That it was not the intention of the legislature to annex these boiler inspectors to the police force, and make them members thereof, is manifest from the provisions of section 4, tit. 11, c. 583, of the Laws of 1888, where officers and persons who shall constitute the police force of the city are specifically named without mention of boiler inspectors. It is true they are invested with the same powers and granted the same privileges as members of the police force, and the possession of such powers and privileges was doubtless essential to the successful discharge of the duties of their position. But the bestowment upon boiler inspectors of the powers of police officers is far from constituting them members of the police force. We find nothing in the law to indicate a design to make an addition to the police force by the appointment of boiler inspectors, or to do more than secure safety in the use of steam by a proper system of inspection. Such inspectors are therefore not within the protection provided for members of the police force, and cannot demand a trial before their removal. The proceedings of the commissioner should therefore be confirmed. All concur.

HUNTER v. NEW YORK, O. & W. R. Co.

*(Supreme Court, General Term, Second Department. July 18, 1890.)***APPEAL—REVIEW—WEIGHT OF EVIDENCE.**

A brakeman who had struck his head against something while riding on top of a box-car, going through a tunnel, sued the railroad company for the injury on the ground that it was negligent in not giving him notice of a brick arch in the tunnel which reduced its height to 4 feet 7 inches above the top of the car. At the first trial plaintiff testified that he was in a sitting posture when the car entered the tunnel, and the court of appeals reversed a judgment in his favor on the ground that it was physically impossible for him to have come in contact with the arch while in that position. At the second trial plaintiff testified that he rose up as he entered the tunnel to go on the top of the car to another brake; that he was not asked on the first trial whether he stood up; and that he then testified that the tunnel looked as though he could stand up and go through without any trouble. *Held*, that a verdict in his favor would not be disturbed.

Appeal from circuit court, Orange county.

Action by Charles H. Hunter against New York, Ontario & Western Railroad Company. There was a verdict for plaintiff for \$8,000. From the judgment entered thereon defendant appeals. For opinion on a former appeal, see 28 N. E. Rep. 9.

Argued before BARNARD P. J., and DYKMAN and PRATT, JJ.

John B. Kerr, (*William Vanamee*, of counsel,) for appellant. *T. A. Read*, for respondent.

DYKMAN, J. The plaintiff in this action was a brakeman in the employ of the defendant, and received injuries while passing through a tunnel. As originally excavated, the tunnel was 26 feet wide, and 20 feet high from the ties to the roof. Some years after the construction of the road there was a brick arch built in the tunnel commencing about 200 feet from its west portal, and extending eastward about 85 feet, which reduced the space to about 15 feet 9 inches from the top of the rail to the center of the arch. When the plaintiff was injured he was on the top of a box-car 11 feet 2 inches high above the rails, and it was his theory upon the trial that his head came in contact with the arch as he went into the tunnel from the west, and he was knocked off of the car, and thus sustained his injuries. Upon the first trial of the cause the plaintiff testified that he was in a sitting posture on the top of the box-car, and remembered nothing after he entered the tunnel, and when the cause reached the court of appeals that court decided that it was physically impossible for the plaintiff to receive his injuries in that manner. Upon the second trial, however, the plaintiff swore he rose up as he entered the tunnel to go on the top of the car to another brake, and that he remembered nothing after that. That evidence, if true, avoided the difficulty which caused the reversal of the judgment by the court of appeals, and whether it was true or false was a question for the determination of the jury. It was not and could not be contradicted, and it was not impossible or impracticable. It might be true, and the jury found it was so. He said he was not asked on the first trial whether he stood up; and he says he then testified that the tunnel looked as though he could stand up and go through without any trouble. It does not seem to be a case for the interposition of an appellate tribunal. In the place, and performing the functions, of the jury, we might have reached a different conclusion, but that consideration does not justify our interference with the verdict. The verdict is not contrary to evidence, or against the preponderance of the testimony, but is entirely supported and justified by the evidence. If the testimony of the plaintiff commanded the respect and received the belief of the jury, as it did, that is sufficient to justify the verdict. The judgment and order denying the motion for a new trial should be affirmed, with costs. All concur.

MENDEL v. BROOKLYN CITY R. CO.*(Supreme Court, General Term, Second Department. July 18, 1890.)***TRIAL.—INSTRUCTIONS.—REFUSAL TO CHARGE.**

Refusal to charge abstract principles is not error where all the principles applicable to the case have already been charged.

Appeal from circuit court, Kings county.

Action by Marcus Mandel against the Brooklyn City Railroad Company. There was a verdict for defendant, and plaintiff appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

George W. Wilson, for appellant. *Morris & Whitehouse*, for respondent.

DYKMAN, J. This action was commenced to recover for damage resulting to the plaintiff from an injury inflicted by the horses and car of the defendant. The action is based upon the negligence of the defendant, and the testimony upon the trial was quite contradictory. The jury rendered a verdict for the defendant, and the plaintiff has appealed from the judgment entered thereon. The verdict is fully sustained by the evidence, and we cannot interfere upon the questions of fact involved after the verdict of the jury. At the close of the charge of the trial judge several abstract principles were submitted to him with a request to charge them as they were read. All the principles involved which were applicable to the case had been charged by the judge, and he declined to make any further charge. No error can be predicated upon such refusal, and therefore the exceptions are unavailing. The judgment and order denying a motion for a new trial should be affirmed, with costs. All concur.

EQUITABLE LIFE ASSUR. SOC. v. HUGHES et al.*(Supreme Court, General Term, Second Department. July 18, 1890.)***COSTS.—TAXATION IN FORECLOSURE SUITS.—SEARCH OF TITLE.**

Under the statute and rules of practice in New York, fees paid by complainant in foreclosure suits for searches of title are only taxable as legal disbursements when the searches are official. Affirming 9 N. Y. Supp. 383.

Appeal from special term, Kings county.

Foreclosure proceedings instituted by the Equitable Life Assurance Society against Mary Ann Hughes and others. Plaintiff appeals from an order sustaining the clerk's refusal to tax to plaintiff items paid by it to the Lawyers' Title Insurance Company for searches of title.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Henry Day (*George Waddington*, of counsel,) for appellant. *Stephens B. Jacobs*, for respondents.

DYKMAN, J. This is an appeal from an order vacating and setting aside an order overruling the taxation of costs in this action, and also from an order affirming the refusal of the clerk to allow certain items for disbursements for searches. The question presented is whether the sums paid to the Lawyers' Title Insurance Company are taxable as legal disbursements by the plaintiff in an action to foreclose a mortgage. It was decided at the special term (9 N. Y. Supp. 386) that only disbursements for official searches could be allowed in such cases, and the sum claimed by the plaintiff and rejected by the clerk, having been paid for unofficial searches, could not be taxed as a legitimate disbursement. Our examination leads us to the same conclusion, and the orders appealed from should be affirmed, with costs and disbursements. All concur.

TOWNSEND v. TOMPKINS.

(Supreme Court, General Term, Second Department. July 18, 1890.)

INSURANCE—LIABILITY OF INSURED FOR SERVICES OF AGENT.

One dealing with a fire insurance company through an intervening agent is not liable to the latter for his services in making out the policy.

Appeal from Dutchess county court.

Action by John M. Townsend against Mary G. Tompkins. A judgment rendered for plaintiff by the justice, before whom the cause was tried, was affirmed by the county court, and defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

W. Farrington, for appellant. *Lewis Baker*, for respondent.

DYKMAN, J. The plaintiff commenced this action in a court of a justice of the peace to recover the value of his services in writing a policy of fire insurance for the defendant, and upon the trial it appeared that he was an agent of a fire insurance company, and made out a policy of insurance for the defendant, and delivered the same to her, which she returned in a few days. The justice rendered a judgment for the plaintiff, which was affirmed on appeal to the county court, and the defendant has appealed from the judgment of affirmance to the court. Our conclusion is that the defendant incurred no obligation to the plaintiff in the transactions she had with him respecting the insurance. She dealt with the insurance company through the plaintiff as the intervening agent. The judgment should therefore be reversed, with costs. All concur.

EMBLER v. TOWN OF WALLKILL.

(Supreme Court, General Term, Second Department. July 18, 1890.)

ENCROACHMENTS ON HIGHWAYS—LIABILITY OF TOWNS.

Under Laws N. Y. 1881, c. 700, § 1, imposing a liability on towns for injuries caused by defective highways in cases where the highway commissioners were personally liable at common law, a recovery can be had of a town for personal injuries sustained by reason of the branches of a tree being permitted to hang so low over the traveled portion of a highway as to leave a space insufficient for the passage of a load of hay.

Appeal from circuit court, Orange county.

Action by Henry W. Embler against the town of Wallkill. There was a verdict for plaintiff, and defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

William Vanames, for appellant. *W. F. O'Neill*, for respondent.

DYKMAN, J. While the plaintiff was riding on the top of a load of hay along one of the public highways of the town of Wallkill he was struck in the face by the stub of an overhanging branch of a tree, and scraped off the load, and precipitated to the ground, and severely injured. This action was brought against the town for recovery of the damages sustained by the plaintiff by reason of such injuries, and the basis of the action is the negligence of the highway commissioners in failing to maintain the road in question in a condition of safety for travelers. The cause was tried at the circuit, and the plaintiff recovered a verdict of \$6,000, and the defendant has appealed from the judgment, and also from the order denying the motion for a new trial on the minutes. Commissioners of highways are charged with the duty of active vigilance and watchfulness in ascertaining the condition of the highways, and they must exercise proper care in their maintenance in a reasonably safe condition for all ordinary travel. Such are the duties imposed upon those officers by the law, and when they are not discharged, and injury results to a traveler from a failure in their performance, without his fault, he

has a cause of action for the damages sustained by reason of such negligence. At the common law the towns were not liable for the negligence of such commissioners, because they are neither the agents nor servants of the town, and the commissioners were personally liable for the consequences of their own negligence; but now, in this state, the legislature has intervened by statutory enactment, (Laws N. Y. 1881, c. 700, § 1,) and imposed a liability upon the towns in all cases where the commissioners would be personally liable. The statute is wise and salutary, and furnishes a more certain and adequate remedy and satisfaction for injuries resulting from the negligence of public officials. Upon the facts and the law this is a plain case for the plaintiff. The tree in question stood upon the side of the highway, and its branches hung over the traveled portion of the road so low as to leave a space insufficient for the passage of a load of hay, and that condition had existed for more than 10 years. Those facts presented a case of inexcusable negligence, and there is no principle which will exonerate the town from the liability resulting therefrom. The case was submitted to the jury by the trial judge in a charge which fully explained and laid down the legal principles which controlled the case, and there was no error committed upon the trial. The point respecting the liability of the city of Middletown is untenable. The judgment and order denying the motion for a new trial should be affirmed, with costs. All concur.

HART et al. v. HAIGHT.

(Supreme Court, General Term, Second Department. July 18, 1890.)

SALE—RESCISSION OF CONTRACT.

Where a purchaser of merchandise returns it to the sellers because it is not of the stipulated quality, and they accept it without objection, there is a mutual rescission of the contract, and the sellers can neither recover the price nor deal with the merchandise in any way on the purchaser's account.

Appeal from Westchester county court.

Action by George W. Hart and Benjamin F. Hart against James H. Haight. The case comes up on defendant's appeal from a judgment of the county court affirming a judgment rendered by a justice of the peace in favor of the plaintiffs.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Eugene B. Travis, for appellant. *Robert McCord*, for respondents.

DYKMAN, J. This is an appeal from a judgment of the county court affirming a judgment of a court of a justice of the peace in favor of the plaintiffs against the defendant. The appeal to the county court was upon questions of law only, and no new trial in that court was demanded. The facts are substantially these: The plaintiffs are merchants in the city of New York, and the defendant is a retail dealer in Peekskill. In the month of February, 1886, the defendant purchased a quantity of butter from the plaintiffs upon their representation that it was fine, and came from the best butter region in the country. When the butter reached the defendant he discovered upon examination and trial that it was of an inferior quality, and did not answer the representation of the plaintiffs. He then saw one of the plaintiffs and informed him of the inferior quality of the butter, and that he should return the same, and he did so return 12 firkins of the butter to the plaintiffs, who sold it for \$25.90 less than the price for which it was sold to the defendant. This action was brought for the recovery of that sum, and the plaintiffs obtained a judgment therefor, as we have stated, and our examination of the case shows both judgments to be contrary to law.

The contract between the parties was an executory contract for the sale of personal property, and when the butter came to be delivered the defendant

had a reasonable time in which to examine the same, and determine its character, and ascertain whether it answered the representations made by the plaintiffs respecting its quality; and when he found it did not answer such representations, and was an inferior article, he had two courses which he might adopt. One was to accept the butter and offset the damages he might sustain by way of counter-claim in an action for the recovery of the price, and the other was to refuse to accept the butter and return it, and thus rescind the contract; and the latter course was the one he pursued. Thereupon the contract was nullified, and the butter remained the property of the plaintiffs, and they could neither recover the price from the defendant nor deal with it in any way on his account, and their attempted sale of the same on account of the defendant was a nullity. They simply sold their own butter. In this case the rescission of the contract was by mutual consent; for the defendant informed one of the plaintiffs of his intention to rescind the contract, and he raised no objection to that course. But the element of mutuality is not essential. The right to rescind the contract resided with the defendant upon the discovery of the inferiority of the quality of the butter. The following authorities justify the principles we have laid down, and the conclusion we have reached. 2 Kent, Comm. (10th Ed.) 660; *Sprague v. Blake*, 20 Wend. 64; *Hart v. Wright*, 17 Wend. 277; *Gallagher v. Waring*, 9 Wend. 28. It follows that the judgment of the county court and that of the court of the justice of the peace should both be reversed, with costs. All concur.

WATSON v. BENZ.

(Supreme Court, General Term, Second Department. July 18, 1890.)

COSTS—ON APPEAL—JUSTICE OF THE PEACE.

Under Code Civil Proc. N. Y. § 3072, relating to appeals from justices of the peace, where new trials are demanded in the appellate court, which provides that "either party may, at any time after the action is deemed at issue in the appellate court, and before the trial, serve upon the adverse party a written offer to allow judgment to be taken against him for a sum or property, or to the effect therein specified, with or without costs, * * * and if the party to whom it is made fails to obtain a more favorable judgment he cannot recover costs from the time of the offer, but must pay costs from that time," where the offer is not accepted, and the party obtains a more favorable judgment than the offer, he can recover costs from the time of the offer. Distinguishing *Zoller v. Smith*, 45 Hun, 319.

Appeal from Queens county court.

Action by William Watson against Albert Benz to recover damages for trespass to real estate. Plaintiff appeals from an order retaxing his costs. Code Civil Proc. N. Y. § 3072, relates to appeals from justices' judgments where new trials are demanded in the appellate court.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

C. A. S. Van Nostrand, for appellant. Harrison S. Moore, for respondent.

DYKMAN, J. The plaintiff recovered a judgment in this action against the defendant in a court of a justice of the peace for \$25 damages and \$5 costs, and the defendant served a notice of appeal to the county court, in which he demanded a new trial in that court. Within 15 days after the service of the notice of appeal the defendant served a written offer to allow judgment to be taken against him for the sum of \$5, but the offer was silent on the question of costs, and it was not accepted. The action was retried in the county court, and the plaintiff obtained a verdict for \$12.50. Thereupon the county clerk adjusted the costs of the plaintiff at \$64.92, and entered judgment in his favor for \$77.42. Subsequently, and on the motion of the defendant, the county court made an order vacating the adjustment of the costs, and reducing the judgment to \$12.50, and allowed \$10 costs of the motion to be offset against

the judgment, as corrected and reduced. From the last order the plaintiff appealed to this court, and we find it erroneous.

The question lies under the control of section 3072 of the Code of Civil Procedure, which is as follows, so far as it has application to this appeal: "Either party may, at any time after the action is deemed at issue in the appellate court, and before the trial, serve upon the adverse party a written offer to allow judgment to be taken against him for a sum or property, or to the effect therein specified, with or without costs. * * * If the party receiving the offer within ten days thereafter serves upon the adverse party notice that he accepts it, he may file it with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If the offer is not thus accepted, it cannot be proved upon the trial, and if the party to whom it was made fails to obtain a more favorable judgment he cannot recover costs from the time of the offer, but must pay costs from that time." As the converse of the last paragraph of this section must be true, it follows that if the offer be not accepted, and the party does not fail to obtain a more favorable judgment, he can recover costs, from the time of the offer, and the plaintiff in this case can recover costs because he did obtain a judgment more favorable to him than the offer. The offer tendered him a judgment for \$5, and upon its acceptance by him he might enter judgment for that sum only, without costs, whereas he obtained a judgment for \$12.50, more than double the amount offered, so that both in respect to the verdict and the costs the judgment was more favorable to the plaintiff than the offer. The case of *Zoller v. Smith*, 45 Hun, 319, is not an authority here, because the plaintiff failed to recover a judgment more favorable than his offer. The order appealed from should be reversed, with \$10 costs and disbursements, and the motion should be denied, with \$10 costs. All concur.

BARTLETT v. SUTORIUS.

(Supreme Court, General Term, First Department. June 6, 1890.)

ASSUMPSIT—COMPLAINT.

Complainant alleged that plaintiff shipped goods to defendant, his agent, to sell, and that defendant collected the proceeds, and converted same to his own use. An order of arrest founded on such complaint was vacated upon appeal because the complaint did not allege, as required by Code Civil Proc. N. Y. § 549, that defendant converted money received "in a fiduciary capacity." 9 N. Y. Supp. 2. *Held*, that the complaint stated a good cause of action, though not for money received in a fiduciary capacity, and that the trial court erred in dismissing the complaint.

Appeal from circuit court, New York county.

Action by Stephen L. Bartlett against Edward Sutorius for the proceeds of certain sales alleged to have been made by defendant as plaintiff's agent. An order of arrest, granted on the ground that defendant converted money received "in a fiduciary capacity," was vacated by the general term on the ground that the complaint did not allege that defendant received the money "in a fiduciary capacity." At the trial the court dismissed the complaint under the decision of the general term vacating the order of arrest. See 9 N. Y. Supp. 2. Plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Daniel D. Sherman, for appellant. Davison & Chapman, for respondent.

VAN BRUNT, P. J. The learned judge in the court below evidently mistook the purport of the decision heretofore made in this case upon the application to vacate the order of arrest. All that the court decided upon that appeal was that, as the complaint did not contain the allegations required by section 549 of the Code, the order of arrest could not be sustained. It did not decide that the complaint does not state a good cause of action. On the contrary, the complaint contains a cause of action, but not for money received in

a fiduciary capacity. The learned court therefore erred in dismissing the complaint, and the judgment should be reversed, and a new trial ordered, with costs to appellant to abide event. All concur.

VAN DEVENTER v. LONG ISLAND CITY.

(*Supreme Court, General Term, Second Department. July 12, 1890.*)

TAXATION—VOID ASSESSMENT—RELEVY BY LEGISLATURE.

The legislature has power to ratify and relevy void taxes, and the power includes the interest as well as the amount of the tax originally.

Appeal from special term, Queens county.

Action by Jacob H. Van Deventer to vacate taxes on real estate in Long Island City for the years 1877 to 1886, the irregularity being that for certain of the years the assessors omitted to assess certain lands embraced in public parks, and for the years 1882 and 1883 did not assess any personal property in the city. Defendant pleaded the ratification, confirmation, and levy of all the taxes prior to 1883, by Laws 1882, c. 383, and Laws 1886, c. 656. The court refused to find that the taxes, prior to 1883, were levied, ratified, and confirmed by the acts of 1882 and 1886, and defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

W. J. Foster, for appellant. Frank E. Blackwell, for respondent.

BARNARD, P. J. No new principles are involved different from those presented by the cases of *People v. Bleckwenn*, 7 N. Y. Supp. 914, and *Francklyn v. Long Island City*, 32 Hun, 451, lately decided by this court. In these cases the tax was void for an omission of the assessors. The tax-roll was made out in due form, and under the statute notice, but the assessors did not annex, in one of the cases, a statute certificate. The legislature reimposed the tax by direct act. In the other case the defect was similar in principle. It was held on appeal to this court that the legislature had the power to levy, confirm, and ratify the tax, and that this power included the interest as well as the amount of the tax originally. The defect in the first case consists in the fact that the assessor left off the roll, purposely, real and personal property. The lands in the complaint were only charged with their proportionate share of the amounts directed to be raised on the city. It is very doubtful whether under these averments the whole levy would be void. If it was a void tax the legislature could validate it. *Ensign v. Bares*, 107 N. Y. 329, 14 N. E. Rep. 400, and 15 N. E. Rep. 401. The legislature had power to relevy the same, and apportion the tax. *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. Rep. 682. It is not therefore necessary to determine the question whether the plaintiff's cause of action is barred by the short statute of limitation, created by chapter 383, § 11, Laws 1882, and chapter 656, § 10, Laws 1886. The judgment should be reversed, and a new trial granted, costs to abide event. All concur.

In re EQUITY GAS-LIGHT CO.

(*Supreme Court, General Term, Second Department. July 12, 1890.*)

CORPORATIONS—DISSOLUTION—LEAVE TO SUE.

An order denying an application for leave to bring action in behalf of the state to vacate the charter of a gas company on the ground of non-user and other neglect will be affirmed where it appears that the company assumed a large responsibility and outlay upon the strength of the discontinuance of a former action for the same purpose, and no new facts are alleged why the charter should be annulled which did not exist at the time of such discontinuance.

Appeal from special term, Westchester county.

v.10N.Y.s.no.10—51

Application by the people of the state of New York for leave to commence action against the Equity Gas-Light Company of the eastern district of Brooklyn for a forfeiture of the company's charter, rights, and franchises. The application was denied, and the people appeal.

Argued before BARNARD, P. J., and PRATT, J.

Charles F. Tabor, Atty. Gen., and *Jesse Johnson*, for the People. *Horace Graves*, for respondent.

BARNARD, P. J. The legislature, in April, 1874, incorporated the Equity Gas-Light Company of the eastern district of the city of Brooklyn. Three years were given by the act in which the company were to organize and commence the transaction of business, and the charter was to be forfeited if the company did not commence operations in three months from the passage of the act. Only a very small portion of the construction of the work was commenced within the three months, and the company did not organize and commence business within the three years. In 1884, upon the petition of the Williamsburgh Gas-Light Company, the attorney general commenced proceedings by action to vacate the charter. The Equity Gas-Light Company opposed the application, and put in an answer. The case was brought to trial in March, 1885. It was tried partly before the court at special term, a large part of the testimony being taken before a referee. The case was not finally submitted until about the summer of 1888. The case was very voluminous. Before the case was decided, and on the 10th of January, 1890, the attorney general discontinued the action. On the 27th of March, 1889, the attorney general determined to apply in the first judicial district for leave to bring another action. This application was made and denied. The attorney general applied in the second district for such leave, and his application was denied. He applied for the order which denied the leave to sue again. The motion was properly denied. The action discontinued seems to have been solely in the interest of the Williamsburgh Gas-Light Company. It was initiated on its petition, and was based upon an alleged injury to the interests of that company. A non-user of chartered rights did not annul a charter without a judicial decree, and when the attorney general discontinued the action the Equitable Gas-Light Company increased its capital, and paid into the state treasury the tax thereon. It has made a contract for the immediate construction of buildings and works for the manufacture of gas, and for the laying of 45 mains within its chartered territory. There are no new facts alleged why the charter should be annulled which did not exist when the former action was discontinued, and there are the most powerful reasons why a new action should not be commenced. The Equitable Gas-Light Company has relied upon the action of the state through its officers to assume a large responsibility and outlay, and it is apparent that it will be for the public interest that it should build and operate its works. The order should therefore be affirmed, with costs. All concur.

LONDON v. VAN ETTE *et al.*

(*Supreme Court, General Term, First Department. June 6, 1890.*)

COSTS—EXTRA ALLOWANCE—OFFER OF JUDGMENT.

Where defendant becomes entitled to costs under Code Civil Proc. N. Y. § 733, providing that if plaintiff does not accept an offer of judgment made by defendant before the trial, and "fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time," defendant is not limited to the costs expressly provided for in the statute, but may be granted an extra allowance in a proper case. *Overruling Magnin v. Deismore, 47 How. Pr. 11.*

Appeal from special term, New York county.

Action by George I. Landon as receiver of the Bowling Green Savings Bank against James Van Etten and Smitten V. Tripp. Defendants offered to allow judgment for \$1,500 with interest. The recovery was for \$1,609.90, but at that date the amount of the offer with interest was for \$2,407.25. Defendants appeal from an order denying them an extra allowance. Code Civil Proc. N. Y. § 788, provides that if plaintiff does not accept an offer of judgment made by defendant before trial, and "fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time."

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Wheeler, Cortes & Godkin, (L. Godkin, of counsel,) for appellants. *Van Etten and Alexander Cameron*, for respondent.

BRADY, J. The defendant's offer of judgment was better than the plaintiff's recovery. He is therefore the prevailing party, and entitled to costs. The learned judge at special term thought him entitled also to an additional allowance, but felt constrained to refuse to grant it from want of power, his judgment in that respect yielding to the decision made in *Magnin v. Dinsmore*, 47 How. Pr. 11, to that effect. That case does not however discuss the question which presents itself *in limine*, namely, what is meant by an allowance. Justice WOODRUFF, in *Brady v. Dubrow*, 2 E. D. Smith, 78, 84, arrived at the conclusion, upon examination of the question, that the allowance was of additional costs, and that the phrase must be so interpreted. This result is satisfactory, the chapter relating to the subject being entitled in the Code, "Fixing the Amount of Costs," and articles 1 and 2 under the title are "Sums Allowed as Costs;" "Taxation of Costs." Whatever is given by way of indemnity under the statute is within the designation "costs," and being costs, the party entitled to them, as provided by the Code, is also entitled to those given in addition to the established sums. If the prevailing party, for example, is entitled to costs, an allowance meaning additional costs may be given him to such extent as may be determined on a proper application showing the right to them to exist. It is unnecessary, however, to pursue this subject, inasmuch as the question has already been considered and determined by this court in *Commissioners v. Spofford*, 3 Hun, 57. The proposition asserted and maintained by that case is where either party is entitled to costs such costs are not restricted to those given expressly, but include the allowance, if a proper case be made for them. This decision was predicated on the sections of the old Code, which are, however, substantially the same as those of the present Code. The order appealed from should therefore be reversed, and the motion be remitted for consideration. Ordered accordingly, with \$10 costs and disbursements of this appeal. In expressing these views we must not be understood as intimating an opinion as to the propriety of granting any allowance. All concur.

PEOPLE *ex rel.* ROE v. McLEAN *et al.*, Police Commissioners.

(Supreme Court, General Term, First Department. June 6, 1890.)

MUNICIPAL CORPORATIONS—DISCHARGE OF POLICEMAN.

A patrolman charged with sitting in a restaurant during his tour of patrol duty admitted being in the restaurant, and when asked what he was doing there stated it was a chilly night, and he went in for coffee. *Held*, that his dismissal from the force would be set aside for want of proof that he was on a tour of duty at the time.

Certiorari to review the action of police commissioners in dismissing relator, Cornelius W. Roe, from the police force of the city of New York.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

J. M. Tierney, for relator. *John J. Delany*, for respondents.

BRADY, J. The relator was charged with absence from his post during his tour of patrol duty, his absence consisting in sitting in a restaurant, but for

what period is not stated. When the trial commenced the relator was called and examined, the first question asked, it may be observed, relating to a subject not embraced in the charge or specification. It was, "Why were you not here this morning, as ordered?" and was followed by several questions relating to that seeming dereliction. The question finally put was this: "The charge against you is sitting in a restaurant at 10:47 P. M., October 3d," which was admitted to be true, the relator stating, when asked what he was doing there, that it was a chilly night, and he went in for a cup of coffee. There is, however, no evidence that he was at that time on a tour of duty as charged, no further proof of any kind having been given, and the evidence does not therefore sustain the judgment pronounced against him. The rules asserted and reasserted for our guidance by the court of last resort, in the consideration of the evidence against the members of the force who have been tried, are so strict, and there is such a marvelous limit upon our control, that it is incumbent upon us to see to it, and with some scrutiny, that the charge made is sustained not inferentially, but absolutely, upon proper proof. For this reason, namely the absence of any proof that the relator was on a tour of duty at the time he was seen in the restaurant, the judgment should be vacated, and the relator reinstated. It may be remarked here in addition that the relator's wife, as appears by the record, made the following affidavit, to which no response was made:

"City and County of New York—ss.:

"Maggie Roe, being duly sworn, deposes and says: 'I am the wife of Cornelius W. Roe, the petitioner named in the petition hereto annexed. On or about the 21st day of November, 1889, shortly after my said husband had been dismissed from the police department, I called upon Police Commissioner John McClave, at his residence, No. 156 West 72d street, in the city of New York, in relation to my said husband's dismissal. I called the said commissioner's attention to the very slight dereliction with which my said husband had been charged, and in the conversation which ensued the said commissioner stated that my said husband, Cornelius W. Roe, had been dismissed on account of his previous record, and not because of the charge on which he was last tried; that, when the case came before the full board, Police Commissioner McLean brought up the record of previous charges against my said husband, and on that account recommended dismissal, and that the other commissioners voted accordingly.

MAGGIE ROE.'

"Sworn to before me this 15th day of February, 1890,

"JOHN MULHOLLAND, Notary Public, (75,) N. Y. Co."

And, further, that the relator's record as an officer returned by the respondent, and which was doubtless used against him, was not given in evidence at the trial, or he given any opportunity to explain it. These things combined suggest elements employed in the consideration of the case which should not have been countenanced, and therefore not permitted to influence the respondents in forming their judgment. Ordered as suggested, with costs. All concur.

BARROW S. S. CO. v. MEXICAN CENT. R. CO.

(Supreme Court, General Term, First Department. July 13, 1890.)

CONTRACT—INTERPRETATION.

An agreement between plaintiff and defendant for the transportation of Mexican pilgrims from New York to Rome by a steamer owned by plaintiff was made by a correspondence, which commenced with a letter from defendant referring to a preceding conversation respecting the matter, and adding: "Our people in Mexico advise that upon favorable terms they can secure a party of about 175 or 200 people, with a possibility of increasing the number. These people will be divided into classes, about as follows: 75 first-class, 75 second-class, 50 steerage." Plaintiff replied stating the rates, but without mentioning any number, and received an answer expressing dissatisfaction with the rates, and stating: "There is a probabili-

ity that there will be 250 people, or more." Plaintiff then wrote stating, *inter alia*: "We beg to confirm the understanding arrived at between us, viz., that you will not ship less than 75 first-class, 75 second-class, and 100 third-class passengers for the round trip;" and then again mentioned the rates, which were accepted by a letter on the same day, stating: "There is a probability that the party will exceed 250." Other letters passed without mentioning the number of passengers until plaintiffs wrote expressing surprise at hearing of a falling off in the number of the passengers, and notifying defendant it would be held responsible for the passage money on the numbers originally arranged. The vessel was then engaged for the trip. *Held*, that the agreement was for the transportation of 250 persons, including the different classes, and that plaintiff could recover of defendant damages resulting from its failure to furnish that number. *Distinguishing Railway Co. v. Dane*, 48 N. Y. 240. DANIELS, J., dissenting.

Appeal from circuit court, New York county.

Action by the Barrow Steam-Ship Company against the Mexican Central Railroad Company. Verdict and judgment for plaintiff. Defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Wing, Shoudy & Putnam, (J. A. Shoudy, of counsel,) for appellant. S. F. Kneeland, for respondent.

BRADY, J. The plaintiff, as the owner of the steam-ship *Bolivia*, made a contract with the defendant for the transportation by that steamer of Mexican pilgrims from New York to Rome. The complaint alleges that the defendant agreed to ship not less than 250 passengers; 75 of the first-class, 75 second-class, and 100 third-class. It also alleges that the defendant only furnished 64 first-class, 29 second-class, and 44 third-class passengers, and the plaintiff was compelled to send the vessel with the number of passengers designated, and suffered damage in consequence to an amount stated. The answer admits that passengers to the number alleged were furnished only, but denies that the contract bound the defendant to furnish any greater number. It was conceded on the trial that, if the plaintiff was entitled to any damages, the amount of them would be \$5,471, for which amount a verdict was directed by the court, although it would seem from the opinion delivered upon the motion for new trial, that the learned justice presiding entertained, as he said, considerable doubt as to whether the plaintiff had any cause of action against the defendant. Whether or not a contract was made between them, depends upon the construction to be placed upon the correspondence relating to the engagement of the vessel named, and to this correspondence our attention will be now directed. In a letter written on behalf of defendants dated March 24, 1888, it was said by the writer, among other things: "Referring to the subject of our conversation regarding the pilgrimage from Mexico to Rome. I beg to say that our people in Mexico advise that upon favorable terms they can secure a party of about 175 or 200 people, with a possibility of increasing the number. These people will be divided into classes, about as follows: 75 first-class, 75 second-class, 50 steerage." On March 31st, in a letter written on behalf of the defendant, the writer says: "Again referring to the subject of the pilgrimage from Mexico to Rome, I have to say that I am in receipt of a telegram from Mexico, advising that all arrangements have been made, so that this party can leave there at an early date, and there is a probability that there will be 250 people, or more." The answer of the plaintiff to that letter says, among other things: "We beg to confirm the understanding arrived at between us, viz., that you will not ship less than 75 first-class, 75 second-class, and 100 third-class passengers for the round trip." By letter of the same date, evidently in answer to the letter just referred to, the writer says: "Regarding the numbers of the party, I beg to say that my latest advice from Mexico, as mentioned in my previous letter of this date, that there is a probability that the party will exceed 250, but I have not been furnished with information as to the exact number of each class." The next letter found in the order of correspondence is dated April 3, 1888, written on behalf of the plaintiffs, in which no reference is made to the number of passengers. Upon the

same day a letter was written on behalf of the defendant, in which it is said: "I beg to advise you that I am in receipt of further telegraphic communications regarding the pilgrimage party from Mexico to Rome, and am advised that the final details are now being prepared, and that the party will leave Mexico, as intended, on the 7th inst. There is no suggestion in that letter as to the number of passengers, and therefore, according to the correspondence up to that time, the understanding was that there would not be less than 250 passengers. This was but a few days before the steamer was to sail. On the 12th of April, however, the following letter was written on behalf of plaintiffs, and, according to the recollection of the witness, in answer to a verbal communication:

"APRIL 12th, 1888.

"George W. Keeler, Esq., Gen. Eastern Agent Mexican Central Ry., 261 Broadway, City.—DEAR SIR: We were very much surprised to learn from your representative this morning of the great fall-off in the numbers of the Mexican excursion party, from what were guaranteed in your letter of the 31st ult. to us, and for which we have been making preparations, namely: 75 first-class, 75 second-class, and 100 third-class passengers. Every other consideration having been sacrificed by us to accommodate this party, we beg to notify you that we shall hold you responsible for the passage money due to us on the numbers originally arranged for.

"Yours, truly,

HENDERSON BROTHERS."

To this letter the following response was sent on behalf of the defendants:

"NEW YORK, April 13, 1888.

"Messrs. Henderson Bros., Agents Anchor Line, 7 Bowling Green, N. Y. City.—GENTLEMEN: Upon my return I find your favor of the 12th inst. regarding pilgrimage from Mexico to Rome. I beg to correct the impression which you seem to have that my letters of the 31st ult. guaranteed you 75 first-class, 75 second-class, and 100 third-class passengers. Those letters contained information as to size of the party exactly as I received it from Mexico, namely, 'that there is a probability that the party will exceed 250,' and in fact one of the letters distinctly states that no information had been received as to the number of people in each class. Your Mr. Martin has seen all recent telegraphic correspondence between our people at Mexico and this office upon the subject of this pilgrimage, and while I have expected that the numbers would be in accordance with indications contained in such telegrams, I have made no definite guaranty, either verbally or in writing; and, moreover, had you been guaranteed 250 people it would have been unnecessary for you to have made daily inquiries during the present week as to the number in the party, as you have done. As shown in the telegram, of which a copy was left at your office yesterday, this pilgrimage has proved a partial failure, and can result in no profit to the Mexican Central Railway, or any of the other railways in interest.

"Under the circumstances it is but fair that you should accept the situation the same as the other lines, as our chances of securing future parties against competition by direct steamers from Vera Cruz to Europe, will depend upon our making a success, as far as the people are concerned, of the present pilgrimage, just as much as though the number had been as large as our people had reason to expect.

"Very respectfully,

G. W. KEELER."

It will be observed that the last paragraph of this response suggests an acceptance of the situation as but fair, and for the reasons assigned. But it does not appear by anything said or done by the plaintiffs that they waived any of the rights secured by the contract, which they regarded as having been consummated, or accepted the suggestion that they should waive any such rights. It will have been observed from the phraseology employed in the correspondence that the number of excursionists originally contemplated was increased, and that there was no suggestion of a diminution of the number

finally named, until the letter of the 12th of April. On the 24th of March the number was stated at or above 175 or 200, with a probability of increasing the number. In the letter of the 31st of March it was said: "There is a probability that there will be 250, or more, and when upon that day the plaintiffs wrote to the defendant's agent confirming the understanding as to 250 passengers of different classes there was no suggestion in the answer to that letter of a less number. The number in the aggregate up to 250 was positively stated. The conjecture was as to the number of each class, about which exact information had not been furnished. The rest of the correspondence up to the 12th of April was based upon the proposition that there would be 250 passengers in different classes, with a probability not that it would be less than that number, but that it would exceed it, and this understanding presented itself in such force as to clearly justify the plaintiffs in making the necessary arrangements to transport the number named, which they proceeded to do. As the result, therefore, of the proper consideration and construction of the correspondence, the engagement was for the transportation of 250 persons including the different classes. It is undoubtedly the rule that the intention of the parties is to govern in the interpretation of contracts, especially when they are ambiguous, or uncertain, by expression. But the object in view necessarily enters into the consideration of what the parties intended. It certainly was intended that the plaintiffs should make the necessary preparation for the transportation of 250 persons divided into different classes, and they were bound to be in readiness at the time designated to carry out such a contract, and were entitled to the time necessary to make such preparation. The contract between the parties depending upon the interpretation and construction of the correspondence is *sui generis*, and adjudications in kindred cases are of comparatively little value. We are referred by the learned counsel for the appellants to a number of decisions which he thinks are conclusive; for example, that of *Railway Co. v. Dams*, 43 N. Y. 240. But the agreement there was to transport not exceeding 6,000 lbs. of freight during a certain period. Of course that is an entirely different case. The case of *Robinson v. Noble's Adm'rs*, 8 Pet. 181, is regarded by the learned counsel as similar to this. But there the agreement was to ship certain stores supposed to amount to 3,700 barrels, assuming one-half as flour barrels, and the other as whisky or pork barrels. But this was conjectural. Whether there would be 3,700 barrels or not is in doubt. It should not be overlooked that in the letter of April 12th the defendants were notified of the attitude taken by the plaintiffs with regard to the contract, and that they would be held responsible for the passage money on the numbers originally arranged; notwithstanding which the ship was employed for the transportation, and the numbers furnished carried to their destination. It may also be said that under any other interpretation of the contract the plaintiffs would be bound to proceed on the voyage with any number of passengers that the defendants chose to furnish, a result seemingly, at least, iniquitous. It is thought that under all the circumstances the plaintiffs were entitled to recover, and that the judgment should be affirmed, with costs.

VAN BRUNT, P. J., concurs.

DANIELS, J., (*dissenting*.) The verdict was directed for the damages sustained by the plaintiff from the failure of the defendant to furnish at least 250 passengers to be carried by the plaintiff by steamer and railway from the city of New York to the city of Rome, and back to the city of New York. The passengers were Mexican pilgrims, visiting Rome by way of Naples, and the contract between the parties for their carriage was made by correspondence. And the right of the plaintiff to maintain the action to the extent to which it has been permitted depends upon the existence of an obligation on

the part of the defendant to furnish 250 passengers. It did furnish no more than 184, and the damages awarded were for the loss arising out of the difference between that number and 250. Whether the defendant became liable for these damages must be ascertained from the letters themselves which passed between the agents. These letters, as they are contained in the case, commenced with one written on the 24th of March, 1888, by the agent of the defendant to those representing the plaintiff. It refers to a preceding conversation relating to the business, and then adds: "Our people in Mexico advise that upon favorable terms they can secure a party of about 175 or 200 people, with a possibility of increasing the number. These people will be divided into classes as follows: 75 first-class, 75 second-class, 50 steerage." The plaintiff's agents replied on the 27th of March stating the prices for the different classes of passengers, but without mentioning any number. The agent of the defendant wrote again expressing dissatisfaction concerning the rates, and still further: "I have to say that I am in receipt of a telegram from Mexico advising that all arrangements have been made so that this party can leave there at an early date next month, and there is a probability that there will be 250 people, or more." The plaintiff's agents under the same date, which was March 31, 1888, wrote again to the same person, making as a part of their letter this statement: "We beg to confirm the understanding arrived at between us, viz., that you will ship not less than 75 first-class, 75 second-class, and 100 third-class passengers for the round trip;" and then again mentioned the terms for the passengers. The rates were accepted by a letter in reply on the same day, and adding further: "Regarding the numbers of the party, I beg to say that my latest advice from Mexico, as mentioned in my previous letter of this date, is that there is a probability that the party will exceed 250, but I have not been furnished with information as to the exact number of each class. I have telegraphed the first and second class capacity of the Bolivia, and of course if our people exceed those numbers in either class, such excess numbers will have to adapt themselves to the accommodations which can be furnished." Nothing further was stated as to the number until the 12th of April, and then the agents of the plaintiff wrote: "DEAR SIR: We were very much surprised to learn from your representative this morning of the great fall-off in the numbers of the Mexican excursion party from what were guaranteed in your letter of the 31st ult. to us, and for which we have been making preparations, namely, 75 first-class, 75 second-class, and 100 third-class passengers. Every other consideration having been sacrificed by us to accommodate this party, we beg to notify you that we shall hold you responsible for the passage money due to us on the numbers originally arranged for." And on the next day the defendant's agent to whom this letter was addressed replied, concerning the terms of the agreement, as follows: "I beg to correct the impression which you seem to have that my letters of the 31st ult. guaranteed you 75 first-class, 75 second-class, and 100 third-class passengers. Those letters contained information as to size of the party exactly as I received it from Mexico, namely, 'that there is a probability that the party will exceed 250;' and in fact one of the letters distinctly states that no information had been received as to the number of people in each class. Your Mr. Martin has seen all recent telegraphic correspondence between our people at Mexico and this office upon the subject of this pilgrimage, and while I have expected that the numbers would be in accordance with indications contained in such telegrams I have made no definite guaranty, either verbally or in writing, and, moreover, had you been guaranteed 250 people it would have been unnecessary for you to have made daily inquiries during the present week as to the number in the party, as you have done."

It seems quite clear from this correspondence that the defendant did not become bound to furnish as many as 250 passengers. The first suggestion as

to the number was that the people in Mexico advised that they could upon favorable terms secure a party of 175 or 200, with a possibility of increasing the number. That was followed by a later letter saying that all arrangements had been made for the party to leave Mexico, and that there was a probability that there would be 250 persons or more. And the plaintiff's agents in reply stated that they begged to confirm the understanding arrived at that not less than 75 first-class, 75 second-class, and 100 third-class passengers would be shipped. There had, however, been no definite understanding or agreement to that effect made. But all that had been done was to make the statement of what were considered probabilities as to numbers. And that, as it was finally expressed, was "that there is a probability that the party will exceed 250." But there was no agreement in this, or any preceding letter, that it would reach that number. At most, estimates were given which the facts failed to realize. And when the statement was made of the understanding of the plaintiff's agents, that was not accepted as a correct result of what previously had been written, but the writers were informed that there was a probability that the party would exceed 250, as that was mentioned in the preceding letter of the agent of the defendant. This was not an acceptance of the understanding mentioned by the plaintiff's agents, but, at most, it was a reference to what was written in the preceding letter as to the number of the party expected; and in that letter the number was mentioned as probably 250, or more. It did not obligate the defendant to furnish a party of 250 persons, but stated the advices, and probabilities only, which placed the plaintiff's agents in a position where they could judge for themselves as to the number of people probably to be carried. What was written failed to create any positive obligation that this number of people would form the party. The agents on each side were supplied with the same information as to what might be expected. And the hopes created by it exceeded the reality. For the result of the disappointment the defendant did not become liable, certainly not to the extent determined at the trial. The judgment and order should be reversed, and a new trial ordered, with costs to the defendant to abide the event.

BUTLER v. TOWNSEND *et al.*

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

MASTER AND SERVANT—FELLOW-SERVANTS—WHO ARE.

Plaintiff's intestate, who was employed as a ship caulker, is not the fellow-servant of one employed by the master to construct, with materials furnished by the latter, scaffolding for intestate to stand on while performing his duties.

Appeal from circuit court, Kings county.

Action by Agnes Butler, as administratrix of John Butler, deceased, against James A. Townsend and George Edgett, to recover damages for the death of her intestate, alleged to have been caused by defendant's negligence. There was a verdict for plaintiff for \$5,000. From the judgment entered thereon defendants appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Wing, Shouly & Putnam, for appellants. Charles M. Stafford, for respondent.

BARNARD, P. J. John Butler, deceased, plaintiff's intestate, was a ship caulker. He was employed by the defendants at the Erie basin. The defendants erected a staging all around the basin. Upon this staging there were placed wooden horses, and from the top of one horse to the other planks were placed upon which the caulkers stood to do their work upon the vessel. The accident was caused by the breaking of one of these planks, and the plaintiff's intestate was killed by the fall. The scaffolding was built from materials fur-

nished by defendants. The case is one where the master was bound to construct the scaffolding and staging, so as to make it safe for the purpose intended. The proof shows that one of the planks was defective, and that the defect could be easily seen upon examination. The constructors of the scaffolding were not co-employees of the caulkers in the sense that their neglect excused the common master. The master owed the duty. *Bushby v. Railroad Co.*, 107 N. Y. 374, 14 N. E. Rep. 407; *Probet v. Delamater*, 100 N. Y. 266, 3 N. E. Rep. 184. Assuming that the constructors of the scaffolding were the servants of the master the proof is very strong. The plank which broke had been condemned, and this condemnation had been noted by a cross-mark in chalk. This plank was put on the horse with the chalk-mark on the under side. The plaintiff's intestate thus could not see the defect. The judgment should therefore be affirmed, with costs. All concur.

affirmed 7-6 N.Y. 624; 17 N.E. 40
DYKMAN, J. The intestate of the plaintiff, while in the service of the defendants, received injuries by the breaking of a scaffold, which resulted in his death. He stood upon the scaffold in the performance of his duties, and it gave way under his feet, and he fell to the ground. The trial of the action took the usual course of actions based upon negligence, and the testimony on the part of the plaintiff tended to convict the defendants of negligence, and the effort on the part of the defendants was to exculpate themselves from the charge, and the question of the contributory negligence was also introduced into the case. At the close of the testimony, the case was a proper one for the jury, and it was submitted to that body of fact triers under a charge of which the defendants cannot complain. The verdict was for the plaintiff, and under the testimony and the facts developed we cannot interfere. The judgment and order denying the motion for a new trial should be affirmed.

FARMERS' L. & T. Co. v. NEW ROCHELLE & P. R. Co.

(*Supreme Court, General Term, Second Department. July 12, 1890.*)

PARTIES—NECESSARY PARTIES.

A resolution granting permission to a railroad company to lay its tracks in the streets of a village required the company to give its bond conditioned to indemnify the village from all damages sustained from the building of the road. The bond was given, and the village brought suit thereon, claiming that the condition had been broken. *Held*, that this did not render the village a necessary or proper party to an action to foreclose a mortgage given by the company to secure a series of its bonds.

Appeal from special term, Westchester county.

Action by the Farmers' Loan & Trust Company against the New Rochelle & Pelham Railroad Company, to foreclose a mortgage given by defendant to secure a series of its bonds. The village of New Rochelle moved to be made a party defendant, and now appeals from an order denying the motion.

Argued before **BARNARD, P. J.**, and **DYKMAN** and **PRATT, JJ.**

Martin J. Keogh, for appellant. *Turner, McClure & Rolston*, for respondent.

BARNARD, P. J. The defendant is a domestic corporation formed to construct a street railroad in New Rochelle, with a branch to Pelham. On the 2d day of November, 1885, the board of trustees of the village of New Rochelle granted by resolution permission for the defendant to construct, maintain, and operate its road on the streets and highways of the village, as expressed in the resolution. Certain conditions were contained in the resolution in respect to the method to be observed in building and keeping in repair the railroad, and in grading the streets between the tracks, and on each side of the same. In 1888 the defendant executed a mortgage to the plaintiff

on its road, and franchises, privileges, and equipments to secure a loan. This action is brought to foreclose that mortgage. Among the conditions specified in the resolution giving the privilege to lay the tracks in the village was one to the effect that the railroad company should indemnify the village from all damages which might result from the building the road, or the grading the streets, and that a bond in the penal sum of \$10,000, should be given to that effect. The bond was given, and the village claims that damages were sustained by the village by reason of the acts and omissions of the railroad, and has commenced an action upon the bond to recover the amount thereof. This action was commenced in October, 1889, and is still pending. The railroad denies all liability in its answer. In November, 1889, the Farmers' Loan & Trust Company commenced an action to foreclose its mortgage, and the village applied to be made a party defendant. The motion was properly denied. There is nothing in the resolution which gives or purports to give a lien on the railroad. Conditions are imposed as to construction and grading, and a bond demanded to secure the observance of these conditions, but no lien is called for. The franchise to the defendant was not given by the village, but by the people upon the consent of the village. This consent is irrevocable as against the loan company, and railroad after its construction, and the purchaser will take subject to the conditions contained in the consent. The village is therefore only a general creditor as against the railroad, and under the case of *Herring v. Railroad Co.*, 105 N. Y. 340, 12 N. E. Rep. 768, cannot be made a party defendant. If the village has the first lien on the railroad it will remain after the Farmers' Loan & Trust Company foreclose their subsequent one. As a first lienor the village would not be a proper party. *Goebel v. Iffa*, 111 N. Y. 170, 18 N. E. Rep. 649. The order should be affirmed, with costs and disbursements. All concur.

PEOPLE v. DE CAMP.

(Supreme Court, General Term, Second Department. July 12, 1890.)

JURY—IMPANELING—WAIVER OF OBJECTIONS.

Where some of the jurors in a criminal case are drawn and sworn in the absence of one of the sessions justices, and objection thereto is first made at the close of the trial by motion to dismiss, the irregularity will be deemed to have been waived.

Appeal from court of sessions, Rockland county.

An indictment against John De Camp for assault. At the close of the trial defendant moved to dismiss on the ground that there was no constitutional court at the time the last four jurors were sworn, one of the justices being then absent. The motion was denied, and from this denial and the judgment of conviction defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Garrett Z. Snider, Dist. Atty., for respondent.

BARNARD, P. J. The defendant was put upon trial for an assault, at the Rockland court of sessions. When the trial commenced there was a full bench, consisting of the county judge and the two sessions justices. Eight jurors were impaneled in the regular way, when the court took a recess. One of the sessions justices was late in his arrival, and the other four jurors were drawn and sworn in his absence. The accused and his counsel were both present during the impaneling of the whole twelve jurors, and no objection was made to the continuance of the drawing of the last four jurors from the regular box nor to the administering of the oath to the jury. Before the trial actually commenced the court was full, and then no objection was made to the irregularity in drawing the jury in the absence of the sessions judge. The accused had a constitutional jury in number, and drawn according to law

and in his presence, and, under the rules of law applicable to the case, with his assent. A waiver of right is implied by sitting by in silence. Judgment affirmed.

PROVOST v. ROEDIEGER *et al.*

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

1. MORTGAGES—SETTING ASIDE FORECLOSURE SALE—INSANITY OF MORTGAGOR.

A sale on foreclosure will not be set aside on the ground of the insanity of the mortgagor at the date of sale, where the affidavits fail to show with any definite particularity when the insanity commenced, and it appears that the mortgagor did not give up business until two years after the sale.

2. SAME—INADEQUACY OF PRICE.

A petition to set aside a sale on foreclosure on the ground of inadequacy of price is properly refused where it appears that plaintiff bid in the property for \$1,000, and, after holding it for more than 5½ years, paying about \$1,500 in taxes, a great part of which was a lien on the premises at the date of the sale, he sold the property for \$3,750, being \$750 above the amount of the mortgage.

Appeal from special term, Queens county.

A petition by Patrick J. Gleason and Emma Roedieger, as administrators of Louis C. H. Roedieger, to reopen foreclosure proceedings instituted against their intestate by the plaintiff, John C. Provost. No resale was ordered, but the court ordered plaintiff to credit on the deficiency judgment the sum realized on a resale of the property, and directed the judgment to be satisfied on plaintiff's being paid the balance due. Plaintiff appeals.

Argued before BARNARD, P. J., and PRATT, J.

Manley & Wadley, for appellant. *A. N. Weller*, for respondents.

BARNARD, P. J. The judgment in this case was entered in March, 1884. The sale of the mortgaged property took place in May, 1884, and the same was purchased by the plaintiff for \$1,000. The plaintiff expended some \$1,500 in paying taxes and assessments on the property, a great part of which was a lien on the premises at the sale. In 1888 the plaintiff sold the property to a *bona fide* purchaser. Roedieger became insane, and died in 1889. The petitioners, his administrators, ask to set aside the sale because he was insane at the date of the sale, and because the price was inadequate. The affidavits failed to show with any definite particularity when the insanity commenced. The affidavit of Dr. Denler tends to show that Roedieger was insane in March, 1884, when the judgment was obtained. His testimony is shaken by the affidavit of the wife of the lunatic that he was a smart business man up to about August, 1885, and this agrees with a statement made by Dr. Denler that the manifestation of insanity which he puts in 1884 was really in 1885. He says that the incident was a year or a year and a half before the examination of the lunatic, which undoubtedly was in July, 1886. The lunatic did not give up business until May, 1886. The proof, therefore, fails to show that Roedieger was of unsound mind on or before May, 1884.

The proof as to inadequacy of price is equally unsatisfactory. The mortgage, it is true, was for \$3,000, but taxes and assessments had been permitted to accumulate so as to increase the deficiency to a large amount. The bid was really about \$2,500, and there was realized from the property in October, 1888, the sum of \$3,750. The interest on the purchase and taxes on the property after the purchase would, with the bid, nearly or quite reach that sum. No resale was ordered, but an account was directed of payments of taxes and assessments since the purchase to be taken, and of the income received therefrom after the purchase, and before the sale, in 1888, and that the balance over expenses and the amount received in the sale by plaintiff, less the bid at the mortgage sale, be credited on the deficiency judgment. The public sale is to stand. The sale by plaintiff is to stand, but the referee is to charge the plaintiff with the amount of his sale, and with rents after the fore-

closure sale, and thereby reduce the deficiency judgment. The equity of this is not plain. The plaintiff relies on a judgment and a purchase under it. The order upholds the judgment and sale under it, but really sets the sale aside as to the plaintiff, and makes him responsible for the proceeds of the property, and for the larger price obtained some four years after. If the mortgage sale ought not to stand, the plaintiff should be reinstated to his rights on a resale. The order should therefore be reversed, and the motion denied, with costs and disbursements.

MESEROLE v. BROOKLYN CITY R. Co.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

Where a person starts to cross the track as soon as the rear of the train from which he had alighted has passed him, without turning his head in either direction to see if any train is coming, and regardless of a caution given him by the conductor, he is guilty of contributory negligence, and no recovery for his death can be had of the company.

On exceptions from circuit court, Kings county.

Action by Walter L. Meserole, as administrator of Thomas Meserole, against the Brooklyn City Railroad Company, for negligently causing the death of plaintiff's intestate. A nonsuit was ordered, exceptions to be heard in the first instance at general term.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Carpenter & Roderick, for plaintiff. *Morris & Whitehouse*, for defendant.

PRATT, J. This action was brought by the plaintiff, as administrator, to recover damages sustained by the plaintiff, and the other next of kin of Thomas Meserole, deceased, by reason of the death of said deceased caused by the negligence of the defendant, its agents or servants. At the close of the testimony the action was dismissed upon the ground that it appeared from the evidence that the deceased was guilty of contributory negligence, and that the defendant was free from negligence.

We think the case was properly disposed of upon the first ground. If the case had been submitted to the jury, and a verdict rendered that no head-light was burning upon the engine which struck the deceased, it would have been incumbent upon the court to set it aside as against the weight of evidence under well-established rules. It follows from the fact that a head-light was burning that if the deceased had looked in the direction of the approaching train he could not have failed to see its approach, and avoided it. But the question is not left to inference. The fact clearly appears that he did not look, but, although notified to look out by the conductor of the car from which he had alighted, he proceeded to cross the track upon which the train was approaching without turning his head in either direction to see if any train was coming. The evidence clearly shows that deceased neither looked nor listened for an approaching train, but started to cross as soon as the rear of the train from which he alighted had passed him some four or five feet. Had the deceased turned to look after he had passed the rear of the car, he could not have failed to discover the danger. It is no answer to say that the train from which he alighted obstructed his view, as it was his duty to look, after he had passed the rear of that train, before he stepped upon the opposite track. The whole conduct of the deceased showed a reckless want of care. Instead of waiting until the train from which he had stepped had gone a proper distance, so as to disclose an approaching train, he immediately turns up his coat collar, and puts a muffler over his ears, and proceeds to cross the track without looking or listening, and regardless of a caution given him by the conductor. Judgment affirmed, with costs. All concur.

FORNEY v. ENGINEERING NEWS PUB. CO.

(Supreme Court, General Term, First Department. June 26, 1890.)

USE OF TRADE NAME—INJUNCTION.

Plaintiff issued a monthly periodical named "The Railroad and Engineering Journal," the result of the consolidation of two periodicals he had purchased, one of which was known as "The American Railroad Journal." Defendant published a weekly periodical called "Engineering News and American Railway Journal." In an action to enjoin defendant from using the words "Railway Journal" it appeared that plaintiff's paper had but a limited circulation, and there was no evidence showing actual confusion in any instance from the claimed similarity in names, while the titles, as printed, indicated possibility of error from plaintiff's use of the term "Engineering" rather than the defendant's use of the words "Railway Journal." *Held*, that relief sought was properly denied.

Appeal from special term, New York county.

Action by Matthias N. Forney against the Engineering News Publishing Company to restrain defendant from using the words "Railway Journal" in the sub-title of its periodical named "Engineering News and American Railway Journal." The complaint was dismissed, and the following opinion rendered: "BEACH, J. In January, 1887, plaintiff issued the first number of a monthly periodical named 'The Railroad and Engineering Journal.' In 1886, he had purchased, for five hundred dollars each, two monthly publications called, respectively, 'The American Railroad Journal,' and 'Van Nostrand's Engineering Magazine.' The issue of January, 1887, was the result of consolidation. There is slight proof tending to show that the 'American Railroad Journal' was to a limited extent known, and sometimes spoken of, without the prefix of 'American.' The defendant publishes a weekly periodical now named 'Engineering News and American Railway Journal.' It is the outcome of a prior publication first called 'The Engineer and Surveyor;' then 'The Engineer, Architect, and Surveyor;' then 'The Engineering News;' then with an addition of 'American Contract Journal;' and, lastly, 'Engineering News and American Railway Journal,' since February, 1888. The defendant's paper seems to be usually called 'The Engineering News,' and the letter-heads, stamped envelopes, and subscription orders bear the abbreviated title only. I think it a fair deduction from the evidence that plaintiff's paper is sometimes called 'Forney's Paper,' and 'Forney's Railroad Journal.' Upon these facts the plaintiff prays the court to enjoin the defendant from using the words 'Railway Journal' in its title. To grant this relief would, in my opinion, extend the exercise of equitable power beyond the limits ever before reached by adjudication. Above and beyond the technical rules regulating the application of equitable relief lies the broad principle, necessitating a living equity in a plaintiff's case rather than a skeleton only held together by the thin wire of abstruse reasoning. In the case at bar, plaintiff's publications have but a limited circulation, and there is an utter absence of evidence even tending to show actual confusion in any instance from the claimed similarity in name, while the titles as printed, instead of indicating possibility of error from defendant's use of the words 'Railway Journal,' rather show probable confusion and mistake from plaintiff's use of the term 'Engineering.' Considering the titles in full I cannot see any real similitude. To select therefrom two words which are not the popular appellation of either or both, and enjoin their use by defendant, would unnecessarily extend the boundary line limiting the discreet exercise of equitable power. I should question the propriety of its exercise upon the sole fact that one publication was called 'The Railroad Journal,' and another 'The American Railway Journal.' Extrinsic facts, such as resulting confusion, intent to imitate, probable imposition upon subscribers or purchasers, would be needed where resemblance is so slight. The learned counsel for plaintiff relies mainly upon the case of *American Grocer Pub. Ass'n v. Grocer Pub. Co.*, 25 Hun.

398. The proof showed there that the plaintiff's paper was known and commonly called 'The Grocer.' One Price was its editor until 1875, when he ceased to act, and began the publication of a new paper called 'The Grocer,' issued December 11, 1875, published on same side of same street and block as the plaintiff's, and when plaintiff removed to another locality the defendant followed. In addition there was some evidence of business confusion, united with the marked similarity in name, in fact, and of exactness in common designation. The cases cited by the learned justice also show an imitation lacking in this case. In *Howard v. Henriques*, 3 Sandf. 725, the titles were 'Irving House' and 'Irving Hotel.' In *Clement v. Maddick*, 5 Jur. (N. S.) 592, the use of words 'Bell's Life' in newspaper titles was enjoined because plaintiff's journal was familiarly known by that name. In *Ingram v. Stiff*, Id. 947, the names were alike. The French adjudications are upon like facts. The 'Moniteur Universel' and 'The Moniteur Official,' because it incontestably appeared that the former was always known as 'The Moniteur;' others, 'The Press' and 'The Free Press,' 'The Petit Journal' and 'The Petit Journal de la Somme.' The principle is that there must be an adaptation of plaintiff's title either exact or to an extent sufficient to show an appropriation of words producing similitude in the titles themselves, or from well-established popular designation. Within this principle the plaintiff has failed to bring his case by proofs, and the relief sought by his bill of complaint must be denied. Decree for defendant, with costs."

Plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Rowland Cox, for appellant. J. W. Hawes, for respondent.

VAN BRUNT, P. J. It does not seem necessary to discuss at large the questions presented upon this appeal. The facts are distinctly stated in the opinion of the court below, and the grounds upon which the relief should be refused to the plaintiff are there correctly set forth. The cases of *Stokes v. Allen*, 9 N. Y. Supp. 846, (decided at the May term of this court,) and *Richardson v. Richardson*, 8 N. Y. Supp. 52, also serve to illustrate the correctness of the conclusions arrived at. The judgment should be affirmed, with costs. All concur.

PEOPLE ex rel. WOLTMAN v. MYERS, Comptroller, etc.

(Supreme Court, General Term, First Department. June 6, 1890.)

MUNICIPAL CORPORATIONS—REMOVAL OF OFFICERS.

On *certiorari* to review the removal of relator from his position of clerk of markets on the ground that it was in violation of Laws N. Y. 1882, c. 410, § 43, declaring that no regular clerk or head of a bureau shall be removed until he has been informed of the cause of the proposed removal, and allowed an opportunity to explain, and that in every case of removal the true grounds thereof shall be entered on the records of the department or bureau, it appeared that in the course of an investigation relating to the allotment of market-stands witnesses testified to paying relator money for getting them stands; that the city comptroller caused to be sent to relator an oral communication informing him of the testimony and calling for an explanation; that a letter from relator was subsequently received by the comptroller showing relator had received information concerning his conduct, admitting that he had received the money, and stating he had donated it for political purposes; and that thereupon his removal was ordered. Held, that relator had been afforded the opportunity secured by the statute for explanation, and that the legality of his discharge was not affected by the fact that relator's inability to discharge his duties was entered on the record as the cause of his removal.

Certiorari to review the action of Theodore W. Myers, comptroller of the city of New York, in removing relator, Henry Wolتمان, from his position as clerk of markets. For former litigation, see 8 N. Y. Supp. 555.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Solon P. Rothschild, for relator. Henry B. Twombly, for respondent.

DANIELS, J. The writ has been issued upon the assertion of the relator that he was removed from his position of clerk of the markets in violation of section 48, c. 410, Laws 1882. So much of the section as is asserted to have been infringed by his removal is that declaring that "no regular clerk or head of a bureau shall be removed until he has been informed of the cause of the proposed removal, and has been allowed an opportunity of making an explanation, and in every case of a removal the true grounds thereof shall be forthwith entered on the records of the department or bureau." But by the return which the respondent has made to the writ it appears that an investigation had taken place before the commissioners of accounts, of the methods of the department of finance, so far as they related to the allotment of stands or stalls in the new West Washington Market, and that in the course of that investigation it appeared that the relator received money from certain market-stand holders during the latter part of the year 1888, and prior to the 4th of January, 1889, and that Michael Woolley had testified before the commissioners that he had asked the relator to look out for the interests of the witness in the allotment of stands, and had paid him \$25 for so doing; that Frederick Menk had also testified that he and his partner had applied to Woltman to have certain stands allotted to them, and upon the allotment he had paid \$25 or \$50 to Woltman for election purposes; that Nelson Doe had testified that, for the allotment of stands to his firm of Dudley, Clapp & Doe, he made a present of \$100 to Woltman, and that Francis Lowery testified that his firm had given \$250 to the relator for his services in getting them four stands in the market, and that other persons had paid him \$25 for his trouble in arranging stands for them. The amended return also stated that the comptroller had sent to the relator an oral communication by Brewster Maverick that he had been informed that testimony had been taken before the commissioners of accounts that the relator had received bribes in his official capacity, and therefore demanded an explanation of his conduct with reference thereto, on the ground that his conduct, if unexplained, would call for his removal. Maverick in an affidavit made by him subsequent to the return denied having conveyed this communication to the latter. But this denial, as well as that of the relator himself, is overcome in its effect by the letter of the latter to the comptroller, dated on the 17th of March, 1889, for by this letter it appears that the relator had received information concerning his conduct, requiring on his part an explanation, and this letter then proceeded to give such an explanation as the relator supposed would exonerate him from the effect of the testimony given before the commissioners of accounts; and in his letter of explanation he admitted that he had received money which he had donated for political purposes. No other evidence to support his statement was supplied by him in any form to the comptroller, and the letter in its details clearly indicates that information had been received by the relator of the nature and character of that mentioned in the return of the comptroller, and that it was in answer to that, and in compliance with the necessity of explanation on his part, that the letter was written; and after receiving this letter from the relator the comptroller made the order removing him from his office.

The section of the act of 1882 does not require any special formality in the proceedings to be taken for the removal of the clerk, but what has been required is that information shall be given to him of the cause of the proposed removal. The information is not required to be in writing, although it is advisable that it should be, and it could therefore be communicated in the form in which the comptroller conveyed it, and which it appears from the conduct of the relator he received, and it afforded the opportunity for explanation to the latter which the statute was intended to secure to him before his removal could regularly be made. But when this explanation was received by the comptroller, then he was at liberty to act upon the case. He was not concluded by the letter and explanation of the relator, neither was it necessary

that the evidence which had been taken before the commissioners of accounts should be again taken before the comptroller, or in the presence of the relator himself. For the law permitted the comptroller to act upon the testimony which in this manner had been taken and brought to his attention by the commissioners of accounts, and upon the effect of that evidence, as he believed it to be truthful, to remove the relator from his position. This subject was examined, and very fully considered in *People v. Thompson*, 94 N. Y. 451, where the course taken in this instance by the comptroller was sanctioned by the judgment of the court. It was there held that a formal trial or investigation was not required by the law, as indeed it was not from the language which has already been quoted, and that its provisions will be satisfied by the proceedings taken in the manner in which this was conducted by the comptroller. What he was required to do was to call upon the relator for an explanation of these facts disclosed and supported by the testimony of these witnesses, and when he gave that explanation that fulfilled the design of the act; and as long as it proved to be unsatisfactory and unreliable, then the comptroller was authorized to remove the relator from his office. It is true that the act was not complied with in the entry on the record of the true cause of the relator's removal. But this was induced by a feeling of generosity and charity on the part of the comptroller to save the character and position of the relator, and instead of stating upon the record, as the fact was established to the satisfaction of the comptroller, that the relator had been guilty of this misconduct, he was mildly informed, and the conclusion was so recorded, that he was removed because of his continued inability to discharge the duties of clerk of the market. But as a sufficient legal cause for his removal was presented and sustained, and he was afforded the opportunity secured by the statute for explanation, the comptroller was authorized to remove him, as long as the explanation given by him proved to be unsatisfactory, and that effectually terminated the proceeding so far as it is brought before this court to be reviewed by virtue of the writ of *certiorari*, and it should be affirmed with costs, the amount of which will be settled by the order to be entered.

VAN BRUNT, P. J., concurs. BRADY, J., concurs in result.

PLYMOUTH SOCIETY OF MILFORD v. HEPBURN.

(*Supreme Court, General Term, First Department. June 26, 1890.*)

WILLS—CONSTRUCTION—WHEN LEGACY VESTS.

By his will testator gave the income of his real and personal estate to his wife and son during their joint lives, the survivor to take the whole thereof, and upon their decease, the son leaving lawful issue then surviving, all the estate was to go to such issue, and in case there should be no such issue, then the real estate was to be sold. Testator further provided that "upon the decease of my said wife and son, he not leaving lawful issue then both surviving, as aforesaid, I give and bequeath my estate, and the proceeds and sales of my real estate, aforesaid, as follows." Then followed certain legacies, including one to plaintiff, a religious society in Connecticut, the interest of which was to be applied to keeping testator's monument in repair, and the balance, if any, towards discharging the salary of plaintiff's minister. At testator's death plaintiff had not capacity to take the legacy, but before the death of the life-tenants the Connecticut statutes were amended so as to enable it to take. Held, that it was testator's intention that the bequest to plaintiff should not go into effect until the death of his wife and son, the latter leaving issue both surviving, and that as plaintiff had capacity to take upon the happening of that event, the gift then went into effect.

Submission of controversy on agreed facts.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Horace Barnard, for plaintiff. *J. C. O'Connor, Jr.*, for defendant.

VAN BRUNT, P. J. It appears that David Hepburn departed this life in the city of New York in the year 1845, leaving a last will and testament which
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was duly admitted to probate by the surrogate of the county of New York in 1846, and letters testamentary were duly issued thereon to Susan Hepburn, the wife of the testator. The testator died leaving him surviving his widow and his son, George Mix Hepburn, who died without issue March, 1885, the widow dying in March, 1889. Subsequently the defendant, Mary C. Hepburn, was appointed administratrix with the will annexed. By his will the said David Hepburn gave the rents, income, and profits of all his estate, real and personal, to his widow and son equally, to be divided between them during their joint lives, the survivor to take the whole of such income; and upon the decease of his wife and son, he leaving lawful issue surviving the survivor, the testator gave, devised, and bequeathed all his estate to such issue; and upon the decease of his wife and son, he not leaving lawful issue then surviving, he authorized and empowered his executor or executors, the survivor or survivors of them, to sell and dispose of all his real estate, etc. The testator further provided as follows: "Upon the decease of my said wife and son, he not leaving lawful issue then both surviving, as aforesaid, I give and bequeath my estate, and the proceeds and sales of my real estate aforesaid, as follows, that is to say." He then gave a legacy of \$500 to his mother-in-law, and then follows the clause which forms the subject of dispute in this action: "*Eighth*. I give and bequeath the sum of one thousand dollars to the Second Congregational Society of the town of Milford in the state of Connecticut, to be by said society placed and forever kept out at interest for the purposes following, that is to say, from out of such interest money to keep the burying lot owned by me, situate in said Milford, in repair, by painting the iron fence surrounding the same black once in each year, and forthwith, from time to time, as often as way be necessary, to repair said fence, the monument thereby inclosed, and keep said lot and all things appertaining thereto at all times in good repair, order, and condition, and cause to be made or cut on said monument suitable inscriptions relative to my own decease, the decease of my said wife and son, that is, of such of us as shall be there interred, and pay and apply the balance of such interest money towards discharging the salary of their minister for the time being." The plaintiff, a Connecticut corporation, having accepted this legacy and demanded the same, the administratrix has declined to pay the same upon the grounds—*First*, that the legacy was void; *second*, that the plaintiff was not qualified to take; and, *third*, that the claim was barred by the statute of limitations.

It seems to be conceded that at the time of the death of the testator the plaintiff had not the capacity to take; but it appears that subsequently, and before the death of the survivor of the life-tenants, in the year 1885, the statutes of Connecticut were so amended as to enable the plaintiff to take. One of the questions, therefore, presented is whether the vesting of the legacy was by the will postponed until after the death of the survivor of the life-tenants. We think that it was so postponed, and that no interest vested until the death of the survivor of the life-tenants, and that such was the intention of the testator. It is to be observed that in every instance where he speaks of the happening of an event upon which depends a bequest there is no devise until the happening of the event. He does not give a remainder over under any circumstances, but he says "upon the decease of my wife and son I then give," etc. This is the language used when he is speaking about his son leaving lawful issue, and such issue must survive both the son and the wife before any interest is devised. As has been observed, the testator says "upon the decease of my said wife and son, he leaving lawful issue him and her surviving, I then give, devise, and bequeath all my estate to such issue." This same idea is carried out where the testator deals, with the possibility of his son and wife dying, his son not leaving issue both surviving,—“upon the death of my wife and son, he not leaving lawful issue then surviving, I authorize and empower my executors to sell,” etc. And subsequently he says: “Upon

he decease of my said wife and son, he not leaving lawful issue them both surviving, as aforesaid, I give and bequeath my estate, and the proceeds of my said real estate as follows;" showing that it was his intention that the bequest should come into effect upon the happening of the contingency of the death of his wife and son, his son not leaving issue both surviving; and there was no devise before that bringing the character of the bequest within the definition of an executory devise, as it was understood to be before the passage of our Revised Statutes, where contingent remainders and executory devises were blended into one. This is illustrated by the case of *Burrill v. Boardman*, 48 N. Y. 258, where the devise was supported as an executory devise. And the rule is laid down that when it appears from the will that the donee is to come into being in the future, or to become qualified to take upon the happening of some future event, a present bequest will not be presumed, nor unless there is not the least circumstance from which to collect the testator's intention of anything else than an immediate devise to take effect *in present*. In the case at bar, as already stated, the plain intention of the testator was that the power to take should depend upon the happening of a future event, and that there was no intention to make an immediate devise to take effect *in present*. Under these circumstances, then, if at the time of the happening of the event the plaintiff had capacity to take, the gift then went into effect according to the intention of the testator. In this view it is clear that the statute of limitations cannot apply. And it is difficult to see how it could apply in any case, because the right of possession certainly did not arise until the death of the survivor of the life-tenants; and, until there was a right of possession on the part of the legatee, he has no claim upon the executor which he can enforce. Therefore the statute of limitations does not run. The plaintiff seems, therefore, to be entitled to judgment.

BRADY, J., concurs.

DANIELS, J. Before the time arrived for the directions concerning the legacy to take effect, and in the year 1885, a statute of the state of Connecticut was enacted, sustaining legacies for the preservation, care, and maintenance of cemetery lots, and monuments thereon. This statute has since been in force, and it comprehends this case, inasmuch as the testator's widow did not depart this life until the year 1889. And, by a still preceding law, a legacy for the maintenance of the ministry of the gospel has also been sanctioned. In both of its objects, the directions of this testator had been anticipated by the laws of the state of Connecticut, where the society existed for which the legacy was provided. And the plaintiff, for these reasons, and those mentioned by the presiding justice, is entitled to recover it.

DADY v. MAYOR, ETC., OF THE CITY OF NEW YORK.

(*Supreme Court, General Term, First Department. July 18, 1890.*)

MUNICIPAL CORPORATIONS—GRADING CONTRACTS—CERTIFICATE OF COMMISSIONER.

A contract for grading a street provided that, in computing the 800 days within which the work was to be completed, there should be excluded Sundays, holidays, and days when work was suspended by order of the commissioner of public works, and the time during which work was delayed by any act or omission of the city, "all of which shall be determined by the said commissioner of public works, who shall certify to the same in writing." *Held*, that the obtaining of such certificate was not a condition precedent to the maintenance of an action to recover moneys earned under the contract.

SAME—APPORTIONMENT OF OVERTIME.

In an action on such contract, there being no evidence on which to make an apportionment of the overtime between the contractors and the city, it was proper to decline to charge that the jury might apportion the overtime so that plaintiff should recover only for the exact number of days that the work was delayed by

the action of defendant, and in lieu thereof instruct the jury that, if defendant delayed the contractors so as to prevent the completion of the work within the contract time, plaintiff was entitled to a verdict for the full amount, but that if it had caused no such delay defendant was entitled to a verdict.

B. SAME—INTERFERENCE BY CITY.

A contractor undertaking to grade a street within a certain time does not assume the risk of any delay he might suffer through the operation of section 328 of the New York city consolidation act, giving sewerage works a preference over work connected with other street improvements.

Appeal from circuit court, New York county.

Action by Michael J. Dady against the mayor, etc., of the city of New York. Judgment was entered on a verdict for plaintiff, and there was an order denying a motion for a new trial, from which defendant appeals.

Argued before VAN BRUNT, P. J., and BARRETT and BARTLETT, JJ.

John J. Townsend, for appellant. *L. Laflin Kellogg*, for respondent.

BARTLETT, J. The plaintiff brings this action as the representative of the firm of John Cox & Co. to recover a balance of \$2,841 claimed to be due from the city upon a contract for regulating and grading One Hundred and Eighth street from Eighth avenue to Manhattan avenue, and setting curb-stones and flagging sidewalks therein. The defendants admit the execution of the contract, but claim the right to retain out of the sum which the contractors would otherwise be entitled to receive \$2,740 as liquidated damages for delay in completing the work, and \$101 as repair security. The contract provided for the completion of the work in 300 days, and authorized the city to deduct and retain out of the moneys payable thereunder the sum of \$20 a day as liquidated damages for delay beyond the prescribed period. The defendants insist that the contractors are chargeable with 137 days' overtime under this provision in the contract, to which the plaintiff responds that the city itself prevented him from doing the work in 300 days, and hence should not be allowed to hold back any portion of the payment. His proposition that the delay was attributable to the action of the city authorities in carrying on other public works in the neighborhood, which prevented him from fulfilling his contract so far as the element of time is concerned, has been sustained by the finding of the jury. The contract provides that in computing the 300 days Sundays shall be excluded, and holidays on which no work is done, and days when work is suspended by order of the commissioners, and "the time, aggregated in days and parts of days, during which the work required by this contract has been delayed by any act or omission of the parties of the first part, [the defendants,] all of which shall be determined by the said commissioner of public works, who shall certify to the same in writing."

The first point made in behalf of the appellants is that the plaintiff was bound to produce the certificate mentioned in this clause of the contract, or prove that he had applied for it and that his request had been unreasonably refused. But the contract does not make the obtaining of this certificate a condition precedent to the maintenance of a suit to recover moneys earned thereunder. The provision seems designed to enable the defendants, if so disposed, to appeal to the commissioner of public works to decide how much time should be excluded from the 300 days by reason of the city's interference with the due prosecution of the work by the contractors, so that if the contractors claimed too large a deduction on that account this officer should act as an arbiter between the parties previously chosen or consented to by both. Unless the city called him in to compute the delay, however, the contractors were certainly not bound to do so.

Section 328 of the New York city consolidation act prescribes that the construction of work under plans for sewerage shall have precedence over, and shall not be interfered with by, any work connected with other street improvements. The plaintiff attributed much of the delay to the building of a

sewer in Eighth avenue. The second point made in behalf of the city on the present appeal is that the plaintiff must be deemed to have had knowledge of this law, and in undertaking to complete his work in 800 days the contractor assumed the risk of any delay he might suffer through the operation of the statute giving sewerage works a preference over other street improvements. In other words, the position of the appellants appears to be that the city can avail itself of this statute to interfere with a street contractor's work, and then charge him \$20 a day for the delay which it thus occasions. Further discussion of this suggestion seems unnecessary.

Finally, it is contended that the trial court erred in declining to instruct the jury that they might apportion the overtime between the contractors and the city so that the plaintiff should recover only for the exact number of days that the work was delayed by the action of the city authorities. The learned judge was of the opinion that there was no evidence in the case precise enough to make such an apportionment anything but mere guess-work, and charged the jury that if the city by its action so delayed the contractors as to prevent them from finishing the work within the contract time the plaintiff was entitled to a verdict for the full amount, but that if it had caused no such delay the city was entitled to a verdict. I think this instruction was correct. When the city caused any substantial delay in the work, it lost the right to charge the contractors with the stipulated liquidated damages for overtime, and could only insist that the time of completion should be reasonable. In my opinion, the judgment and order appealed from should be affirmed, with costs. All concur.

ROYCE *et al.* v. ADAMS.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

ADMINISTRATOR WITH THE WILL ANNEXED—POWER TO SELL LAND.

Where a will empowers the executors, "or whoever shall execute this my will," to sell testator's real and personal estate, an administrator with the will annexed can give a valid deed of the realty.

Case submitted on agreed statement.

Action by William B. Royce and others, administrators *c. t. a.* of Henry R. Low, to compel defendant, Jennie C. T. Adams, to accept a deed of land formerly belonging to testator, and to pay the purchase price.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

William J. Groo, for plaintiffs. *Alton J. Vail*, for defendant.

DYKMAN, J. The question for determination in this action is whether the administrators with the will annexed, who are also the trustees substituted in the place of the executors of the last will and testament, of Henry R. Low, deceased, can give a good title to the real property of which he died seised. The language is this: "*Second.* I hereby nominate and appoint my father-in-law, John D. Watkins, and my sons, Russell T. and John W. Low, executors, and my wife, Mary C. Low, executrix, of this my last will and testament, hereby empowering my said executors and executrix, or whoever shall execute this my will, to sell, lease, or otherwise convey or dispose of any and all my real and personal estate and effects, and to give good title thereto, without lien, charge, or incumbrance of any kind upon the same, either for cash or on credit, or both." This language annexes the power of sale to the office of executor, and no personal confidence in the discretion of the person named is either expressed or implied. The power of sale is bestowed upon the executors and executrix, or whosoever shall execute the will. Under such circumstances an administrator with the will annexed takes the power of the original executors, and the power or trust may be executed by them. *Bain v. Matteson*, 54 N. Y. 663. The same rule applies to the administra-

tors in their character of substituted trustees. *Farrar v. McCus*, 89 N. Y. 140. Judgment in favor of the plaintiff should therefore be rendered upon the demurrer. All concur.

ATKINSON v. OELSNER.

(*Supreme Court, General Term, First Department. July 18, 1890.*)

NEGLIGENCE—EVIDENCE.

While crossing a street plaintiff was run over by defendant's wagon, and rendered unconscious. He testified that he remembered looking in both directions before attempting to cross. An eye-witness testified that plaintiff was knocked down by the wagon or the horse. Another eye-witness testified that he saw plaintiff fall, and thought that it was the horse or shaft that struck him; that the wagon was being driven "at a pretty nice gait," and that the driver did not stop until he had gone about 125 feet from where the accident occurred. The driver was not called as a witness. *Held*, that the case was properly sent to the jury.

2. APPEAL—HARMLESS ERROR.

Error in refusing to strike out plaintiff's testimony as to a conversation with the doctor at the hospital, in which the latter told him he had a lot of ribs broken, was harmless, in view of competent evidence, wholly uncontradicted, that plaintiff had sustained a fracture of the ribs.

Appeal from circuit court, New York county,
Action by William D. Atkinson against Rudolph Oelsner. Judgment was entered on a verdict for plaintiff, and an order was entered denying a motion for a new trial, and defendant appeals.

Argued before VAN BRUNT, P. J., and BARRETT and BARTLETT, JJ.
Ashbel P. Fitch, for appellant. *Hermon H. Shook*, for respondent.

BARTLETT, J. This case has been submitted without oral argument. The only point urged in behalf of the appellant is that a verdict should have been directed in his favor on the ground that there was no evidence that his servant had been negligent in driving the wagon by which the plaintiff was injured. The proof as to the circumstances of the accident was quite meager, but I think it was sufficient, in the absence of any explanation on the part of the defendant, to warrant the inference of negligence. On the afternoon of September 23, 1886, while the plaintiff was crossing Forsyth street, at the intersection of Delancey street, in the city of New York, he was knocked down by a beer wagon, or by the horse drawing the same, which was driven by one Charles Rint, an employe of the defendant. The plaintiff himself was rendered unconscious, or nearly unconscious, by the injuries which he received, and was not able to give any account of how the accident happened, but he did testify to facts indicating that it was not attributable to any fault on his own part. He was on the right-hand side—the north side—of Delancey street, going towards Broadway, and was carrying a parcel of umbrella sticks on his left shoulder. When he got to Forsyth street he raised the bundle, and looked one way, to see if anything was coming, and then looked the other, to see if anything was coming from that direction. He did not see anything coming, and walked across beyond the car track, after which he has no memory of what occurred until he regained consciousness subsequently to the accident. In the brief for the appellant it is stated that none of the witnesses saw the plaintiff struck by either horse or wagon. I do not so read the evidence. The witness Carpenter testified to seeing the plaintiff first on the curb, with the bundle of canes on his shoulder, and then said: "The next I saw of him was in the center of the street, knocked down by a beer wagon, or by a horse. * * * I did not see the wagon coming up Forsyth street until it struck him. He was knocked down there by a shaft or by the horse." It is true the witness could not tell whether the horse or the shaft struck the person of the plaintiff, but his inability to speak with precision on this point is of no consequence. He is positive that the plaintiff was thrown down by

the vehicle or by the animal that drew it, and that is enough. The other eyewitness of the accident was the police officer, Rooney. He saw Mr. Atkinson fall, and thought it was the horse or shaft that struck him, but could not see or say just where it struck him. The testimony of this policeman indicated that the wagon was being driven at such a rate of speed, and with such a careless outlook on the part as the driver, as to charge him with negligence. He says: "I saw the man fall, and the driver was driving at a pretty nice gait, and I ran after him, hollowing to him to stop, and I suppose I went about 125 feet before he did stop." The plaintiff's testimony shows that there was nothing to obstruct the view, and the fact that the driver went on such a distance after knocking down the plaintiff tends to prove that he was so unobservant as not to know what he had done, or was going so fast that he had difficulty in checking his horse, and it seems not improbable that both these elements of negligence entered into his conduct on this occasion. The witness Carpenter agrees with the officer as to the speed of the beer wagon, saying: "I know he was going pretty well, because after the man was knocked down the officer did not get him [the driver] until probably 100 feet or more beyond where the accident happened." The driver was not called to explain how he came to run over or run down the plaintiff. The defendant himself, however, confirmed the evidence of the plaintiff's witnesses to the effect that the wagon was an open one, so that its construction offered no obstacle to the driver's view of persons upon the cross-walk. Taking all the proof together, it showed, not merely the occurrence of an accident, but that it occurred under circumstances from which negligence on the part of the defendant's agent might legitimately be inferred; and the trial court was therefore right in giving the case to the jury.

There is an exception in the record to the refusal of the court to strike out the plaintiff's testimony as to a conversation with the doctor at the hospital, in which the doctor told him he had a lot of ribs broken. So far as this statement was concerned, the motion ought to have been granted, but the error in denying it was harmless, as there was other competent medical testimony in the case, wholly uncontradicted, to the effect that the plaintiff had sustained a fracture of the ribs. The judgment under review ought to be affirmed. All concur.

HENDERSON v. KOHN *et al.*

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

JUDGMENT—RES ADJUDICATA.

Defendants made advances to plaintiff, taking his notes therefor which were collaterally secured by deeds of his lands. On the failure of defendants their assignee brought an action at law against plaintiff on the notes, which were declared invalid and a judgment with costs was rendered against the assignee. *Held*, that such judgment was not a bar to a subsequent action by plaintiff against defendants, for the recovery of the notes and a reconveyance of his lands.

Appeal from special term, Kings county.

Action by Malcolm Henderson against Julius A. Kohn and others, to compel a reconveyance of land given as collateral for notes. There was judgment for plaintiff, and defendants appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Nathan Bijur, for appellants. *Moore & Moore*, for respondent.

BARNARD, P. J. The present defendants, in October, 1886, were partners under the name of J. O. Kohn & Co. This firm advanced money to the plaintiff, and took as security from him deeds of land in Tennessee as collateral security. These advances were made under agreements in writing in respect to the building of a railroad in Texas on the joint account of plaintiff and defendants. The firm of J. O. Kohn & Co. subsequently failed in busi-

ness, and John A. Kohn, as assignee of the notes, brought an action upon them. In this action upon the notes the present plaintiff, Henderson, set up a breach of the contract under which the notes were given, and claimed that the notes were invalid, and that the lands given as collateral thereto should be deeded back to him, (Henderson.) The action for the recovery of the notes was tried by a jury, and it appeared that the notes were invalid, and the jury rendered a verdict to that effect. The judgment was entered simply in favor of the defendants, with costs. This action is brought to obtain a reconveyance of the land thus taken and held for these void and inoperative notes.

The first action is not a bar to this action. The former action binds the parties, and the judgment states that the right to obtain the reconveyance of the land was not within the issues which were tried in the action. The evidence offered to support the counter-claim was excluded because it could not be maintained in the action. The former action is only conclusive as to those matters which were or might have been litigated between the parties. *Goebel v. Iffla*, 111 N. Y. 170, 18 N. E. Rep. 649. The judgment, therefore, should be affirmed, with costs. All concur.

MCCARTHEY *et al.* v. WRIGHT *et al.*

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

COSTS—LIABILITY OF ASSIGNEE.

Code Civil Proc. N. Y. § 8247, provides that where, after the commencement of an action, the cause of action becomes by transfer the property of a person not a party to the action, the transferee or other person so interested is liable for costs to the same extent as if he was the plaintiff, and where costs are awarded against plaintiff the court may order the person so liable to pay them. Plaintiffs brought replevin for goods sold by them and transferred to defendants on the ground that the sale was induced by fraud, and recovered possession of the same. After the commencement of the action, defendants made a general assignment for the benefit of creditors, but the assignee was never made a party to the action, and refused to have anything to do with it, because of the suspicious circumstances connected with the transfer of the property to defendants. Held that judgments having been rendered for plaintiffs for the retention of the goods, and for costs, the assignee could not be made liable for such costs under the above section.

Appeal from special term, Herkimer county.

Action by David K. McCarthey and others against Isaac N. Wright and others. An order was made requiring Isaac B. Richmond, the assignee of the defendants, to pay costs out of the assigned funds in his hands, and he appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Hadley Jones, for appellant. *L. E. Fuller*, for respondents.

MARTIN, J. This was an action of replevin. It was commenced January 22, 1886. The property which was the subject of this litigation was sold by the plaintiffs to the firm of Johns Bros., and by that firm transferred to the defendants. The sale and transfer of the goods in question was sought to be avoided, and the goods recovered, upon the grounds: (1) That the sale by the plaintiffs to Johns Bros. was induced by fraud; and (2) that the transfer to the defendants was also fraudulent and void as to the plaintiffs, and hence that no title passed to the defendants. The property was taken by an officer under the process issued in this action, delivered to the plaintiffs, and retained by them. The defendants appeared and answered. About two months after the commencement of this action the defendants made a general assignment for the benefit of their creditors to the appellant. The assignee was never made a party to this action. None of the goods claimed by the plaintiffs ever came to his possession, or any of the proceeds thereof. Indeed, he never claimed them, nor that he had any interest in them. When spoken to

about the litigation which had arisen in relation to such property he declined to have anything to do with it, or with the property involved therein, because of the suspicious facts connected with such transfer, thus practically admitting the plaintiff's alleged title. The action was afterwards tried, and the defendants had judgment. An appeal was taken, the judgment was reversed, and a new trial ordered. The action was subsequently noticed for trial, and when reached a motion was made by the plaintiffs to substitute the appellant as a party defendant, which resulted in an order that the appellant should be made a party, unless the defendants should within 10 days serve upon the plaintiffs an offer of judgment for the retention of the goods replevied, with costs to the date of the offer. In pursuance of that order an offer was made and accepted, and judgment was entered thereon in favor of the plaintiffs for the property in question, and for \$698.23 costs, against the defendants. The plaintiffs, having failed to collect the costs from the defendants, moved at a special term for an order requiring the appellant to pay them from the moneys in his hands belonging to such trust-estate, which was granted, with \$10 costs. From that order the assignee appeals. The respondents, and the court at special term, relied upon section 3247 of the Code of Civil Procedure as a basis for this order. The provisions of that section, so far as possibly applicable to this case, are as follows: "Where an action is brought in the name of another by a transferee of the cause of action, or by any other person who is beneficially interested therein, or where, after the commencement of an action, the cause of action becomes, by transfer or otherwise, the property of a person not a party to the action, the transferee, or other person so interested, is liable for costs in the like cases, and to the same extent, as if he was the plaintiff; and where costs are awarded against the plaintiff, the court may by order direct the person so liable to pay them."

It is quite obvious that the facts of this case do not bring it within the letter of the statute quoted. Here no action was brought by the appellant in the name of another, either as transferee or as one beneficially interested therein, nor was any cause of action transferred to him after the commencement of the action. This section is unlike section 321 of the old Code. The respondents, however, claim that the rule in an action of replevin is different, and that in such an action both parties are to be regarded as plaintiffs. There are some authorities that would seem to justify that claim. It was so held in *Mill Co. v. Muzlow*, 4 N. Y. Supp. 197, but upon appeal to the court of appeals that case was reversed, (115 N. Y. 170, 21 N. E. Rep. 1048,) and RUGER, C. J., in delivering the opinion of the court, said: "We are unable to concur in the course of reasoning adopted by the court below, by which, in analogy to the rules pertaining to the former action of replevin, a claim of title by the defendant must be considered the statement of a cause of action in separate counts. * * * The action of replevin was abolished by the Code of Procedure, and its peculiar and distinctive features suspended by the rules of practice therein provided for the conduct of actions of claim and delivery." We do not think the respondents' claim that the defendants are to be regarded as though plaintiffs in this action, or that the appellant is to be treated as the transferee of a cause of action after the commencement of the action, can be upheld. Nor do we think that the appellant was a person beneficially interested in any cause of action involved in this case. No title to the goods in question ever passed to him. It rested in the plaintiffs after the disaffirmance of their contract with Johns Bros., and the reclamation of the property. It so rested in them when the assignment was made. The appellant did not claim any title to or interest in it. He refused from the outset to make any such claim because the transaction between his assignors and Johns Bros. was apparently fraudulent. He took no part in the defense of the action, or in any way intermeddled with it. We are of the opinion that the facts as established by the papers read on this motion were insufficient to

justify the order provided for by section 3247, and that the order appealed from cannot be sustained. In *Taylor v. Bolmer*, 2 Denio, 193, where the plaintiff, while a suit was pending, made a general assignment for the benefit of creditors, and the cause was afterwards tried, and judgment had by the defendant, it was held that the assignees, not having intermeddled with the prosecution, were not liable. BRONSON, C. J., who delivered the opinion of the court in that case, said: "The rule is that when an assignee, or person beneficially interested in the demand, brings or carries on a suit in the name of another he must pay the defendant's costs if the suit fail. Here the assignees neither brought the suit, nor have they been instrumental in carrying it on. They have done no act whatever by way of prosecuting the claim. The defendant relies on a *dictum* of mine in *Miller v. Franklin*, 20 Wend. 630, to the effect that it is enough that an assignee *pendente lite* knows of the suit, and allows it to proceed for his benefit. That was going too far. None of the cases charge the assignee unless he has employed the attorney, contributed money, or in some other way been instrumental in carrying on the litigation." In *Heather v. Neil*, 14 Wkly. Dig. 46, it was held that the mere transfer of a judgment or right of action in course of prosecution to an assignee in bankruptcy does not render him chargeable with the costs which the defendant may afterwards recover. His liability is confined to such costs as he may have caused by his own proceedings in the case. Where the assignee simply defends an appeal from a judgment formerly recovered by the bankrupt, on which appeal the judgment is reversed, and takes no further steps in the matter, he is not liable for costs on dismissal of the complaint on a new trial.

A person to whom a judgment is to be paid, if a recovery is had, is not liable for costs where the suit is prosecuted without his knowledge or consent. Such a person is not the party beneficially interested in the recovery within the provisions of section 3247. *Elliot v. Lewicky*, 51 N. Y. Super. Ct. 51. In *McHarg v. Donnelly*, 27 Barb. 100, it was held that a creditor is not liable for costs where a receiver sues without his request or direction, although the recovery inures to his benefit. The same doctrine was held in *Cutter v. Reilly*, 5 Rob. (N. Y.) 637, and *Wheeler v. Wright*, 23 How. Pr. 228. We think the cases cited sustain our conclusion that upon the facts disclosed the appellant ought not to have been charged with the costs in this action, and that the order should be reversed. Order reversed, with \$10 costs and disbursements. All concur.

PAGE v. MAYOR, ETC., OF THE CITY OF NEW YORK *et al.*

(Supreme Court, General Term, First Department. June 6, 1890.)

1. EVIDENCE—EXPERT TESTIMONY.

A surgeon testifying as an expert for plaintiff in an action for personal injuries, having stated that he had heard "most" of the plaintiff's testimony, was asked the following question: "Take such a fall as he describes here, resulting from a collision of two cars, and the symptoms following that fall, he having theretofore been a sound and healthy man, can you state with reasonable certainty that the consequences that have followed are natural and usual?" Held, that such question should not be allowed, as it permitted the witness to state his conclusions from the testimony, instead of confining his opinion to a supposed state of facts.

2. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

Newly-discovered evidence to the effect that prior to the injury complained of plaintiff had been injured in a railroad accident is not available as ground for a new trial, though plaintiff's counsel stated in the course of the trial that plaintiff had already stated that he was perfectly sound and healthy before his fall and injury, and that he had received none other, as such statement of counsel will not be deemed a stipulation in the absence of anything to show that it was intended to be such.

Appeal from circuit court, New York county.

Action by Joshua F. Page against the mayor, etc., of the city of New York and the city of Brooklyn, to recover for personal injuries alleged to have been

sustained through defendants' negligence. There was a verdict for plaintiff for \$15,000. From the judgment entered thereon defendants appeal. They also appeal from an order denying their motion for a new trial on the ground of newly-discovered evidence to the effect that prior to the injuries complained of plaintiff had been injured in a railroad accident.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

W. H. Clark, (Thos. P. Wickes, of counsel,) for appellants. Isaac S. Catlin, for respondent.

BRADY, J. This action was brought to recover damages sustained by personal injuries resulting from the defendants' carelessness. On the trial the plaintiff called Dr. Olcott as an expert, by whom he had been examined in reference to his condition subsequent to the injuries received. The witness stated several examinations, and the condition in which he found the plaintiff on each of such occasions. He was then asked whether he received a statement from him as to how he fell in the car when the injury was received, to which he answered affirmatively. The witness was then asked this question: "Did you hear his testimony upon the witness stand to-day?" to which he responded by saying: "Most of it. Yes, sir." He was then asked the following question: "Question. Take such a fall as he describes here, resulting from a collision of two cars, and the symptoms following that fall, he having theretofore been a sound and healthy man, can you state with reasonable certainty that the consequences that have followed are natural and usual?" It will have been observed that the question is neither hypothetical in any respect nor founded upon all that the plaintiff said, but "most of it," which leaves to conjecture how much of it the witness considered to be "most of it," and whether if he had heard the whole of it there would have been any qualification of his answer. It was however duly objected to, but was allowed after exception. The answer was predicate of the plaintiff's statement only so far as the witness had heard it, but was not in form such as allowed a party to attain the result, in form at least, by adopting a hypothetical question, and this is the extent only to which such an inquiry is allowed. If it were otherwise, the witness would be, to a certain extent at least, as he was here, allowed to usurp the functions of the jury, who alone are to trace effects to the cause as shown by competent proof; for example, a collision of cars is proved, and a person in one of them who before the collision is bodily sound is found with a broken limb or serious wounds. The injuries are then *prima facie* the effect of the collision, but the jury are to determine that question on the evidence, and hence the examination of the medical attendant is always as to what was the condition of the patient after the accident. He is not called upon to state whether that condition is the consequence natural and usual of the collision such as described. He may state facts and circumstances, but not conclusions, especially when founded upon evidence heard only in part; but may, if an expert, be asked for his opinion upon a supposed state of facts presented in a question. The question itself, here considered as such, is radically defective for the reason that it assumes that the consequences stated flowed from the collision, when in legal effect it was wholly immaterial whether the consequences were natural and usual if they were present and existed, and whether they were or not was a question for the jury. The cases relating to this line of examination carefully preserve the rights of the party to be affected by it from any infraction of the province of the jury as indicated by the rule, which is positive and unyielding, that questions kindred to the one discussed must be put hypothetically, or its equivalent, and thus leave the fact stated in it to be found by the jury before the evidence elicited can be applied. See *Uransky v. Railroad Co.*, 44 Hun, 119; *Gregory v. Railway Co.*, 8 N. Y. Supp. 525; *Turner v. City of Newburgh*, 109 N. Y. 309, 16 N. E. Rep. 344. For these reasons the judgment appealed from must be reversed, and a new

trial ordered, with costs to abide the event. Ordered accordingly. All concur.

APPEAL FROM ORDER DENYING MOTION FOR NEW TRIAL.

VAN BRUNT, P. J. An examination of the record in this case does not lead us to any different result from that which was arrived at by the special term. The newly-discovered evidence, because of which a new trial is sought, is not of that character which enables the court to say that its introduction would probably lead to a different result, and the only circumstance disclosed by the record, which has caused any hesitation in coming to the conclusion that the order should be affirmed, is the statement contained in the record by the plaintiff's counsel during the progress of the trial that the plaintiff had already stated that he was perfectly sound and healthy before his fall and injury, and that he had received none other. If this was to be deemed as a stipulation upon the part of counsel of a fact, then, clearly, it was not entirely true. But it does not appear that it was intended to be of that character, but a mere statement on the part of counsel of what the plaintiff had previously testified to, and which was not in fact a correct statement of any testimony which he had given. We do not think that although this statement may have been incorrect a new trial should, necessarily, be granted for that reason. The newly-discovered evidence does not seem to be of that gravity which would justify the court in vacating the judgment which has already been obtained. It may possibly have some effect upon a new trial; but there is not that certainty as to its effect which is necessary to be seen in order to give the defendants the right to a new trial of the issues involved. The order should be affirmed, with \$10 costs and disbursements. All concur.

STONO v. WEILLER.

(Supreme Court, General Term, First Department. June 26, 1890.)

1. RIGHT TO TRIAL BY JURY—EQUITABLE RELIEF.

An action wherein the complaint seeks to have set aside, on the ground of fraud, a release to defendant of all liability for causing plaintiff's arrest, and to recover damages for malicious prosecution, is for equitable relief, and is not triable by jury.

2. DURESS—PER MINAS—EVIDENCE.

Evidence that while plaintiff, in an action for malicious prosecution, was under arrest for embezzling money of defendant, the latter made threats that unless plaintiff paid him a certain amount, and gave him a general release from liability for causing the arrest, he would send him (defendant) to the state-prison, and that plaintiff executed the release, will not sustain an action to have the release set aside as having been obtained by duress *per minas*, unless followed by proof that the threats were the inducing cause of the execution of the release.

Appeal from special term, New York county.

Action by Louis Stono against Herman Weiller. Judgment for defendant, and plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

A. B. Moore, for appellant. S. B. Hamburger, (S. F. Higgins, of counsel,) for respondent.

VAN BRUNT, P. J. This action was brought to set aside a general release executed by the defendant, and to recover damages for malicious prosecution. Upon the case coming up for trial before a judge and jury, the court refused to try the case with a jury, and sent the case to the special term for trial, upon the ground that equitable relief was asked for; to which the plaintiff excepted. The case subsequently came up for trial at special term before a judge without a jury, and upon the evidence offered upon the part of the plaintiff the court dismissed the complaint; which ruling was excepted to, and these exceptions are the ones which are brought up by this appeal.

It is urged that the plaintiff had a right to a trial of the question of the fraud in the release by a jury, and that the practice of allowing questions of this character to be heard by a jury is as old as civilization. We think, however, that, under any condition of the pleadings, the allowing of such questions to be tried by a jury as matter of right is quite a modern innovation. It is undoubtedly true that, if the pleader had drawn his complaint in proper form, he might have had this question of duress in respect to the release tried by a jury; but he has chosen in his complaint to assail the release, and ask that it be adjudged fraudulent and void, and only a court of equity can grant such relief. If he had sued for the damages for malicious prosecution, ignoring the release altogether, and the defendant had set it up as a defense in his answer, he might have attacked the release before a jury. But having asked to have it set aside in his complaint, the action was properly triable before the court without a jury. In fact, until the innovations introduced by the Code, he could not have maintained his action for malicious prosecution at all without first bringing his action in equity to set aside the release.

It appears from the evidence that the plaintiff had been arrested for embezzlement, and that while under arrest the defendant had made threats that unless the plaintiff paid him \$50, and his attorney \$25, and gave a general release, he would send him to the state-prison; but there is no evidence in the case upon the part of the plaintiff that he executed this release because of such threats, or that they constrained the will of the plaintiff, and induced the execution of the release. It may be that the plaintiff intended that this should be inferred, but no such evidence appears in the case presented upon this appeal. It appears to us that the absence of this class of evidence is fatal to the plaintiff's claim. Had it been present, an entirely different case would have been presented. In the case of *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. Rep. 76, and *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. Rep. 741, such threats, where a party is under arrest, will support the claim that a promise was obtained by duress *per minas*. There being no evidence, however, that these threats were the inducing cause of the execution of the release, we think the judgment appealed from should be affirmed, with costs. All concur.

PEOPLE *ex rel.* FREY v. BELL, Police Commissioner.

(Supreme Court, General Term, Second Department. July 18, 1890.)

MUNICIPAL CORPORATIONS—REMOVAL OF POLICEMAN.

The dismissal of a patrolman from the police force upon a charge of willfully maltreating and using unnecessary violence towards a prisoner, in violation of rule 183 of the police department, will not be disturbed where an examination of the testimony introduced on the trial shows that relator while making an arrest several times struck the prisoner (who was intoxicated, and who neither resisted arrest nor assaulted relator) on the head with his night-stick.

Certiorari to review the action of James D. Bell, police commissioner of the city of Brooklyn, in dismissing relator, Frederick M. Frey, from the police force of said city.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.
J. A. Wernberg, for relator. F. A. McCloskey, for respondent.

DYKMAN, J. This is a writ of *certiorari* to review the proceedings of the defendant as commissioner of police of the city of Brooklyn in the trial and dismissal of the relator, who was a patrolman of the police department of the city of Brooklyn. The specification of the charge upon which the relator was tried was "that said patrolman Frey, on September 2, 1888, at 1 A. M., willfully maltreated his prisoner, John McLaren, using unnecessary violence towards the same by striking him repeatedly over the head with a night-stick, inflicting severe scalp wounds, while said McLaren did neither resist arrest

nor assault said policeman." The charge was for a violation of rule 133, which is this: "Any member of the force who shall willfully maltreat, or use unnecessary violence towards a prisoner or citizen, on complaint being made, and the fact established by competent testimony, after a due trial had, shall be immediately dismissed from office, or otherwise punished." The relator was tried before the commissioner in the usual manner, and found guilty, and sentenced to dismissal from the police force. An examination of the testimony introduced upon the trial discloses a full justification of the condemnation of the relator. His treatment of the intoxicated man whom he arrested was entirely unjustifiable. He maltreated him and used unnecessary violence towards him, and he therefore fell under the condemnation of rule 133, and his punishment was justified by that rule. The proceeding should therefore be confirmed. All concur.

McLOUGHLIN *et al.* v. MILLER.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

COVENANTS AGAINST INCUMBRANCES—BREACH OF—ASSESSMENTS.

At the time of the execution and delivery of a deed containing a covenant against incumbrances the legislature had passed an act authorizing the improvement of the avenue fronting the property conveyed, and requiring the property along the route to pay \$175,000 of the cost, one-twentieth part of which was to be levied and collected in each year for 26 years. *Held*, that the installments levied after the deed was delivered were not incumbrances within the meaning of the covenant.

Appeal from special term, Kings county.

Action by William R. McLoughlin and another, as executors, etc., of Robert McLoughlin, against Ira O. Miller, to recover money paid by plaintiffs for assessments on property conveyed by defendant's deed to their testator, with full covenants and warranty. There was judgment for defendant, and plaintiffs appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Tunis G. Bergen, for appellants. *Ira O. Miller* and *Alfred E. Mudge*, for respondent.

BARNARD, P. J. Ira O. Miller and wife, on the 1st of July, 1872, conveyed a piece of property in the city of Brooklyn to Robert McLoughlin. The deed contained a covenant of warranty against all incumbrances except a mortgage of \$1,900. The legislature had, before this, authorized the improvement of Fourth avenue. The property along the route was required to pay \$150,000 of the cost of the improvement, one-twentieth part of which was to be levied and collected in each year for 20 years. \$175,000 of the cost of the improvement was to be collected in 1870 from the property in the first 12 wards of the city. All taxes and assessments imposed upon the lots in question, before the delivery of the deed, were paid by defendant. The question therefore is, were the installments of the one-twentieth part of \$150,000, payable each year, an incumbrance? We think the successive installments, although fixed by the legislature in advance, a part of the tax for the years in which they were collectible, and that they were not liens on the land from the beginning, within the covenant against incumbrances. The tax was fixed so far that a certain sum was to be raised each year, but every year brings its burdens. There are various sums which are required to be annually collected, but the land is not incumbered thereby, until the tax levy is actually made, and such taxes are a lien on the land from the date of the confirmation of the yearly tax levy only. The evidence does not show an assessment for the entire number of yearly payments in 1870. A fair inference from the fact proven is that the first payment only was made a lien on the land. In order to arrive at the amount of the first payment all the cost of the work did appear, but it

was not and could not be collected at once. There was therefore no cause of action proven. *Barlow v. Bank*, 63 N. Y. 399. The judgment must therefore be affirmed, with costs. All concur.

ROGERS v. McGUIRE et al.

(Supreme Court, General Term, Second Department. July 13, 1890.)

MECHANICS' LIENS—PAYMENTS.

An action to foreclose a mechanic's lien on a house and lot involved the issue whether plaintiff was entitled to the second payment of the contract price which was due "when cornice is set, siding on, and floors laid." It appeared that a small portion of the siding which could better be done at a later stage of the work, had been omitted, and that the owner made no objection to the omission, but promised payment. *Held*, that a finding that the payment was due would not be disturbed.

Appeal from special term, Westchester county.

Action to foreclose a mechanic's lien filed by George A. Rogers against Hannah McGuire, the owner of the premises, William McGuire, her husband, and others. From the judgment entered therein, defendant Hannah McGuire appeals.

Argued before BARNARD, P. J., and PRATT, J.

Norman A. Lawlor, for appellant. *L. C. & W. P. Platt*, for respondent.

BARNARD, P. J. The principal question in this case was one of fact. The plaintiff is a builder, and the defendant McGuire owned a lot of land upon which the plaintiff agreed to erect a building for an agreed price. The first payment, of \$1,500, was paid. The second payment, of \$2,000, was due "when cornice is set, siding on, and floors laid." Proof was given tending to show that the payment was due and payable; that the work called for was done, and the certificate of the architect delivered; that a portion of the siding was not on, but this could be better done at a later stage of the work; and that a full performance in this respect was waived. Notwithstanding this, the owner refused to pay the installment, and the contractors stopped work. The architect testified that the siding omitted was small spaces between the stone front, and that the stone front was to be put up first. This was included in the third payment. The owner at first made no objection to the omission, but promised payment of the second installment. The trial court could not therefore find otherwise than that the second payment was due and payable. The plaintiff proved extra work beyond this to support the finding of the court that there was due at the time of the breach of the contract the sum of \$2,500, with interest thereon from 27th April, 1887. Whether the building was larger than the specification called for, and what it would cost to furnish it, and whether the work was well done or not upon it, were questions which became subjects of contradictory proof. The proof supports the finding upon the questions so far as the same are involved in the case. The judgment should therefore be affirmed, with costs.

LAWRENCEVILLE CEMENT CO. v. PARKER, (four cases.)

(City Court of New York, General Term. June 3, 1890.)

CORPORATIONS—DISCOUNTING NOTES—EVIDENCE—PRESUMPTION.

The president of a corporation not engaged in banking discounted a note payable to his own order, and paid for it with the check of the corporation, to which he afterwards assigned the note. *Held* that, discounting by the corporation being forbidden by statute, it will be presumed that it was not a corporate act, and that the use of its money was a wrongful appropriation thereof, in satisfaction of which it received the note, and, the president being dead, the court is not bound to credit the testimony of the defendant giving the transaction another color in order to defeat a just demand.

Appeal from trial term.

Argued before MCGOWN and FITZSIMONS, JJ.

B. Dorar Killian and *M. H. Cardoso*, for appellants. *Arnoux, Ritch & Woodford*, for respondents.

PER CURIAM. This is an appeal from judgments rendered at trial term, in four actions, the defenses being similar. The first defense is usury, but as no corrupt agreement was proved, and the difference between the interest exacted and the legal rate is so slight that the error may well be attributed to mistake in calculation, rather than to intention or to criminal misconduct, the real defense is that the plaintiff is not a banking corporation, and discounted the notes in suit. The answer does not refer to the statute, but it is evidently intended that, by force of the statute, the discount was invalid.

The difficulty we encounter in respect to this defense is twofold: *First*, the defendant was the only witness, and, being directly interested in the result, the trial judge was not bound to believe him; *next*, there is no legal evidence showing a discount of the notes by the plaintiff. The transaction was had by the defendant on the one hand, and David Scott, the payee of the note, on the other. True, Scott was the president of the corporation, and gave the defendant its checks, but they were signed by him alone, and there is no direct evidence that the corporation authorized, sanctioned, or approved of his act, and, the act being an illegal one, the presumption would naturally be against such authority or approval. Scott's knowledge is not imputable to the plaintiff. See *Bank v. Savery*, 82 N. Y. 291. The conduct of Scott, the payee, admits of two interpretations: one, that he did the act for the corporation under what he supposed to be his authority as such; *next*, that it was not a corporate act, but an individual act of his own, (the notes not being payable to the corporation, but to his own individual order, and bearing his individual indorsements on which he was individually liable,) and that he, without authority from the corporation, misappropriated its moneys by giving them to the defendant, in which case the corporation might have sued him for the misappropriation, or might have traced the funds so misappropriated by the trustee into the hands of the defendant, or into any security in which they could be identified. Such is the fact as found by the trial judge, and, as the transaction admits of two interpretations, it was for the trial court to determine which was correct. The trial judge also finds that Scott subsequently made reparation for the wrong by delivering the notes over to the plaintiff. The facts admit of this construction. The checks were also payable to Scott's order, so that the documentary proofs show an individual transaction between Scott and the defendant. It was neither alleged nor proved that the transaction was to evade the statute, or that the plaintiff was privy to any such intent. The law favors an innocent rather than a wrongful construction of the acts of parties. It does not favor forfeitures, and equity often relieves from them. The defendant seeks by technical pleas to defeat the collection of honest obligations to pay, and is entitled to no especial favor from the court in aid of his design. The defense is devoid of merit, and has no equity to commend it. As we remarked before, the defendant was the only witness, and, being interested, the trial judge was not bound to accept his interpretation of the transaction through which he sought to avoid the payment of money he ought to have restored, and that promptly at maturity. This is particularly so in view of the fact that Scott, the payee, is dead. The court of appeals has shown a disposition to relieve from the penalties of the statute where it can consistently be done. See *Bank v. Krug*, 102 N. Y. at page 335, 6 N. E. Rep. 682. The evidence in the present instance fails to make a case sufficiently clear to warrant us in holding that the statute is applicable, and that the notes are void. Upon the entire record we find that no injustice was done. The result is sufficiently sustained by the proofs, and the judgments must be affirmed, with costs.

WILSEY v. FRANKLIN et al.*(Supreme Court, General Term, Second Department. July 18, 1890.)***PARENT AND CHILD—COMPENSATION FOR SERVICES.**

Upon her marriage plaintiff ceased to live with her parents, and became estranged from her mother. After several years the mother, who was then 80 years old, alone and helpless, sent for plaintiff to come and take care of her, and plaintiff did so for 50 weeks, and then left her. *Held*, that a promise to pay for the services would be inferred.

Appeal from judgment entered on the report of a referee.

A claim by Anne C. Wilsey against the estate of her mother, Mary Mixon, for services rendered deceased in her life-time. The matter was referred, and the referee decided that plaintiff was entitled to judgment for \$705.89. The report having been confirmed, the executors appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Henderson Benedict, for appellants. *H. C. M. Ingraham*, for respondent.

BARNARD, P. J. The claimant is a daughter of deceased, and her claim is for personal services rendered to her mother. The question is whether the parties lived together, and the services were rendered by one member of the family to another, or whether the services were to be paid for. Deceased was a widow, over 80 years of age, and quite helpless. The claimant had left her father's family upon her marriage in 1872. Her husband died in 1879, and after his death she lived in different places, and in March, 1881, she was living in Boston. Upon the death of the husband of deceased she was left alone, and she requested her son, Stephen Mixon, to request her daughter, the claimant, to come on from Boston and take care of her. Upon this request she came on from Boston, and took care of her mother for 50 weeks, when she left the family of deceased, and never afterwards lived with her mother. The referee, under the evidence, was justified in finding that the services were to be paid for. The mother was helpless, and, from her age, would probably continue to be so. Her husband was dead, and she was left alone. She was exacting, and hard to please. "It was a thankless task to serve her," says one of her children. She had quarreled with the claimant upon her marriage, and this estrangement had continued until after her husband's death. Under this state of facts she directs her son to write to the plaintiff, and convey to her the request of her mother that she would come on and aid in the house-keeping. The case is not one where a child continues with her mother after becoming of age. The claimant had for years ceased to be a member of the family, and she only went back to live upon her mother's solicitation, and then to do the work of nurse, housekeeper, and servant. The plaintiff went upon the understanding of the mother "that she could come there with her, and stay for a while." The employment was fully proven, and the usual inference of a promise to pay should apply to it. Neither party could have expected such services as were rendered by the claimant to her mother would be gratuitously rendered. Assuming a right of recovery, the amount of the claim is not complained of. The judgment should therefore be affirmed, with costs.

HASKINS v. STEWART et al.*(Supreme Court, General Term, Second Department. July 18, 1890.)***MASTER AND SERVANT—ORDINARY RISKS OF EMPLOYMENT—SEWERS.**

A laborer was killed by the caving in of the sides of a sewer while he was at work thereon for the contractors. The cause of the accident was the bursting of a city water-pipe which was defective at the place of fracture, but the defect was not known to any one before the accident. The method of bracing the sides of the

sewer was that generally used under similar conditions, and had been approved by the city engineer. *Held*, that the contractors were not liable, the accident not being one which they were bound to anticipate and guard against.

Appeal from Westchester county court.

Action by Mary Haskins, as administrator of her husband, Reuben Haskins, against James Stewart and George Stewart, to recover damages for the death of intestate alleged to have been caused by the negligence of defendants. There was a verdict for plaintiff for \$5,000. From the judgment entered thereon defendants appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Joseph F. Daly, for appellants. *Martin J. Keogh*, for respondent.

BARNARD, P. J. The case does not show that the defendants were guilty of actionable negligence. They were contractors for the building of a sewer in Yonkers. The plaintiff's intestate was an employe of the defendants in the construction of the work. The sewer excavation at the place of the accident which caused the intestate's death was a little short of 16 feet in depth, and 5 feet wide at the top. The excavation was protected by planks placed upright against the side. There were placed cross-pieces 4 feet apart between the planks. The upright planks were placed at a distance of 8 feet from each other. Along the top of the cut there were placed from 8 to 6 planks horizontally inside the uprights. Under this method of protection over a half mile of the sewer had been safely constructed. When within 35 feet of the end, a water-pipe which had been placed in the street parallel with the sewer, and within 2 feet or thereabout from the edge of the trench, burst. There was under the public water-main a small private main placed there before the public one was put in. The accident was caused by one of these pipes suddenly bursting and filling the trench with water, and thereby causing a caving in of the banks. It was a question as to which of these pipes caused the accident. The defendants had laid the public water-pipe, but the case does not show that they knew of the existence of the smaller one. The public pipe could be laid without disclosing the smaller one under it. The bursting of either pipe was not one of the calamities which the contractor was bound to anticipate and guard against. There was nothing in the fact that a water-pipe was within two feet of the sewer which called for an additional safeguard against caving in. The bracing used was similar to that commonly used in constructing sewers with conditions similar to this. It was approved by the city engineer, and it did not give way until an unforeseen and unexpected bursting of the water-pipe, in no way connected with the plaintiff's employment. This pipe was along the whole excavation, and sometimes as near as it was when it broke and filled the trench with water. It appeared that the city water-pipe, at the place of fracture, was defective. This fact was unknown to any one before the accident. The case seems therefore to be controlled by *Burke v. Witherbee*, 98 N. Y. 562. The protection was safe, judging by a safe use until the accident happened, and then the cause was outside of the danger which could be reasonably expected by the most careful of masters. It is not necessary, therefore, to examine the question whether the accident was within the risks of the employment, or the exception taken on the trial. We think the action failed upon the question of the negligence of the master. There should, therefore, be a new trial granted, with costs to abide event. All concur.

BARKER v. TOWN OF OSWEGATCHIE *et al.*

(*Supreme Court, Special Term, St. Lawrence County. January 7, 1898.*)

1. COUNTY BOARD—ISSUE OF TOWN BONDS—VALIDITY.

A resolution of the county board authorizing a town to erect a bridge, and issue its bonds in payment therefor, is rendered entirely void by the board's failure to

require (as provided by Laws N. Y. 1875, c. 482, § 8) adequate security, in addition to that given for the faithful performance of their ordinary duties, from the officers charged with the duty of issuing the bonds and disbursing the proceeds.

2. TOWN BONDS—FORM.

A resolution of the county board authorizing a town to issue its bonds in the usual form of town bonds, with interest coupons payable to bearer at the rate of 4 per cent. per annum, the bonds and interest to be paid at a designated bank and at specified times, substantially complies with Laws N. Y. 1875, c. 482, § 4, which requires the board, in its resolution authorizing the issuance of bonds, to prescribe their form, and to fix the time and place of payment and the rate of interest.

3. BRIDGES—CONSTRUCTION BY TOWN—APPOINTMENT OF COMMISSIONERS BY COUNTY BOARD.

Under Laws N. Y. 1875, c. 482, as amended by Laws 1876, c. 357, and Laws 1885, c. 451, which provides that county boards may authorize towns to build bridges and issue their bonds in payment therefor, the county board may, in its resolution authorizing the building of a bridge, appoint commissioners to supervise its construction, though such power of appointment is not expressly conferred by the act.

Action by Mathew Barker to enjoin the town of Oswegatchie, Daniel Magone, William J. Averell, Fenton Devoy, Alexander Mayne, Henry Lovejoy, and Samuel H. Palmer, as supervisors of said town of Oswegatchie, the board of supervisors of St. Lawrence county, and the board of town auditors of said town of Oswegatchie, from constructing a bridge at the Eel Weir rapids in said town. A temporary injunction was granted, and defendants now move to dissolve it.

Wales, Hand & Fish and *George R. Malby*, for plaintiff. *John A. Vance*, for defendant the board of supervisors. *Daniel Magone*, for the other defendants.

TAPPAN, J. This is an action brought by the plaintiff, as a tax-payer of the town of Oswegatchie, in St. Lawrence county, who has been assessed, and has paid taxes within a year from the time of the commencement of the action, in which taxes have been assessed upon an amount exceeding \$1,000 against the board of supervisors of said county, said town of Oswegatchie, the supervisor of said town, the board of town auditors of said town, and Daniel Magone and four other persons, who are named in the bill, passed by the said supervisors, as commissioners to construct a bridge at the Eel Weir rapids across the Oswegatchie river, in said town, to enjoin the defendants from taking any further action under said bill, and for a temporary injunction pending the action, and for further relief. The complaint is framed under chapter 678 of the Laws of 1887, and section 1925 of the Code of Civil Procedure. On December 18, 1889, a temporary injunction was granted. This motion, heard upon an order to show cause, is made upon the complaint and affidavit upon which the injunction was granted, and affidavits upon the part of defendants, who move to vacate said temporary injunction. Upon the petition of more than 12 electors of said town presented to the town-clerk, the latter, on the 25th day of October, 1889, gave notice of a special town-meeting to be held on Saturday, the 2d day of November, 1889; the polls to be opened at 1 o'clock, and to close at 4 P. M. that day. The notice stated that the meeting would be held for the purpose of raising and appropriating the necessary money to maintain the bridge across the Oswegatchie river at the Eel Weir rapids in said town, and that a resolution would be offered in said special town-meeting to raise a sum, not exceeding the sum of \$10,000, for that purpose. Such special town-meeting was duly held at the time and place designated in the notice, and the electors voted by ballot to raise and appropriate \$10,000, the ballots being 152 for, and 3 against, the resolution. At about the time of the opening of the meeting a resolution in writing was offered. It was not acted upon until near the close of the voting, when it was passed by a *viva voce* vote, and was as follows: "Resolved, that we hereby request the supervisor of the town of Oswegatchie, and the several ward supervisors of the city of Ogdensburg, to secure the passage of an act at the next

session of the board of supervisors of St. Lawrence county authorizing the supervisor to borrow money to build a new bridge across the Oswegatchie river, at the Eel Weir rapids, on the site of the present bridge, and appointing William J. Averell, Daniel Magone, of Ogdensburg, Fenton Devoy, Henry Lovejoy, and Alexander Mayne, of Oswegatchie, commissioners to construct such bridge in such form and manner as they shall deem for the best interests of the town, and that the order of such commissioners on the supervisor of the town shall be his warrant for disbursements to be made from time to time, as may be necessary, in payment on account of said bridge, not to exceed the sum of ten thousand dollars. The said commissioners shall be entitled to three dollars per day for each day actually employed." On November 21, 1889, the board of supervisors of St. Lawrence county passed the following bill:

"The board of supervisors of St. Lawrence county do enact as follows:

"Section 1. In accordance with a resolution adopted at a special town-meeting of the town of Oswegatchie, called and held pursuant to law, the supervisor of said town is hereby authorized to borrow on the credit of said town a sum not exceeding ten thousand dollars, at a rate of interest not exceeding four and one-half per cent. per annum, and execute the bonds of the town therefor, which bonds, and the annual interest thereon, shall become due and payable at the Ogdensburg Bank, in Ogdensburg, in said town, as follows: Two thousand dollars on the first day of February in each of the years 1891, 1892, 1893, 1894, and 1895, respectively; interest to be paid annually on the first day of February on all sums remaining unpaid.' There shall be levied and collected from the taxable property of said town in each year preceding the date at which the said bonds become due such sums of money as shall be required to pay interest on said bonds, and the face thereof, at maturity.

"Sec. 2. Said bonds shall be in the usual form of town bonds, coupons payable to bearer, and shall be signed by the supervisor, and countersigned by the town-clerk of said town, and a true record shall be kept thereof by both said supervisor and town-clerk. The supervisor of said town shall sell said bonds for the highest price he can obtain therefor, but not less than par value, and the whole, or so much of the money received from the sale thereof as shall be necessary, shall be paid over to the commissioners hereinafter provided for, upon their order, in payment for the construction of the bridge across the Eel Weir rapids in said town on the site of the present bridge.

"Sec. 3. William J. Averell, Fenton Devoy, Alexander Mayne, Henry Lovejoy, and Daniel Magone, of said town, are hereby appointed commissioners for said town, to construct the bridge hereinbefore provided for. Such commissioners shall keep a record of their proceedings, and no action taken by any of the said commissioners individually shall in any manner bind said town. Their order on the supervisor of said town shall be his warrant for payment, on account of building such bridge. They shall, on or before the first Monday of November, 1890, and annually thereafter, until such bridge is fully completed, file a verified statement of their expenditures with the town-clerk of said town, which account shall be subject to audit by the board of town audit. The commissioners shall receive three dollars per day for each and every day devoted to the carrying out of their duties under this act.

"Sec. 4. This act shall take effect immediately."

The complaint alleges that the board of supervisors and the said board of town auditors intend to take illegal action in pursuance of said bill or resolution of said board of supervisors, and that the defendants named as commissioners and the said supervisor have taken and intend to take further illegal action thereon. The complaint further alleges that the said bill, act, or resolution of the board of supervisors is invalid in the following particulars: (1) The authority to issue bonds as herein provided is irregular, illegal, and void, and that said bill, act, or resolution of the said board of supervisors does not contain, as required by section 3, c. 482, of the Laws of 1875, a provision requiring

adequate security, in addition to the security now required by law to be given by the officer authorized by said bill, act, or resolution, to issue bonds thereunder. The provision referred to (subdivision 6 of section 1 of said act) provides that the board of supervisors may authorize any town or towns liable for the erection, care, repair, and maintenance, in whole or in part, of any bridge, to erect, repair, and maintain the same, and to borrow such sums of money, in the manner provided in subdivision 29 of this section, as may be necessary for the purposes of such erection, repair, and maintenance. Subdivision 29 of said section allows said board to authorize any town to issue its bonds, and borrow money thereon, for a term not exceeding 20 years, for any purpose specified in subdivision 6 of this section, but every act authorizing such loan shall provide for the imposition of taxes to pay the same in equal yearly installments, with interest thereon, within the time specified in this subdivision. Section 3 of said act provides that in every resolution of the board of supervisors authorizing the issue of bonds or other obligations, there shall be contained a provision requiring adequate security, in addition to the security now required by law, to be given by the officer or by the board of officers authorized to issue them, for the faithful performance of his or their duty in the issue of such bonds, and the lawful application of the funds arising therefrom, and the full accounting therefor, and of the funds that may be raised by tax for the payment thereof, which may come into his or their hands annually, to the board of supervisors. The board of supervisors has no powers except those vested in it by legislative enactment. The powers vested in such board by such enactment can only be exercised in the manner therein stated and required. *In re Second Ave. M. E. Church*, 66 N. Y. 395; *Parker v. Supervisors*, 106 N. Y. 392, 13 N. E. Rep. 308, (see opinion at page 410, and cases there cited;) *Cook v. Kelly*, 14 Abb. Pr. 466; *Hardmann v. Bowen*, 89 N. Y. 196; *Wuesthoff v. Insurance Co.*, 107 N. Y. 580, 14 N. E. Rep. 811. Every substantial requirement or condition in regard to the exercise of such powers beneficial to any citizen must be observed and carefully complied with, or the action of the board cannot be sustained. The scheme of the resolution or bill was to authorize the supervisor to borrow money upon the bonds of the town, pay the same to the commissioners therein named, to be used in building the bridge, and to raise the money by tax upon the town to pay the principal and interest as the bonds became due. This money, when raised by tax, would be paid by the collector to the supervisor, to be by him paid to the holders of the bonds. The security required by section 3, which should have been provided for by the supervisors' bill, was essential for the protection of the citizens of the town, and its omission was fatal to the validity of the bill. I think this is more than a mere irregularity. The provision for security was an essential element of the whole scheme. If any portion of the bill had been unaffected by this omission, such portion would have been held valid upon the principle applied to unconstitutional acts of the legislature, which is that when a part of a statute is unconstitutional it does not affect the validity of the remainder unless the provisions are so interdependent that one cannot operate without the other, or are so related in substance and object that it is impossible to suppose that the legislature would have passed the one without the other. The following decisions illustrate the principle: *In re Village of Middletown*, 82 N. Y. 196; *People v. Kenney*, 96 N. Y. 294; *People v. Briggs*, 50 N. Y. 553; *Harbeck v. Mayor, etc.*, 10 Bosw. 366; *People v. Squires*, 1 N. Y. St. Rep. 633. The act or bill of the board of supervisors contemplated the borrowing of money by the supervisor of the town, to be paid to and used by the commissioners appointed by the act. As it did not require the supervisor to give the security required by law, that officer could borrow no money, and the commissioners would have no funds with which to build a bridge. Without funds, or the authority under the act which appointed them to raise funds, that commissioner could neither build nor contract to build a bridge. As

there would be no loan to pay, no tax could be raised, and the whole scheme of the act is defeated, and the whole act therefore void.

The complaint further alleges that the authority to issue bonds as in said act provided is irregular, illegal, and void, in that such act does not specify, as required by section 4, c. 482, of the Laws of 1875, the form of the obligations or bonds to be issued. The section referred to provides that "in every resolution of such board authorizing the issue of any bond or other obligation of debt, the form of the obligation to be issued, the time and place of payment thereof, and the rate of interest to be paid thereon, not exceeding seven per centum per annum, shall be specified." Sections 1 and 2 of said act of the board of supervisors authorized the borrowing of money and the issuing of bonds in the usual form of town bonds, with interest coupons payable to bearer, at a rate of interest not exceeding $4\frac{1}{2}$ per cent. per annum, which bonds, and the annual interest thereon, shall become due and payable at the Ogdensburg Bank in Ogdensburg, \$2,000 on the 1st day of February in each of the years 1891, 1892, 1893, 1894, and 1895, respectively, interest to be paid annually on the 1st day of February on all sums remaining unpaid, said bonds to be signed by the supervisor, and countersigned by the town-clerk of said town. I think this a substantial, sufficient compliance with the provisions of the section referred to, and that this objection to the act is not well taken.

The complaint further alleges that the appointment of the defendants Magone, Devoy, Mayne, Averell, and Lovejoy commissioners of said town to construct the bridge provided for by said act or resolution of said board, and to expend the funds raised therefor, is illegal, in that it is contrary to the general highway laws of the state, and particularly to chapter 377 of the Laws of 1878, as amended by chapter 67 of the Laws of 1879, which vests the power to rebuild said bridge under its provisions in the commissioner of highways of the town of Oswegatchie, and the said board of supervisors has no power, right, or authority in the premises to appoint said commissioners, and the appointment of said commissioners is a nullity. To reach a correct conclusion upon the point stated in this objection will require an examination of the different statutes and decisions. Section 18 of article 8 of the constitution of the state, as adopted in an amendment made in 1874, provides that "the legislature shall not pass any private or local bill providing for building bridges," and in section 23 of article 3 of such constitution it is provided that "the legislature shall, by general laws, confer upon the boards of supervisors of the several counties of the state such further power of local legislation and administration as the legislature may from time to time deem expedient." Under these constitutional provisions, and to carry the same into effect, chapter 482 of the Laws of 1875 and its amendments were passed, as were also other acts not stated in the title to the amendments of that act. If there is authority to appoint such commissioners given to boards of supervisors, it is contained in some statute, as such boards, as before stated, have only the authority given to them by statute, in accordance with these constitutional provisions. The legislature can delegate its powers only as the constitution expressly authorizes it. *Barto v. Himrod*, 8 N. Y. 483. The legislature had the power to appoint commissioners to build a bridge or highway previous to the adoption of the amendment to the constitution hereinbefore mentioned, in 1874, and such power had before that time been frequently exercised by the legislature throughout the state. Chapter 340, Laws 1866; chapter 235, Laws 1874. The above laws furnish instances where bridges were built across the Oswegatchie river, in the town of Oswegatchie, by commissioners appointed by the acts of the legislature referred to. The constitution, as amended in 1874, also prohibited the legislature from passing any private or local bill "laying out, opening, altering, or discontinuing roads or highways," but section 23 of the same article authorizes the legislature to enact general laws conferring

upon boards of supervisors "such further power of local legislation as from time to time it may deem expedient." In *People v. Supervisors*, 20 N. E. Rep. 549, the court held that the effect of the amendment was to take from the legislature the power that it heretofore possessed to pass laws laying out, altering, or working highways, operating independently of the local authorities, and by their own force, while at the same time it preserved to the legislature the power to vest in boards of supervisors within their respective jurisdictions the same powers in respect to laying out, opening, and working highways which the legislature could itself no longer exercise; that the constitutional amendment did not abrogate the pre-existing power of the legislature over the subject. It simply transferred it to the local boards in case the legislature should deem it expedient, and should so enact. Before the adoption of this amendment of the constitution the legislature had, by chapter 865 of the Laws of 1869, conferred general powers upon boards of supervisors to authorize the construction of bridges under certain conditions. Pursuant to the constitutional amendment the legislature passed chapter 482 of the Laws of 1875, amended by chapter 257, Laws 1876, and chapter 451, Laws 1885. Section 1, subd. 6, as thus amended, permits the board of supervisors to authorize any town liable or to be made liable to taxation for the erection, care, repair, and maintenance, in whole or in part, of any bridge, to erect, repair, and maintain the same, and to borrow such sums of money in the manner provided by subdivision 29 of that section as may be necessary for the purpose of erection, repair, and maintenance, and to pay any debt incurred in good faith by or in behalf of such town or towns, before or after the passage of such act. And if any town at a regular town-meeting held between the 1st day of February, 1875, and the passage of this act shall have elected commissioners for the purpose of building a bridge, and providing money to pay for the same, by the issuing of bonds, or otherwise, such bonds, not exceeding the amount authorized at such town-meeting, are hereby authorized and declared valid. This provision at once suggests the question, how may the board of supervisors authorize a town liable to build a bridge to build it? May authority be given to build it by commissioners named in the bill of the supervisors,—as the legislature had been accustomed to authorize the building of bridges before the constitutional amendment of 1874,—or must the supervisors authorize the building of the bridge, the loan to be made for that purpose, and provide that the money to be raised for that purpose be paid to the commissioner of highways, and the money be expended by him in erecting the bridge? In *People v. Meach*, 14 Abb. Pr. (N. S.) 429, the court held that commissioners might be appointed to build a bridge under section 2, c. 855, of Laws of 1869, although no express authority is given by that act to appoint commissioners. This is the language of the court: "The objection that the commissioners are not the proper agents of the board of supervisors to execute the power of building the bridge, and that this should be executed by town or village authorities, I regard as unfounded. The supervisors have the power, and may execute it in any way that satisfies their sound discretion. No particular set of agents is required by the statute or by the general law. The practice of doing it by commissioners is a very general one, and approved by usage of long standing. I do not regard it as the usurpation of an office, but the execution of an agency." In *Kirkwood v. Newburg*, 45 Hun, 323, the question was directly up as to the power of the board of supervisors to appoint commissioners to build a bridge under subdivision 6, § 1, of the Act of 1875, as amended by the beforementioned acts, and the court said: "The plaintiff does not claim that the statute is unconstitutional, but that it does not confer power upon boards of supervisors to appoint commissioners for a town, and compel it to unite with an adjoining town in building a new bridge where one had not previously existed, and issue bonds for the expense thereof, upon the application of the adjoining town. It is elementary law

that when a legislative body has power to direct the performance of an act, it may, unless forbidden, select the agents by which the act shall be performed. The commissioners appointed to build the bridge and issue the bonds are not officers of the town of Kirkwood, within the second section of the tenth article of the constitution, and it does not require that they be elected by the electors or appointed by the authorities of the town." To sustain this last proposition, see *People v. McDonald*, 69 N. Y. 362.

Upon an examination of the different statutes relating to highways and bridges, I find nothing prohibiting the appointment of commissioners for building a bridge. Neither do I find that the general laws devolve the duty of the care, superintendence, and repair of roads and bridges of a town upon the commissioner of highways; nor that money raised for building or repairing bridges, unless by the act by which it is raised, directed to be paid to some agent of the board of supervisors, must be paid over to the commissioners of highways, and expended by them; nor that in some cases stated in the laws conferring authority upon boards of supervisors such boards are specially authorized to appoint commissioners for certain highway or bridge purposes; nor that it necessarily follows that such boards are not authorized to appoint commissioners to build bridges under section 1, subd. 6, c. 482, of the Laws of 1875. In my opinion there is such power.

Notice of the special town-meeting to raise money to build the bridge allowed the electors to vote upon the appointment of commissioners to expend the money in building the bridge. An appropriation of the money to be expended in that way was not an appropriation which could be expended by the commissioner of highways. It might well be argued that if the appropriation had not been coupled with the appointment of commissioners to expend it it would not have been made. The board of supervisors would not have authority to act under section 1, subd. 6, c. 482, of the Laws of 1875, except to pass a bill to give full effect to the action of the special town-meeting. The power of the board is to authorize and render the proceedings of the special town-meeting effectual. It follows that the motion to dissolve the injunction must be denied, and the injunction continued until the determination of the action, except that it may be modified by stating that it is not to be construed to prevent the board of supervisors from enacting such further act, bill, or resolution as it shall deem necessary to give full authority and effect to the vote taken at the special town-meeting, and render the same effectual, and in conformity to the law of the state. No costs to either party.

BERLIN IRON BRIDGE CO. v. WAGNER, Sole Commissioner of Highways.

(Supreme Court, General Term, Third Department. July 7, 1890.)

1. BRIDGES—CONSTRUCTION—COMMISSIONER OF HIGHWAYS.

1 Rev. St. N. Y. c. 501, § 1, invests the commissioner of highways with the care, superintendence, repair, and improvement of highways and bridges within his town; and Laws N. Y. 1873, c. 877, as amended by Laws 1879, c. 67, charges him with the custody and disbursement of whatever money is raised by the town for those purposes. *Held*, that, where a town-meeting votes to raise and appropriate a sum of money for the erection of a bridge across a river, the commissioner of highways is charged with the duty to erect it, and to make appropriate contracts therefor, in the absence of any action placing the work in the hands of other agents.

2. SAME—SPECIAL TOWN-MEETING—ISSUE OF BONDS—APPLICATION TO COUNTY BOARD.

Laws N. Y. 1875, c. 482, as amended by Laws 1885, c. 451, provides that the board of county supervisors may authorize towns to borrow money for the erection of bridges; but that no authority shall be exercised under the act, except on the application of the town, to be made by a vote of the majority of the electors voting at a regular town-meeting, or at a special town-meeting "called for the purpose." *Held*, that an application by a town to the county board for permission to issue bonds for the erection of a bridge made pursuant to a vote of a special town-meeting called under 1 Rev. St. N. Y. pt. 1, c. 11, tit. 2, art. 1, § 7, as amended by chapter 259, Laws 1886, which authorizes a vote on the question of raising and appropriating moneys for the construction of a bridge, but which makes no provision

for an application to the county board, and which provides that "no special town-meeting shall have power to act on any subjects other than such as are specified in this section," does not confer on the county board any power to authorize the issue of the bonds.

Case submitted on agreed statement.

Action by the Berlin Iron Bridge Company against Joseph E. Wagner, as sole commissioner of highways of the town of Oswegatchie, for money due it under a contract for the erection of a bridge across the Oswegatchie river.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

A. D. Wales, for plaintiff. George R. Malby, for defendant.

LANDON, J. The special town-meeting for the town of Oswegatchie was called and held and did vote to raise and appropriate \$10,000 to maintain the highway bridge across the Oswegatchie river, at the Eel Weir rapids in the said town, in strict pursuance of section 7, art. 1, tit. 2, c. 11, pt. 1, of the Revised Statutes, as amended by chapter 259, Laws 1886. The amended section provides that special town-meetings "shall be held, whenever twelve or more persons eligible to the office of supervisor of the town shall, by application in writing signed by them and addressed to the town-clerk, require a special town-meeting to be called * * * to vote on the question of raising and appropriating moneys for the construction and maintenance of any bridge or bridges which such town may be authorized by law to erect or maintain." 1 Rev. St. p. 341, § 8, provides for giving the proper notice. The bridge was one which, by law, the town was bound to maintain. It was old and worn out, and had been condemned by the commissioner of highways as unfit for travel, and the superstructure of a new bridge was necessary. The old piers and abutments were still serviceable. One hundred and fifty-two ballots were cast for raising and appropriating the money, and three against the same. Assuming that no valid action was taken to place the erection of the bridge in the hands of other agents, then we think the sole commissioner of highways of the town was authorized by law to proceed with its erection upon the credit of the appropriation thus authorized, and in reliance upon the subsequent raising by tax of the amount of the appropriation, or so much thereof as should be necessary to meet the expense of the erection, such expense to be audited according to law. The Revised Statutes provide that "the commissioner of highways in the several towns in this state shall have the care and superintendence of the highways and bridges therein; and it shall be their duty (1) to give directions for the repairing of the roads and bridges within their respective towns; * * * (4) to cause the highways and bridges which are or may be erected over streams intersecting highways to be kept in repair." 1 Rev. St. p. 501, § 1. The ordinary highway labor due from inhabitants and tax-payers, and the fines and commutations which may be collected, furnish part of the resources which the commissioners of highways must employ as a means to the performance of these duties. It is obvious that these means must often prove inadequate. Section 4 provided that \$250 additional might be raised by tax, if the commissioners should require it. The commissioners might apply in open town-meeting for \$250 more, (chapter 274, Laws 1832;) also for \$750 more, (chapter 615, Laws 1857;) both of these extra sums, if voted, to be for the "improvement of roads and bridges." Chapter 103, Laws 1858, amended by chapter 442, Laws 1865, authorized the commissioners of highways, by and with the consent of the board of town auditors, to cause roads and bridges destroyed by the elements or otherwise, after the annual town-meeting, to be immediately repaired or rebuilt, although the expense might exceed the sum already authorized by law, the same to be audited and raised by tax. Chapter 377, Laws 1878, amended by chapter 67, Laws 1879, requires that "all moneys raised and collected upon the taxable property of any of the towns of this state for high-

way and bridge purposes shall be paid over by town collectors of taxes to the commissioners of highways of the towns in which said moneys are so raised and collected, and to no other officer or person whatsoever;" permitting, however, the boards of supervisors to make the disposition provided for in chapter 855, Laws 1869, a statute, as it will be seen hereafter, under which the board of supervisors have not acted in this case. The act of 1878 makes it the duty of the commissioners of highways to expend all such moneys upon the highways and bridges. The appropriation voted at the special town-meeting became a town charge. 1 Rev. St. p. 501, § 4. The commissioners of highways must render an itemized account to the board of town auditors of all the moneys paid out by them, with the vouchers thereof, and also an account of the improvements made upon the roads and bridges. 1 Rev. St. p. 502, § 3, amended by chapter 396, Laws 1884. It will thus be seen that the commissioners of highways are charged with the care, superintendence, repairs, and improvement of highways and bridges within their respective towns, and with the custody and disbursement for the purpose of whatever money is provided for the same. No other officers are, by state enactment, in like manner charged with respect to bridges within the town. It seems irresistibly to follow that, in the absence of any other valid provision for the erection of this bridge, the commissioner of highways was charged with the power and duty to erect it.

Cases are cited by the commissioner tending to show various limitations of his power. Of course he has no power except that conferred by statute, either expressly or by fair implication; and his power is strictly limited within his means. He can only obtain the means permitted by the several statutes. His power, duty, and liability are all measured by what he may do, and ought to do, within the means at his disposal. Given the means, he could build this bridge, and ought to build it. *Mather v. Crawford*, 36 Barb. 564; *Huggans v. Riley*, 4 N. Y. Supp. 282; *People v. Meach*, 14 Abb. Pr. (N. S.) 429. He would therefore have the power to employ agents or servants to prosecute the work, and to procure the necessary materials. This involved the power to make appropriate contracts for the same. *Boots v. Washburn*, 79 N. Y. 207. His contract with the plaintiff was within his powers, unless the facts next to be noticed took the power from the commissioner and lodged it elsewhere.

At the opening of the special town-meeting, above mentioned, a resolution was offered to the effect that application be made to the board of supervisors of the county of St. Lawrence at the next session to authorize the town of Oswegatchie to borrow money to build the bridge, and for the appointment of commissioners to build it. The resolution, after some discussion, was laid upon the table by a *viva voce* vote of the electors present, and the voting by ballot upon the resolution to raise and appropriate money proceeded until about the time appointed for closing the polls, and until such voting by ballot ceased, when the resolution for the aforesaid application to the board of supervisors was again offered and concurred in with substantial unanimity by a *viva voce* vote of those present, about 25 in number. At the next session of the board of supervisors an application was made in pursuance of such resolution, and the board of supervisors, in compliance therewith, on the 21st day of November, 1889, passed a law authorizing the town to borrow \$10,000 upon its bonds, and appointing five commissioners to construct the bridge, prescribing details. On the 18th day of February, 1890, the board of supervisors repealed the said law, and passed another in place thereof. The second law was in intent and scope like the first, and was passed to obviate or cure supposed defects or illegalities in the first. The details of this law need not be given. We assume that in every respect it is valid, and transfers the power to erect the bridge from the commissioner of highways to the commissioners named in the law, provided the board of supervisors had jurisdiction to enact it. Between the passage of the first and second law the plaintiff and

defendant entered into a contract whereby the plaintiff agreed to erect the bridge for the price of \$9,200, one-half of which was to be paid upon delivery of the iron joist material of the bridge at the place of its erection. This the plaintiff has done, and if the contract is valid \$4,600 are now due to it. The supervisors' bill was passed in supposed pursuance of chapter 482, Laws 1875, and amendatory acts. The title of the bill so recites, and such recital is required by the second section of the act of 1875. The sixth subdivision of section 1, as amended by chapter 451, Laws 1885, forbids the board of supervisors to pass the law in question except as follows: "But no authority shall be exercised under this subdivision except upon the application of a town liable to be taxed for such purpose, to be made by a vote of a majority of the electors thereof, voting at a regular town-meeting, or at a special town-meeting called for the purpose, or upon the application of the supervisor, by and with the consent of the commissioner of highways, town-clerk, and justices of the peace of such town." The special town-meeting in this case was not called for the purpose of making any application to the board of supervisors. It was called in pursuance of the section of the Revised Statutes first cited in this opinion. That section does not embrace any provision for such an application. It specifies various other objects, and concludes as follows: "And no special town-meeting shall have power to act on any subjects other than such as are specified in this section." As there was no power to make the application at the special town-meeting, as no other valid application was made, and as power to the board of supervisors to pass the law depends upon an authorized application, it necessarily follows that the power did not exist.

We are cited to *Town of Kirkwood v. Newburg*, 45 Hun, 823. In that case the authority of the special town-meeting to pass a somewhat similar resolution was not challenged, and therefore was assumed. The meeting probably was held in pursuance of a law or resolution which boards of supervisors are authorized to make by subdivision 19, § 1, c. 482, Laws 1875, as follows: "To provide for the calling and holding of special town-meetings, to consider and decide any question upon which the electors of the town may be called to take action in accordance with the provisions of this act." The special town-meeting in *Bergen v. Gubna*, 10 Hun, 11, was held under authority conferred by the board of supervisors. The case of *Barker v. Town of Oswegatchie*, ante, 834, (decided by the special term,) arose under the facts in this case. It was an action by a tax-payer to restrain the commissioners from building the bridge. The learned judge assumed that the board of supervisors had the proper application before them. It needs no authority for the proposition that when the performance of a condition precedent lies at the foundation of the existence of a power its non-performance leaves the assumption of the power without foundation.

The learned counsel for the plaintiff argues with force that, assuming the existence of the proper application, boards of supervisors have no power to appoint commissioners in such cases. We incline to the opinion that the weight of authority is the other way. Chapter 482, Laws 1875, is an enactment in pursuance of the constitutional authority to confer on boards of supervisors "further powers of local legislation and administration." The legislature has legislative power, and hence may confer administrative power, and boards of supervisors may, under the constitution, if conferred, receive both legislative and administrative power. The power conferred upon boards of supervisors is a conference of the power appropriate to its execution, except as statutory or constitutional provisions limit or conflict. Id. § 6. The appointment of commissioners to build bridges has long been regarded by the legislature and the courts as an appropriate means to their erection. Upon the case as submitted, as between the parties to the record the plaintiff is entitled to judgment for \$4,600, and such judgment is ordered against the defendant.

LEARNED, P. J., (*concurring*.) If the vote of the town-meeting authorizing an application to the board of supervisors was not a vote "on the question of raising and appropriating moneys for the construction and maintenance" of this bridge, then, under chapter 259, Laws 1886, amending section 7, art. 1, tit. 2, c. 11, pt. 1, vol. 1, Rev. St., the special town-meeting could not vote upon it legally. If it was a vote on that question of raising money or incurring any town liability, then it should have been by ballot. Chapter 122, Laws 1883.

MAYHAM, J., *concurs*.

In re LASAK'S ESTATE.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

1. **WILLS—PROBATE AND CONTEST.**

Where the subscribing witnesses to a will and several codicils thereto all testify to the formal execution of the several papers, that testator's mind was clear and calm, and that he was under no restraint, and subject to no apparent importunity or influence, and their testimony covers a considerable portion of testator's latter years, such papers should be admitted to probate.

2. **SAME—UNDUE INFLUENCE.**

An inference of undue influence will not be drawn from the inequality of a will, especially when there is complete proof of testator's capacity.

3. **SAME—EVIDENCE.**

In a will contest a daughter of testator, whose interest was adverse to the will, testified without objection that her father had said to her that the executor had helped him make his will, and that he was glad his son, who had disgraced his name, was dead. Before her examination was closed this evidence was stricken out on motion of an attorney supporting the application for probate. *Held* that, assuming that testimony received without objection should not have been stricken out, there was no sufficient error to call for a reversal, the evidence not tending to show either incapacity or undue influence.

4. **SAME—PROBATE—POWER OF EXECUTORS.**

An executor who has propounded his testator's will for probate has no active duty to perform, and cannot discontinue the proceeding.

Appeal from surrogate's court, Westchester county.

Proceedings for the probate of the will of Francis W. Lasak. From a decree admitting the will to probate, Cordella D. Chauvet, Antoinette L. Schermerhorn, and Margaret S. Ives appeal. For former litigation, see 7 N. Y. Supp. 2; 8 N. Y. Supp. 740, 775.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Aaron Kuhn, Robert Sewell, and Charles F. MacLean, for appellants. Hoadly, Lauterbach & Johnson, and G. G. & F. M. Reynolds, for respondents.

BARNARD, P. J. The competency of the testator was clearly proven. The testator died in February, 1889, and he left a testamentary disposition of his property evidenced by a will and seven codicils. The will was executed 11th February, 1883, and the last codicil on the 14th April, 1884. The will and the first five codicils are witnessed by the same persons, William G. Lathrops and S. R. Johnson. The two last codicils are witnessed by Horace S. Ely and John A. Ely. All these witnesses were called, and all testify clearly and particularly to the formal execution of the several papers; that the testator's mind was clear and calm; and that he was under no restraint, and subject to no apparent importunity or influence. The witnesses were intelligent business men, and their testimony covered a considerable portion of the testator's latter years. The surrogate was called upon under this evidence to decree probate of the several papers propounded.

There was no error committed upon the trial. John G. Wondets was named as executor in the will. He made a petition for probate, and upon it citations were issued to all parties interested in the estate. Answers were put

in, and the executor employed an attorney who called and examined the several witnesses to the will. He then moved the court to permit him to withdraw and subsequently to dismiss the proceedings. This motion was properly denied, so far as a dismissal was asked for of the probate proceedings. The executor need not apply for probate, and need not be cited to either support or oppose probate. If he does apply for probate he has no active duty to perform, but may remain silent until the surrogate causes the witnesses to the will to be examined, and an order made as to probate. It would be a strained construction of the law as to probate of wills if the court should be compelled to hold that after a will was presented for probate, and presumptively proven by the executor, he could discontinue the whole proceedings. He was not a party to the record with any such power. The executor could not suppress a will before it be offered for probate or afterwards.

Mrs. Chauvet, who was a daughter of deceased, was sworn as a witness upon the trial. Her interest was adverse to the will, but she had made no answer. On the 31st May, 1889, she appeared to have been permitted to testify to certain communications with her father without objection. On the 20th June, 1889, and before her examination was closed, on motion of an attorney who was supporting the application for probate, this evidence was stricken out. Assuming that testimony received without objection belongs to the case, and may not be stricken out, no sufficient error was committed to call for a reversal of the judgment. The evidence is returned, and there is nothing in it which tends either to show incapacity or undue influence. The testator had said to her that the executor had helped him make his will, and that he was glad his son, who had disgraced his name, was dead. The ruling that such personal communications as were offered be excluded, was correct. *Wadsworth v. Heermans*, 85 N. Y. 639; *Holcomb v. Holcomb*, 95 N. Y. 316.

The inference of undue influence to be drawn from the inequality of the will has been so repeatedly rejected by the court of appeals as insufficient for that purpose, standing alone, that no argument can be based thereupon, standing alone, as it does, with full and complete proof of the testator's capacity. The decision should therefore be affirmed, with costs. All concur.

EMPLOYERS' LIABILITY ASSUR. CORP. v. EMPLOYERS' LIABILITY INS. CO.

(Supreme Court, Special Term, New York County. April, 1890.)

1. CORPORATIONS—NAME—INFRINGEMENT.

In an action by the Employers' Liability Assurance Corporation against the Employers' Liability Insurance Company of the United States to restrain defendant from using the words "Employers' Liability" as part of its corporate name, it appeared that there were many corporations carrying on business of the same nature as that in which plaintiff was engaged, and that all used the words "Employers' Liability" in their corporate names. *Held*, that such words designated a kind of insurance business, and did not express proprietorship, and their use by defendant would not be restrained, though plaintiff was the first to use them.

2. SAME—CONFUSION OF NAMES.

It appeared in such case that plaintiff was an English corporation doing business in New York, and that defendant, a New Jersey corporation, had applied to the insurance department for leave to do business in New York. There was no evidence that defendant adopted its name with an intent to imitate that of plaintiff, or in fraud of its rights. *Held*, that the use by defendant of the words "Employers' Liability" in its corporate name would not be enjoined on the ground that confusion would result as to the identity of the two companies, in that it was the custom to refer to insurance companies by abbreviated titles, since defendant would be permitted to do business only in its corporate name, which is distinguishable from that of plaintiff.

3. FOREIGN INSURANCE COMPANIES—REPUTATION OF NAME.

Laws N. Y. 1877, c. 311, providing that no "insurance company hereafter organized under the laws of this state shall use a corporate * * * title which shall at the time of such organization be used to designate any * * * other insurance company already existing under the laws of this state," does not apply to foreign insurance companies.

Action by the Employers' Liability Assurance Corporation against the Employers' Liability Insurance Company of the United States to restrain the use by defendant of the words "Employers' Liability" in its corporate name. Plaintiff now moves to continue a temporary injunction heretofore granted. Laws N. Y. 1877, c. 211, provides that no "insurance company hereafter organized under the laws of this state shall use a corporate * * * title which shall at the time of such organization be used to designate any * * * other insurance company already existing under the laws of this state."

Butler, Stillman & Hubbard, for plaintiff. *Wilson Wallis*, for defendant.

PATTERSON, J. The right of a temporary injunction in this action is claimed by the plaintiff, in the first place, on the ground that it is entitled to the exclusive use of the words "Employers' Liability" as part of its corporate name. In view of what is set forth in the answers of the defendant, and the affidavits read by them, this claim is not established. The words have become descriptive of one kind of insurance business, just as the words "fire," "marine," "accident," "life," indicate other kinds of insurance. There are many corporations in Great Britain, and three in the United States, carrying on business of the same nature as that in which the plaintiff is engaged, and they all employ the words the use of which is complained of here as designating that business. Those words, therefore, have become the general designation of a certain kind or department of the insurance business, and do not express proprietorship or origin, and, while the plaintiff was the pioneer in this particular branch of underwriting, and the first to use the words referred to, it has not shown such a present exclusive right as would justify the injunction on that ground. The restraint is asked for, secondly, on the ground that the use by the defendant of the words referred to will produce confusion, and necessarily result in injury to the plaintiff by the mistakes which will be made by the public as to the identity of the two corporations, especially as it is almost the universal custom among those engaged in the insurance business, and those seeking insurance, to refer to such corporations by their abbreviated titles, as "The Home," "The Continental," etc. The defendant corporation has not yet begun business, nor (as is sworn to) does it intend to do so, it being a foreign corporation, until a proper authorization has been obtained from the insurance department of the state of New York, and the application for this injunction appears to be premature; but, assuming that it might be applied for *quia timet* in a proper case, I think sufficient facts are not presented. The action seems to be based upon what was decided by the court of appeals in England in *Hendriks v. Montagu*, 50 Law J. Ch. 456. There it was held that registration of a corporate name closely resembling that of an already existing corporation would be restrained by injunction on the ground of similarity of title, and the confusion that would ensue from its use by a proposed company, and this was held not only under the provisions of the act of parliament relating to registration of corporate names, but on general grounds. The decision of the three judges reversed the order of the master of the rolls, (JESSEL,) who, in that and in other cases, had held to the contrary, as had also several vice-chancellors in cases which are referred to in the report. *Hendriks v. Montagu* is an authority for the plaintiff here, but it is at variance with the rule as to the use of names to which both parties are entitled, as that rule has been proclaimed in the state of New York.

There is no difference in principle between the use of an individual or co-partnership name and that of a corporate name, although there is a general public policy of this state as to domestic corporations, embodied in legislation to some extent, that no two corporations carrying on the same business shall have the same title. In this case I am not permitted to doubt on the answering affidavits that the corporate title of the defendant company was not adopted with an intent to imitate that of the plaintiff, nor in fraud of its

rights. It is, as is also the plaintiff, a foreign corporation, and, if it may do business here at all, it must transact it in its corporate name. There are connected with its title words which distinguish it from the plaintiff, and if it constantly uses its full title the difference between the two companies will be observable always. The rule as to the use of names where both parties are entitled to the same name, and in cases where no fraud or deceit is charged or proven, (as in this case,) has been stated in *Meneely v. Meneely*, 62 N. Y. 427, and it is there held that such confusion as results merely from similarity will not be a ground for injunction, but where, even innocently, a defendant so uses his name as to cause mistake as to his identity, and to induce the public to believe that he is the plaintiff, the general use of the name will not be enjoined, but the particular manner of the use which causes the mistake, confusion, and consequent injury will be. So in this case, if the defendant corporation shall omit that part of its corporate name which shows it to be an American and not a British corporation, and which distinguishes it from the plaintiff, an injunction might issue as in the recent case in this court of the *Farmers', etc., Co. v. Farmers', etc., Co.*, 1 N. Y. Supp. 44. I have spoken of the defendant corporation as having the right to use its corporate name. I mean, of course, under the law of New Jersey by which it was created, and subject to the acquisition of the authority to do so in this state, which must be accorded to it by the insurance department, and without which it does not intend to begin writing policies. That such authorization had not been granted when this temporary injunction was issued is not a ground for continuing it, nor are the provisions of chapter 211 of the Laws of 1877 applicable to this case. That act by its terms relates to corporations "organized" under the laws of this state, and, as I think, ought not to be extended by judicial construction to foreign corporations, over the naming of which the authorities of this state can have no control. Whether or not this defendant corporation shall do business at all in this state must be determined, in the first instance, by the insurance department. If it is permitted to do so, and then in any way uses its name to make it appear that it is the plaintiff, then that use may be enjoined. There are several insurance companies in this state of the same, or very nearly the same, name, and some confusion must result from that,—the ordinary confusion which the court of appeals declares will not furnish ground for restraint; but if either of them so transacted business as to cause it to appear that it was the other corporation of the same name, as before stated, that manner of use would be enjoined. The affidavits presented by the plaintiff are not sufficient to support the injunction, regard being had to what is contained in the opposing papers, and the motion to continue it must be denied, and the temporary injunction vacated, with \$10 costs.

REILLY v. MAYOR, ETC., OF THE CITY OF NEW YORK.

(Supreme Court, General Term, First Department. June 6, 1890.)

DISTRICT ATTORNEY—COMPENSATION.

Under Laws N. Y. 1871, c. 588, creating a board of apportionment for the city and county of New York, with authority to regulate the salaries of officers and employees of the city and county, a subpoena server in the office of the district attorney, appointed under a resolution of the board of supervisors of the county, is a county officer, whose salary may be reduced by such board from the rate fixed by the legislature. Following *Dolan v. Mayor*, 6 Hun, 806.

Appeal from circuit court, New York county.

Action by James Reilly against the mayor, aldermen, and commonalty of the city of New York to recover salary as subpoena server in the office of the district attorney of the county of New York. The plaintiff was appointed a subpoena server in the office of the district attorney of New York county January 1, 1868, and served until January 1, 1872. His salary was originally

fixed at \$1,300 per annum. By act of the legislature (Laws 1870, c. 382) it was increased to \$2,000 per annum. By Laws 1871, c. 583, a board of apportionment was created for the city and county of New York to regulate the salaries of officers and employes of the city and county government. This board, by resolution adopted June 19, 1871, reduced plaintiff's salary to \$1,300 per annum, to take effect July 1, 1871. He accepted payment at this rate under protest. This action is brought to recover the difference between the amount he was paid and the amount he would have received had his salary been continued at \$2,000 per annum. The resolution of the board of supervisors of December 20, 1864, referred to in the opinion, repeals all former resolutions relating to subpoena servers, provides for the appointment of seven subpoena servers, as theretofore, fixes their salaries at \$1,200 per annum, and abolishes the system of payment by fees. There was a judgment for defendant, and plaintiff appeals.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.
J. Henry McCarthy, for appellant. *J. J. Townsend*, for respondent.

VAN BRUNT, P. J. We are unable to see any distinction between the case at bar and the case of *Dolan v. Mayor*, 6 Hun, 506. The attempt to show that the resolution of the board of supervisors, adopted 20th December, 1864, did not create the office of subpoena server to the district attorney, in no manner distinguishes the case at bar from the one cited. It is true that there is evidence that the district attorney, prior to the adoption of this resolution, employed subpoena servers, but the authority under which such employment was made by the district attorney nowhere appears. From the recitals of the resolution of the 20th December, 1864, it would, however, appear that such employment had been sanctioned by the resolution of the board of supervisors previously adopted, and which were repealed by the resolution of the 20th December, 1864. In any event, we are pointed to no authority authorizing the employment of the plaintiff by the district attorney except the resolution of the 20th of December, 1864. Under these circumstances the facts of the case at bar are precisely the same as those in the case cited, and that decision must control. The judgment should be affirmed, with costs. All concur.

DEVLIN v. ATLANTIC AVE. R. Co. et al.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

CARRIERS—INJURY TO PASSENGER—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

While riding in defendant's horse-car, plaintiff was injured by the shaft of a wagon which collided with the car. In an action to recover for the injuries, the evidence tended to show that the two vehicles had stopped in plain view of each other in a very narrow street, and that the collision would not have occurred had the car stood still for a very short time, and permitted the wagon, which was first in motion, to get by. *Held*, that it was error to order a nonsuit.

Appeal from circuit court, Kings county.

An action by William Devlin against the Atlantic Avenue Railroad Company, impleaded with Cuns Haussknecht, to recover for injuries sustained in a collision between the company's horse-car and the other defendant's wagon. The court dismissed the complaint as against the railroad company, and plaintiff appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Roswell H. Carpenter, (*A. H. Dailey*, of counsel,) for appellant. *Tracy, MacFarland, Ivens, Boardman & Platt*, for respondents.

BARNARD, P. J. The evidence in this case was sufficient to go to the jury. The plaintiff was a passenger on the defendant's road, and was injured by being struck by the shaft of a wagon, which struck the defendant's car on the

side, and near the rear of the same. The car was going down Adams street. The wagon which injured plaintiff was turning from Myrtle avenue into Adams street. When the wagon got to the avenue the defendant's car was at the crossing where Adams street crosses Myrtle avenue. The car was topped. The wagon had stopped first. The wagon started when the car topped, and the car started at the same time. A collision was inevitable, from the position of the vehicles and the narrowness of Adams street. There was barely room in Adams street for a wagon to pass between the tracks and the curb-stone. The vehicles were in plain view of each other, and the collision seems to have happened because the driver of the car started before the wagon could get into Adams street out of Myrtle avenue. There would have been no collision if the car had stood still for a moment. The danger did not come in fact from the side, but from the front. The fact that the car had almost passed is decisive proof that a very short delay in the car would have permitted the wagon, which was first put in motion, to get by. *Green v. Railroad Co.*, 109 N. Y. 297, 16 N. E. Rep. 60. The exception should be sustained, and a new trial granted, costs to abide event. All concur.

In re PEOPLE'S RAPID TRANSIT R. CO.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

RAILROAD COMPANIES—CONSTRUCTION OF ROAD IN NEW YORK CITY.

Laws N. Y. 1860, c. 10, § 1, providing "it shall not be lawful to lay, construct, or operate any railroad in, upon, or along any or either of the streets or avenues of the city of New York, wherever such railroad may commence or end, except under the authority and subject to the regulations and restrictions which the legislature may hereafter grant and provide," applies to every kind of a railroad, and to one to be constructed part of the way under ground, and at other points crossing over streets at right angles on bridges resting on piers built on private lands.

Appeal from special term, New York county.

Application of the People's Rapid Transit Railroad Company to acquire title to a certain tract or piece of land, of which Bowie Dash, Esq., and Mrs. Oulsa Dash, his wife, and the mayor, aldermen, and commonalty of the city of New York are the owners or persons or parties interested therein. The court below, (PATTERSON, J.,) in denying the application, delivered the following opinion: "The petitioner, organized as a railroad corporation under the general railroad act of 1850, and its amendments, proposes to build and operate a railroad from Tarrytown, in Westchester county, to Park place, in the city of New York. The road in the city of New York, north of One Hundred and Twenty-Fifth street, is designed to be constructed and operated under ground, and south of that street to be built on arches of solid masonry upon property to be acquired from private owners on the blocks bounded north and south by street lines; the road-way to be carried on steel bridges from street line to street line, as it would cross the several streets. Under the act referred to, and no other, the petitioner seeks to acquire lands of private owners, and this proceeding is instituted for the appointment of commissioners to appraise certain real estate belonging to the respondents, and which the petitioner alleges to be necessary for its corporate purposes. It is objected by the owners of the property sought to be taken that the petitioner cannot lawfully construct and operate its proposed railroad in the city of New York. It is urged that the intended structure, being partly an under-ground and partly an elevated road, cannot be built in the city of New York under the general railroad act, and that as to an elevated road no authority to build it exists outside of the rapid transit act, (chapter 606, Laws 1875.) I am not at all satisfied that the provisions of the rapid transit act apply to such a cor-

poration as this, for it would appear that that act relates to roads to be built only within one county; but not passing upon that point, or expressing any opinion upon it, I think the act (chapter 10, Laws 1860) effectually prevents the petitioner from carrying out its proposed enterprise. By the last-mentioned enactment it is provided as follows: 'Section 1. It shall not be lawful to lay, construct, or operate any railroad in, upon, or along any or either of the streets or avenues of the city of New York, wherever such railroad may commence or end, except under the authority and subject to the regulations and restrictions which the legislature may hereafter grant and provide. This section shall not be deemed to affect the operation, as far as laid, of any railroad now constructed and duly authorized, nor shall it be held to impair in any manner any valid grant for or relating to any railroad in said city existing on the first day of January, 1860.' This act does not relate simply to street railroads, for it expressly says 'any railroad,' wherever it may begin or end, wherever its terminal points may be, whether both of those points are in this county or one of them in a distant part of the state; and its undoubted purpose was to preserve the streets and highways of the city from the obstruction and interference of new railroads, except under the authority of, and with restrictions and regulations to be thereafter imposed by, the legislature. As the act does not apply only to street railroads, or to those following the course and direction of particular streets and highways, and operated within the city limits alone, regard being had to its purpose, it should be construed as relating to railroads which would cross streets or highways, or be in and upon parts of such streets. A road may be in and upon a street, and not on the surface of the street. An under-ground road may be in or on the street, although beneath the surface. This has been held as to a street railroad, (*In re New York Dist. Ry. Co.*, 107 N. Y. 51, 14 N. E. Rep. 187,) and it may be in or upon the street, although above surface, even when not supported on ground within the street lines. The object of the act of 1860 being to make it unlawful to obstruct or interfere with or affect rights in the streets without further legislative sanction, it would seem clear that part of a railroad structure might be built over a street, crossing it at right angles, and at such a height as to impede travel, or interfere with street uses, and such a structure would be regarded as in or upon the street. Who is to determine at what elevation or altitude a railroad structure crossing a street is to be regarded as not in or upon the street? It was left to the legislature to regulate and place restrictions upon the construction and operation of railroads to be built in the city of New York, after the year 1860, so far as the streets of that city are concerned, and this view is taken by the court of appeals, (*In re Washington St., etc., R. Co.*, 115 N. Y. 445, 22 N. E. Rep. 356,) although the subject is only incidentally discussed there. It that case it was held that street railroads may still be formed under the general railroad act of 1850 and its amendments, except in the city of New York, as to which the act of 1860 applies; and, speaking of that act of 1860, it is said, in regard to the city of New York, 'It is admitted that the general railroad act has now no application, for by chapter 10 of the Laws of 1860 it is made unlawful to lay, construct, or operate a railroad in New York city, except under the authority of the legislature, to be thereafter granted;' and, although street railroads were then only under consideration, I am satisfied the learned judge who wrote the opinion in that case intended to be understood as meaning the statement just as broadly as he made it; for he was not only speaking with precision in limiting observations of other judges in other cases, and was critically accurate, but there is nothing in the act of 1860 to confine its provisions to street railroads. It embraces all railroads but the excepted classes. With these views, I must deny the application." Petitioner appeals.

A. Stickney, for appellant. G. A. Strong, for respondent.

PER CURIAM. The order appealed from should be affirmed, with \$10 costs and disbursements, for the reasons stated in the opinion of Mr. Justice PATTERSON.

PEOPLE ex rel. CAGNEY v. MACLEAN et al., Police Commissioners.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

MUNICIPAL CORPORATIONS—DISCHARGE OF POLICEMAN.

A policeman was charged with conduct unbecoming an officer, the specification being that he was brought to the station-house by a roundsman, he having been taken from the Harlem river by certain other officers, so drunk as to be unfit for duty. *Held*, that the specification sustained the charge, and was sufficiently supported by evidence showing that defendant was so intoxicated as not to appreciate surrounding circumstances.

Certiorari to review the action of police commissioners of the city of New York in dismissing relator, William T. Cagney, from the police force.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

L. J. Grant, for relator. J. J. Delany, for respondents.

VAN BRUNT, P. J. The charge against the relator was conduct unbecoming an officer, the specification being that he was brought to the station-house by a roundsman, he having been taken from the Harlem river by certain other officers so much under the influence of liquor as to be unfit for duty. Some criticism on the form of this specification is indulged in by the counsel for the relator, in that there is no direct allegation that the relator was guilty of conduct unbecoming an officer by reason of voluntary intoxication; nor is there any direct allegation that the conduct unbecoming an officer consisted of "being taken from the river," etc. It is, however, perfectly plain what the charge was which was intended to be specified, and it is very evident from the course of the trial that the relator had no difficulty in knowing as to the circumstances constituting his offense. There seems to have been ample evidence to support the conclusion to which the commissioners came, and the story which the relator testified to in order to account for his condition was utterly incredible, and unworthy of belief. He was found in the Harlem river, undoubtedly having fallen there because of intoxication. When taken out and brought to the station-house his excuse as to this condition was that he had been out in the rain, when the proof was that there had been no rain at all. It is true the physician says he did not smell any liquor on his breath, but his opinion was, from the symptoms which he observed, that he was suffering from intoxication. The sergeant also testifies that when brought into the station-house he was asked how he got into the river, and he said he did not know. He finally seems to have thought of the story about his chasing a couple of fellows and falling overboard, which story he repeated upon his examination before the commissioners. It further appears from the evidence of one of the witnesses, when he was taken out of the water, and was lying on his back on the bow of the canal-boat, he was asked how he got into the river, and he said he was not in the river; and when asked how he got wet, he said, "Raining." And this seems to have been the impression which the circumstances of that evening had made upon his mind. He was evidently so intoxicated as not to appreciate surrounding circumstances. The proceedings should be affirmed, and the writ dismissed, with costs. All concur.

SEEGER v. AMERICAN MINING & MILLING CO.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

MASTER AND SERVANT—COMPENSATION.

Plaintiff asked \$5 per day to work for defendant, and was told that the company could not pay that "now," but would give \$75 per month, "and after 3 or 4 months

then the company could pay wages." Plaintiff worked on that basis about a year, when his salary was raised to \$100 a month which he accepted without objection. *Held*, that defendant was not liable to pay a greater sum.

Appeal from circuit court, Kings county.

Action by Horatio G. Seeber against the American Mining & Milling Company, to recover compensation for services rendered defendant on an alleged contract for \$150 a month. A nonsuit was ordered, the exceptions to be heard in the first instance at general term.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Thos. J. Ritch, Jr., for plaintiff. *Andrew Dutcher*, for defendant.

BARNARD, P. J. The facts proven did not entitle the plaintiff to sustain a verdict based on the evidence, and therefore the case was properly dismissed. The plaintiff is a carpenter; the defendant, a domestic corporation who was about to start a business in breaking stones, and mining and selling sand, at Port Jefferson. The vice-president of the company was in negotiation with the plaintiff to go to Port Jefferson, and act for the company. The plaintiff and this officer of the defendant went there to look at the ground, and finally the question was reached, what would the plaintiff go there for? The plaintiff asked \$5 per day. He was told that the company could not pay that now, but would give \$75 per month, and some stock of the company, "and after three or four months then the company could pay wages." The plaintiff went on that basis. There was no mention of any amount of stock of the company which was to be given in addition to the \$75 per month. No stock was ever given, and this action has no reference to a default in that particular. There was no binding agreement beyond the \$75 per month. The words of the contract do not import any. There was no time when by force of the agreement a new rate of compensation would be due under it. The plaintiff worked under it for about a year, when his rate of compensation was raised to \$100 a month. An application for an advance was made by plaintiff at the end of a little over five months, and none was made. There was no definite time as to the duration of the contract, and none beyond the \$75 per month, subsequently raised to \$100, as to the compensation which the plaintiff was to receive thereunder. Either party could terminate the contract at pleasure. When the plaintiff took his wages under it, there remained no liability upon defendant's part to pay a greater sum than was paid to the plaintiff. The action was properly dismissed, and the exception should be overruled, and the defendant have judgment upon the ruling at the circuit, with the costs of this appeal.

PORT JERVIS, M. & N. T. R. Co. v. NEW YORK, L. E. & W. R. Co.

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—CERTAINTY.

A verbal agreement was entered into by the M. and the E. railroad companies by which a junction was to be made at a certain point, and the E. company agreed to furnish rolling stock for the operation of the M. company at a certain sum per mile. The M. company was afterwards reorganized, when it made an arrangement with the E. company by which certain charges were to be made by the E. company for the use of its turn-table and cars, but until further notice no charge was to be made for terminal facilities. Charges were afterwards made for terminal facilities, but were not enforced. Finally the E. company refused to allow the M. company to use its property any longer. *Held*, that the agreement under which the M. company was allowed to use the terminal facilities of the E. company without charge was too indefinite to be enforced in equity.

Appeal from special term, Orange county.

Action by the Port Jervis, Monticello & New York Railroad Company against the New York, Lake Erie & Western Railroad Company to recover damages for breaking the connection between the roads of these parties at

Port Jervis, N. Y., and to obtain a perpetual injunction requiring the defendant to restore the connection, and restraining further interference therewith. Plaintiff owns and operates a railroad from Monticello, in the county of Sullivan, through the town of Thompson, in which Monticello is situated, and the towns of Forestburgh and Deer Park, connecting with defendant's road at Port Jervis, in the county of Orange, nearly due south from Monticello, 23 miles distant. This road was constructed and the intersection with defendant's road established during the years 1869 to 1872 by a corporation under the name of the Monticello & Port Jervis Railway Company. At that time the defendant's road was owned and operated by a corporation under the name of the Erie Railway Company. At the same time the New York & Oswego Midland Railroad Company was engaged in constructing its road from New York to Oswego, running five miles north from Monticello. At Port Jervis plaintiff's track was connected with that of the Erie Railway on the premises of the latter company. When the road was completed an arrangement was made with the Erie Company to operate it with the rolling stock of the Erie for a certain sum per mile. The intersection of the Monticello track with the Erie was nearly half a mile from the passenger and freight stations at Port Jervis, and fully that distance from the turn-table. That was in the Erie yard at Port Jervis. The trains on the Monticello road made use of the Erie tracks from the junction to the turn-table, and the engines were there turned. The arrangement of the Erie to operate the Monticello road with its rolling-stock at 90 cents per mile continued from its completion, early in 1871, to 1875, when the Monticello road was sold under the foreclosure of a mortgage upon it. The company was reorganized under the name of the Port Jervis & Monticello Railroad Company, and that company continued to operate and own it until November, 1886. In May, 1875, the Erie Railway passed into the hands of Mr. Jewett, as receiver, appointed in proceedings for the foreclosure of certain mortgages upon the road and other property of that company. In 1878, that property was sold in such foreclosure proceedings, and the present defendant was organized, and took the title, which it has since retained. The Port Jervis & Monticello Company operated its road, furnishing its own rolling stock, and an arrangement was made between it and Mr. Jewett, the receiver of the Erie, by which certain charges were made for the use of the turn-table and cars, but, until further notice, no charge was to be made for the use of terminal facilities at Port Jervis otherwise than as specified in the arrangement. With the organization of the present defendant, and taking possession of the Erie Railway, a charge of \$50 per month for the use of terminal facilities was made by the defendant. Its payment was not enforced because of the inability of the Monticello Company to pay. From 1875 the Monticello Company used the tracks and yard of the Erie at Port Jervis for the passage and storage of its trains, the turn-table for turning its engines, the passenger station for its passengers, the sale of its tickets, and the checking and handling of its baggage, and the freight station for receiving, handling, and delivering of its freight. It paid certain ones of the agents of the Erie amounts monthly aggregating more than \$50. In November, 1886, the Monticello road was sold in sequestration proceedings. The present plaintiff was organized, not only for the purpose of operating a railroad from Port Jervis to Monticello, but also to build an extension of that road to intersect with the New York, Ontario & Western Railroad, a competing line of the defendant. The purchasers of the Monticello road conveyed it to the plaintiff. The plaintiff then entered into an agreement with the defendant for the use of the terminal facilities theretofore enjoyed by the Monticello Company for \$100 per month, such payment to cover services of agents. It paid that charge from November, 1886, to March 1, 1888. In the latter part of 1887 the plaintiff made arrangements for building an extension of its road to the Ontario & Western, and when the

defendant was advised that it was the purpose of the plaintiff to bring a competing road upon its tracks, and into its station at Port Jervis, it insisted that the terminal facilities at that place should be paid for at their value, which it fixed at \$300 per month, commencing March 1, 1888. The plaintiff paid that charge for March, 1888, and then ceased paying anything. No further payments having been made after March, on May 22, 1888, the plaintiff was notified that the privilege of using the defendant's property at Port Jervis would be withdrawn after June 1st. By subsequent arrangements the use was continued to June 21, 1888, when the connection was severed. This action was then commenced, and July 21st a temporary injunction was granted, under which the connection was restored and continued until the trial of this action and the entry of final judgment. The case was tried before Justice J. F. BARNARD. The plaintiff claimed that it had vested, permanent, and inalienable right to use the defendant's property without compensation, and based such claim on certain conversations between two of the directors of the original Monticello Company and Fisk and Gould, at the time president and vice-president of the Erie Railway Company. It is conceded that no written instrument existed giving any such right, and it was uncontroverted that no action was ever taken by the directors of either company claiming or granting such right. The trial justice found as a fact that no such right existed as the plaintiff asserted. He, however, stayed all proceedings of the defendant on the decision for 60 days, to give the plaintiff opportunity to move for a commission to fix the terms on which the plaintiff might connect its road with that of the defendant under the statute in such cases. The plaintiff did not avail itself of the privilege thus given, and after the expiration of the 60 days judgment was entered dismissing the complaint on the merits. From that judgment the plaintiff appealed, and the case is now here for review. It is contended by the defendant that the judgment appealed from is right; that the decision of the trial court was correct on the facts; and that, in any view that can be taken of the testimony, the claim of the plaintiff cannot be sustained as a matter of law.

T. F. Bush, for appellant. *L. E. Carr*, for respondent.

PRATT, J. The testimony at the trial was to some extent conflicting, but the decision made was abundantly sustained by proof; nor can we say that there is any preponderance of proof in favor of the appellant. On the contrary, we are of opinion that, if the utmost credit be given to the testimony introduced by plaintiff, it does not show an agreement that equity can enforce; for, if it be conceded that an understanding was reached that terminal facilities should be accorded without charge, we do not find that any time was specified during which that arrangement should continue. Other arrangements were also made, and the Erie might claim, with much show of fairness, that the continuance of the terminal facilities without charge was to be limited to the duration of the other portions of the agreement. Where so much is uncertain, a court of equity has not the means of establishing, with adequate precision, what were the terms and conditions of the agreement, if it be that one was definitely made. We must therefore affirm the judgment.

ROBINSON v. BROWER.

(*Supreme Court, General Term, Fifth Department. June 30, 1900.*)

MORTGAGES—FORECLOSURE—PARTIES.

Where a mortgage, given to secure six annual installments of purchase money for a farm, contains a power of sale by the mortgagee, his executors, etc., and also a clause to the effect that "all unpaid balance to fall due, one-half in one year, and one-half in two years, after the death" of the mortgagee, should be payable, the first to his son, and the other to a person named therein, and it appears that all the

installments secured had fallen due prior to his death, neither the persons named in such clause nor their personal representatives have any interest in the mortgage; and an action for the foreclosure thereof can only be brought in the name of the executor or administrator of the deceased mortgagee.

Appeal from special term, Monroe county.

Action by William Robinson, executor, etc., against Dewitt C. Brower, to foreclose a mortgage. Judgment entered on the findings of the court foreclosing the mortgage. Defendant appeals.

W. A. Sutherland, for appellant. *J. M. Dinninny*, for respondent.

DWIGHT, P. J. The action was for the foreclosure of a mortgage executed in 1871 by the defendant and his wife, Catherine E. Brower, to the plaintiff's testator, Aaron Robinson, to secure a portion of the purchase money of a farm conveyed by the latter to the parties first mentioned, of whom Mrs. Brower was his daughter. It was conditioned for the payment of the sum secured, in six equal annual installments, the first of which was to fall due in six years from date. It was in the usual form, including a power of sale to the mortgagee, his executors, administrators, and assigns, with the addition of the following clause: "But it is understood that, in case said Aaron Robinson should die, all unpaid balance of said amount to fall due, one-half in one year, and the other half in two years, from the death of the said Aaron Robinson, whatsoever written to the contrary notwithstanding, and the half first paid, as last mentioned, to be paid to Willard Robinson, son of said Aaron Robinson, and the balance to the said Catherine E. Brower." Aaron Robinson, the mortgagee, died in 1889, nearly seven years after the last payment on the mortgage became due, and three years after the death of Mrs. Brower. The only objections to the judgment are that the plaintiff, under the clause of the mortgage above quoted, had no interest in or right of action upon the mortgage, but that, the mortgagee having died, the money remaining unpaid on the mortgage became payable to the son, Willard, and the executor of the deceased daughter, Mrs. Brower, and that they were the proper parties to maintain the action. There seem to be two quite conclusive answers to these propositions. The first is that they involve a manifestly erroneous construction of the clause in question. Its true construction apparently is that the death of the mortgagee, upon which event the falling due of any unpaid balance of the amount secured by the mortgage should depend, must be at a time when some such balance had not yet fallen due according to the condition of the mortgage itself. The second answer is that, even if the construction contended for were correct, an action for the foreclosure of the mortgage could only be maintained by the plaintiff as executor of the mortgagee. The mortgage had never been assigned; it was the property of the mortgagee at the time of his death, and passed to his personal representative, to whom, also, in that event the power of sale was given by the terms of the mortgage; and he would be held to account to whatever parties might be entitled to the proceeds of the foreclosure. In that case, moreover, it seems quite clear that no part of those proceeds would be payable to the executor of Mrs. Brower, who had died before the event upon which, under the clause in question, a share of the money secured by the mortgage could in any case have been payable to her. The findings and judgment of the court at special term were in accordance with these views, and the judgment must be affirmed. Judgment appealed from affirmed, with costs. All concur.

QUINN v. McDONALD.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

REFERENCE—WHEN GRANTED—ISSUE OF FRAUD.

Where the answer in a foreclosure suit sets up fraud in the taking of the mortgage and its assignment to plaintiff, the action is not one in which a reference can be compulsorily ordered.

Appeal from special term, Westchester county.

Action by Ellen M. Quinn against Margaret McDonald to foreclose a mortgage assigned to plaintiff. Plaintiff appeals from an order of reference.

Argued before BARNARD, P. J., and PRATT, J.

Pascal T. Southern, for appellant. *Benner & Benner*, for respondent.

BARNARD, P. J. The action is not one in which a reference can be compulsorily ordered. The complaint sets out the execution of a bond and mortgage to one John Lynch by Hugh McDonald to secure moneys due to Michael J. Murphy and Jonas C. Quinn from Edward McDonald, under a contract he had with the United States government. The premises are now owned by the defendant, Margaret McDonald. The only account involved is one between Murphy and Quinn on one side, and Edward McDonald on the other, to determine the amount due on the bond and mortgage as against the surety. This is not an account, in the ordinary acceptance of the term, between the parties, and is not referable. *Camp v. Ingersoll*, 86 N. Y. 433; *Untermeyer v. Bethauer*, 105 N. Y. 521, 11 N. E. Rep. 847. Assuming the action to be referable by motion as one involving the examination of a long account, it should not be referred under the issue made by the pleadings. As has been stated, the complaint avers the execution of a bond and mortgage to secure moneys due from Edward McDonald to Jonas C. Quinn and Michael J. Murphy. The answer denies the execution of the bond and mortgage, and alleges that the same was given to secure a loan which was never made, and that the plaintiff is a fraudulent vendee of the mortgage. The answer further avers that in the deed of the premises from Hugh McDonald to Margaret McDonald a brother of the plaintiff fraudulently inserted an assumption of this mortgage, and the answer claims to cancel the mortgage and strike out this clause. The only real issue, therefore, is of the execution of the bond and mortgage. The charges in respect thereto involve questions of fraud and breach of faith. The circumstances surrounding the transaction as stated in the complaint are not without need of explanation, as the showing of the consideration of the bond and mortgage as stated therein. The bond and mortgage was given to one John Lynch. It was given for \$5,000, payable in the usual form. It contains no reference to the same being given to secure a debt of Edward McDonald. Why it was not given direct to the creditor, and why it was assigned to them rather than the plaintiff, are questions to be answered by the plaintiff upon the trial. The plaintiff has a right to have these issues tried in the usual way. Did the plaintiff, or those acting for her, insert an averment in Margaret McDonald's deed? Was this done by an attorney of this court? The plaintiff is to be compelled to answer these questions under the pleadings, and should have a trial in the special term of this court, or by issue to be framed for a jury. The order should therefore be reversed, and the motion for a reference denied, costs of motion and of appeal to abide event of the action.

QUINN v. McDONALD.

(Supreme Court, General Term, Second Department. July 18, 1890.)

Appeal from special term, Westchester county.

Action by Ellen M. Quinn against Annie McDonald to foreclose a mortgage assigned to plaintiff. Plaintiff appeals from an order of reference.

Argued before BARNARD, P. J., and PRATT, J.

Pascal T. Southern, for appellant. *Benner & Benner*, for respondent.

BARNARD, P. J. The issue in this action is the same in every respect as in the preceding action, (*Quinn v. McDonald*, ante, 855,) and the order granting a reference should be reversed for the same reasons as are given in the foregoing opinion.

DUFF v. HUTCHINSON *et al.**(Supreme Court, General Term, First Department. June 26, 1890.)*

1. RELEASE AND DISCHARGE—ACTION TO AVOID—RESTITUTION.

Where defendants pay a sum of money to plaintiff in consideration of a complete release of all claims on his part against them, an action to open the settlement cannot be maintained where the complaint contains no offer to return the money so paid and the evidence shows that plaintiff is incapable of making such return.

2. SAME—RESTRICTION.

Where a release is executed with full knowledge that it is a general release of all differences between the parties it will not afterwards be restricted merely because the party giving it claims to have discovered other frauds, of which he was not aware when he executed it.

Appeal from special term, New York county.

Action by John R. Duff against William J. Hutchinson and George H. Kennedy. Plaintiff appeals from a judgment dismissing his complaint on its merits.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Edmund W. Powers, for appellant. *Evarts, Choate & Beaman*, (*Joseph H. Choate*, of counsel,) for respondent Hutchinson. *W. B. Putney*, for respondent Kennedy.

VAN BRUNT, P. J. This action was brought to have a certain general release, executed by the plaintiff in favor of the defendants, limited and confined in its operation and effects to three specific matters and transactions between the parties, and for an accounting between the parties as to all other matters or transactions between them. It appeared upon the trial that the defendants were copartners, doing business as stockbrokers and bankers, and had been such for five years and more preceding the 31st of December, 1881; that the defendants during such period transacted business for the plaintiff in buying and selling stocks and bonds, in the course of which the defendants received from the plaintiff large sums of money and large amounts of stock and bonds, and paid out for the plaintiff large sums of money, and charged him with divers sums as interest and commissions on purchases and sales. On the 31st of December, 1881, the said firm dissolved, and a settlement was made between the copartners, and one of the defendants withdrew entirely from the business. A summary statement of all transactions between the plaintiff and defendants up to the time of such dissolution was made, and delivered to the plaintiff, but the plaintiff then or shortly thereafter claimed that it was not correct. Between the 1st of January and the 2d of March, 1882, the plaintiff obtained and received information which he claimed satisfied him that the defendants had defrauded him, and that the account as kept by the defendant was irregular, and fraudulent towards him. On the 2d of March the plaintiff claimed, by reason of the irregular and fraudulent transactions and accounts of the defendants, to receive the sum of \$1,000,000. The defendants denied the charges, and denied that the plaintiff was entitled to receive anything. Thereupon an agreement was made by way of compromise between the plaintiff and the defendants by which the plaintiff agreed to accept from the defendants the lump sum of \$750,000, in full and complete settlement of all claims against the firm; and thereupon the defendants paid to the plaintiff the sum of \$750,000, and the plaintiff executed and delivered a general release to the defendant. The plaintiff subsequently, claiming to have discovered other errors in said accounts than those which he had discovered at the time above mentioned, brought this action for an accounting against the defendants, and that the said release be limited and confined to the specific matters known to the plaintiff at the time at which the release was given. The complaint contains no offer whatever to return the \$750,000 received at the time of the execution of the release, and the evidence upon the

trial shows that the plaintiff was incapable of making such return, and did not even offer to do so upon the trial. Upon this state of facts the court dismissed the complaint, and from the judgment thereupon entered this appeal is taken.

It is conceded upon the part of the plaintiff that if an action at law had been brought against the defendants it would have been necessary for the plaintiff, prior to the beginning of the action, to have offered to return the \$750,000. *Gould v. Bank*, 99 N. Y. 333, 2 N. E. Rep. 16. It is claimed that an action at law proceeds upon the theory that there has been a rescission, but that a suit in equity does not, but upon a diametrically opposite theory that there has been no rescission, and asks the court by its judgment to rescind. It is a suit seeking a rescission, and so far as restoring the party to his original position is concerned, and placing him *in statu quo*, the rule in equity is satisfied if the judgment will accomplish that result. We think that the appellant is mistaken in reference to the rule in equity. The distinction between the rule in equity and the rule at law seems to be that in equity it is not necessary to tender restitution before action brought, but in the complaint restitution must be offered, and, if it appears that the plaintiff is incapable of making restitution, then the action for a rescission will not lie. In the case of *Gould v. Bank*, above cited, it is distinctly held that a party cannot be permitted under any circumstances to keep the fruits gained by a settlement and litigate the question whether he is to be bound by it or not. In other words, the plaintiff will not be allowed even in equity to assume the position that if beaten he will keep what he has got, and if successful he will get what he can. The case of *Allerton v. Allerton*, 50 N. Y. 670, gives no countenance to the rule sought to be established. In that case it was simply held that restitution should not be required because it appeared that under any circumstances the money which had been received belonged to the plaintiff, rescission or no rescission. The cases on the subject of rescission, and the circumstances under which restitution is necessary before the granting of equitable relief, are stated in *Metropolitan El. Ry. Co. v. Manhattan El. Ry. Co.*, 11 Daly, 373. In that case restitution was not held to be a condition precedent to rescission because it appeared upon the face of the papers that under any circumstances the plaintiff was entitled to the money which it had received, whether the contract sought to be rescinded was in existence or not. In the case at bar the frauds alleged by the plaintiff against the defendants were denied. These \$750,000 were received in settlement of a disputed claim, and if the plaintiff desired to open that settlement the defendants had the right to contest the items included therein, and to be placed in a position to have an effective judgment in case they should succeed. They were not bound to go into the discussion of this question with the certainty that if they succeeded the plaintiff would be no worse off because he already had that which had been paid in the settlement and which he was in no condition to return. The principle, which is the cardinal principle governing all applications to a court of equity, that a party seeking equity must do equity, applies to a case like the one at bar. It would be the height of injustice to allow this plaintiff to litigate this question with no chance, in case he should fail, of losing anything that he had gained by the settlement. It is only in those cases where restitution is offered, and it appears that restitution can be made, that a court of equity will wait until final judgment to determine whether restitution should be made or not. Where it appears at the commencement that restitution cannot be made, that ends the right of the plaintiff to have his action for rescission considered by a court of equity. It is clear that the plaintiff was not in a condition, upon the proof offered by him, to claim that the release should be restricted to the items about which he says it was intended to refer. The evidence shows beyond question that he intended to give a general release. That was what was demanded, and that was what he agreed to give, and it was for that he received the \$750,000.

That he did not know at that time of other frauds does not affect this proposition. An instrument cannot be restricted because a party subsequently finds he ought to have been more careful in giving it. It may be set aside because of fraud. It cannot be restricted because of fraud where a party knows the nature of the instrument which he has executed. In the case at bar the plaintiff, having executed a release with full knowledge that it was a general release in settlement of differences between himself and the defendants, claims subsequently to have discovered other frauds, of which he was not aware when he executed the general release. He comes into a court of equity, and claims to have this release shorn of its definite character because he had not in mind the releasing of anything else but that of which he then knew. In other words, he is endeavoring to get for his \$750,000 an entirely different instrument from that which he knew he agreed to give the defendants for that sum. There was no case of mutual mistake. There was no misunderstanding in regard to the terms; that is, the plaintiff knew perfectly well the character of the instrument he was signing, and, under such circumstances, the instrument cannot be reformed, for that is substantially the relief which the plaintiff asks for upon this branch of the case. Upon the whole case, therefore, we do not see how it is possible upon the conceded facts for the plaintiff to maintain his action, and the judgment appealed from should be affirmed, with costs. All concur.

HARRIS v. STRODL.

(*Supreme Court, General Term, First Department. July 18, 1890.*)

1. **WILLS—CONSTRUCTION—SURVIVORSHIP.**

Testator devised all his property to his wife, to receive the rents and profits for life or until she should remarry, and directed that, should she remarry, all the estate should be sold, and one-third of the proceeds be paid to his widow, and the residue be divided equally between his children, the children of any child of testator who may have died to receive the amount which their parent would have been entitled to if living, and that, should his widow die without remarrying, then the estate should be divided between testator's children and the children of any child who may have died, as above. *Held*, that the substituted devise to the children of any deceased child of testator referred to the death of such child before the remarriage or death of the widow, and not during testator's life-time, and a good title to such property could not be given during the life-time of the widow, before her remarriage.

2. **VENDOR AND VENDEE—DEFECTIVE TITLE—RECOVERY OF EARNEST MONEY.**

In an action to recover money paid on a land contract on the ground that the title was defective the tender of a good title at the trial nine months after it was to have been given will not defeat a recovery.

Appeal from special term, New York county.

Action by Sander Harris against John H. Strodl. There was judgment for plaintiff, and defendant appeals.

Argued before VAN BRUNT, P. J., and BARRETT and BARTLETT, JJ.

Samuel J. Crooka, for appellant. *David McClure*, for respondent.

BARTLETT, J. The plaintiff agreed to purchase of the defendant certain real property situated in Hester street, in the city of New York, and paid the defendant \$1,000 on account of the purchase price. In the present action he has recovered the amount thus paid, and an additional sum of \$224.10, expended in examining the title, on the ground that the title offered him by the defendant was not good and marketable. The only question discussed on the argument of this appeal was whether the title was such as a vendee ought to be compelled to accept. I agree with the learned judge at special term that it was not. The title comes through the will of one John George Vix, which provides—*First*, that the testator's wife, Salomea Vix, shall have and hold all his estate, to receive the rents, issues, and profits thereof, and apply the same as she shall see fit, during the term of her natural life, or until she shall

remarry; *secondly*, that, should she remarry, all his said estate, real and personal, shall be sold by his executors at public or private sale, and one-third of the proceeds paid to his wife, and the remaining two-thirds divided equally between his children, share and share alike, the children of any of the testator's children who may have died to receive the amount the parent would have been entitled to if living; and, *thirdly*, that should the testator's wife die without marrying again, then upon her death the estate shall be divided between the children, share and share alike, the children of any deceased child to receive the same proportion the parent would have received if living. A fourth article of the will gives the executors full power to sell and convey any and all of the testator's real estate whenever they may deem it best to do so, and upon such terms as they may think desirable. The widow is still living, and has not remarried. The testator left three children. Two of them are married, one having two children, and the other one child. The third child of the testator is unmarried. The widow and the three children of the testator, John George Vix, executed a conveyance of the property in question to the defendant on February 1, 1886. The contract by which the defendant undertook to convey the premises to the plaintiff was made on February 16, 1888, and provided for the delivery of the deed on or before the 15th of the following April. Upon the trial of the present action, and apparently for the purpose of obviating any objections then existing to the title, the defendant produced a deed from the executors to himself, dated back to February 1, 1886, but acknowledged in December, 1888, and January, 1889. In giving this deed the executors must have assumed to exercise the power of sale conferred upon them by the fourth article of the will. It seems quite clear that at the time he made his contract with the plaintiff, and at the time this action was commenced, the defendant had not acquired a good title. The substituted devise to the children of children of the testator, directed in the second and third articles of the will, refers to the death of his children before the remarriage or death of the testator's widow, not to the death of his children during the life-time of the testator. The rule which construes the term "in case of death" as referring to death in the life-time of the testator applies only where there is an absolute gift on the death of the devisee, for it is based on the principle that death is certain, and hence that, unless such death be restricted to some particular period, it cannot be a matter of contingency. See *Vanderzee v. Slingerland*, 103 N. Y. 47, 53, 8 N. E. Rep. 247. Here, if the children of the testator survive either the remarriage of the widow or her death, there is no substitution in the gift. Under this construction it is evident that until the remarriage or death of the widow it cannot be told whether the children of the testator or the children of such children will take the fee. It is true the remainder taken by the children of the testator is vested, under the definition given by our statutes, but it is subject to be divested by the death of any child leaving children prior to the remarriage or decease of the widow. This possibility of the estate being divested prevents a good title being given by the devisees. I think that the power of sale conferred upon the executors is good, but was exercised too late, so far as this case is concerned. After a delay lasting from April to January the defendant could not tender a deed which would operate as a bar to a valid cause of action then on trial. This offer should have been made promptly, not after the plaintiff had been compelled to abandon his bargain and seek redress by a lawsuit. The judgment was right, and should be affirmed. All concur.

PEOPLE *ex rel.* REIS v. FRENCH *et al.*, Police Commissioners. .

(Supreme Court, General Term, First Department. June 6, 1890.)

MUNICIPAL CORPORATIONS—REMOVAL OF POLICEMAN.

Relator, a policeman, was charged with being so drunk as to be unfit for duty. His captain testified that he could not walk straight, smelt very much of liquor,

and was unfit for duty, but could talk very well. Three of the sergeants testified that relator was unfit for patrol duty. Relator's denial as to his condition was only very slightly corroborated. *Held*, that the evidence created a question of fact for the police commissioners, and that their action in dismissing relator from the force would not be disturbed.

Certiorari to review the action of the police commissioners of the city of New York in dismissing relator, Charles T. Reis, from the police force.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

John M. Tierney, for relator. *John J. Delany*, for respondents.

DANIELS, J. The charge upon which the relator was tried and removed was that he was so much under the influence of intoxicating liquor in the first precinct station-house as to be unfit to perform police duty, and that this was his condition at the expiration of his tour of patrol duty on the 18th of January, 1889. The charge was denied by him, and in support of the charge Capt. McLaughlin testified that the officer could not walk straight, and smelt very much of liquor, but still he could talk very well. This was at the time he was entitled to leave the station-house, and he added that the officer was then unfit for duty. Sergeant Hatton gave substantially the same description of the officer, and added that this was his condition when he came in from patrol duty. Sergeant Doherty was not quite as pronounced in his conclusion, but by his evidence still confirmed the fact that the officer was so much influenced by liquor as to be incapable of overtaking a person who should endeavor to escape from his efforts to capture him. Sergeant Halpin was about as confident as the witnesses first examined, as to the officer's condition, and he added that the latter stated he had taken a drink on account of a person brought in by him, which he thought to be a case of cholera. But in his judgment the officer was unfit for patrol duty, by reason of being under the influence of liquor. The evidence of the surgeon was more favorable to the accused, but his inspection and examination of him was nearly an hour later in the afternoon. The officer denied being in this condition, and also the statement mentioned by Sergeant Halpin, and testified that the person brought in by him was a sick sailor. Patrolman Newton stated that he saw the officer about 20 minutes after 12, when he gave no indication of having been drinking. The further evidence was very slight, and not materially affecting the case. It is quite plain that the evidence created a question of fact for the commissioners to decide. It was sufficient to support the view adopted by them. And upon the whole case there seems to be but one alternative, and that is to affirm their decision. All concur.

In re PRYOR'S ESTATE.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

WILLS—INTEREST ON LEGACIES.

Under 2 Rev. St. N. Y. p. 90, § 48, providing that payment of legacies cannot be compelled until one year after letters testamentary have issued, interest on general legacies begins to run one year after the issue of letters testamentary, and not after the lapse of that period from testator's death.

Appeal from surrogate's court, Westchester county.

Upon the accounting of Henry Barron and Edward Wood, executors of the will of Edmund H. Prior, the question arose as to when the general legacies began to bear interest, and, the surrogate having decided that the legacies drew interest from one year from the issue of letters testamentary, the New York Infirmary for Women and Children, to whom a general legacy of \$15,000 was given, appeals.

Argued before BAERNARD, P. J., and DYKMAN and PRATT, JJ.

De Forest & Weeks, for appellant. *Wilson M. Powell*, for respondents.

BARNARD, P. J. The case of *Bradner v. Faulkner*, 12 N. Y. 472, is a direct authority upon the question presented by this appeal. By the common law, one year after the death of a testator was given in which the executor collected the assets, and a legacy was not, in the absence of expressed direction, payable sooner. It was the uniform practice to allow interest only after the legacy was payable. The Revised Statutes changed the rule so that legacies could only be paid one year after the granting of letters testamentary. 2 Rev. St. p. 90, § 43. The court of appeals in *Bradner v. Faulkner* held that the legacy in that case did not draw interest from the death of the testator, but from and after one year from the granting of letters testamentary. In the case of *Cooke v. Meeker*, 36 N. Y. 15, the court of appeals held the same way. There is no conflict between the opinions of the court. The judgment was that interest be allowed from one year from the granting of letters testamentary, and that was affirmed by the court of appeals. It is true that one of the judges stated that the statute was an affirmance of the common law, and did not change the rule as to interest, but this remark evidently had reference only to the facts of that case. What was apparently intended seems to be that the statute did not give interest from the death of testator, but from and after the expiration of a year from the granting of letters testamentary. The question presented in the case of *Wheeler v. Ruthven*, 74 N. Y. 428, was whether the legacies were due until the end of a life-estate. The court in the opinion speaks of a legacy being due at the end of a year from the death of testator, as if the statute so read. The statute was entirely unimportant in the case. The question was whether the legacies were "due and payable at the end of the year from testatrix's death, so as to bear interest from that time, according to general rule." In the case of *Thorn v. Garner*, 113 N. Y. 198, 21 N. E. Rep. 149, the court of appeals again had the question of interest upon legacies under consideration. The question was whether interest was payable from the death, or from the expiration of one year from the granting of letters testamentary. The rule that interest is only to be charged from the end of one year from the granting of letters testamentary is again restated in *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207, 21 N. E. Rep. 75. The general rule is that interest can only be charged from the date when the legacy is due, and the statute controls that, and now the cases based upon a rule which once existed and is now destroyed by statute have importance in hostility to the general rule. The effect of the statute is to make due a legacy one year from the issuing of letters, and not in one year from the death of the testator. The judgment should be affirmed, with costs.

SWARTWOOD v. WALBRIDGE.

(Supreme Court, General Term, Fifth Department. June 20, 1890.)

SCHOOL-TEACHER AND TRUSTEE—CHARACTER OF EMPLOYMENT—ASSAULT AND BATTERY.

The trustees of a public school may determine the employment of the teacher at pleasure, and the only remedy is on the contract; and a trustee is not liable, as for an assault and battery, for using sufficient force to prevent a teacher from entering a school-house to continue teaching after she had received notice that she was discharged.

Appeal from circuit court, Steuben county.

Action by Sarah Swartwood against Philo Walbridge. Verdict and judgment for plaintiff, and motion for a new trial denied. Defendant appeals.

Argued before DWIGHT, P. J., and MACOMBER and CORLETT, JJ.

J. W. Dinning, for appellant. A. M. Burrell, for respondent.

DWIGHT, P. J. This was an action of assault and battery. The defendant was the trustee of a school-district in which the plaintiff had been for some time employed as the teacher of the school. The alleged assault was committed by the defendant in resisting an attempt by the plaintiff to force an entrance

into the school-house, for the purpose, as she declared, of taking charge of the school after she had been notified by the defendant that she was discharged from her employment as teacher; and the question is distinctly presented, by several exceptions in the record, whether the trustee of a public school has the power to discharge a teacher, either with or without cause, to the effect of terminating the employment of the teacher, and depriving him of his authority to continue in charge of the school. Of course, the trustee cannot by any act of his own, and without the consent of the teacher, abrogate an existing contract, which the latter has not violated, and stands ready to perform, so as to deprive the teacher of his remedy for a breach of the contract. *Finch v. Cleveland*, 10 Barb. 290. But the question here is not whether the trustee may terminate the contract, but whether he may terminate the employment of the teacher at his pleasure. The answer to the question manifestly depends upon the relation in which the two stand to each other. If the position of the teacher were a public office, and the trustee the appointing power, we should expect to find the tenure of the office defined by the statute by which it was created. But there is no such office created or recognized by statute. The teachers of the public schools are not public officers, but simply the employes of the trustees of the schools in whose service they are employed. *Peoples v. Board*, 3 Hun, 177. They are not appointed, but hired, and the tenure of their employment must be governed by the same rule as that which applies to the case of every person employed in the service of another under a contract of hiring. That contract is one of which neither party can enforce specific performance. No employer can be compelled to retain in his employment a servant, of whatever grade or whatever the term of his employment, beyond the time when it suits his pleasure to dispense with his services; nor, equally, can the person employed be compelled to continue in the employment beyond the limit of his pleasure and convenience. Either is of course liable to an action for a breach of the contract, but neither can employ restraint or force to compel performance on the part of the other. This rule, it is apparent, does not impair the obligation of the contract, but merely excludes one mode of enforcing its obligation. The housekeeper may discharge her cook, the keeper of horses may discharge his groom, the merchant his clerk or book-keeper, the manufacturer his overseer or superintendent, notwithstanding an unexpired contract of employment, and the remedy of the person discharged is by his action for damages. He can neither compel specific performance of the contract by process of law nor maintain himself in his position by force. Of course the rule is reciprocal in its operation. No servant or employe can be compelled, either by legal or personal constraint, to continue to render the services contracted for. He may leave his employment whenever he sees fit, and the remedy of his employer is by action for breach of contract. Applying these principles to the case in hand, it seems that the teacher cannot be compelled to remain in the school and teach, nor the trustee to permit her to do so. The obligation of the contract, and the remedy for its violation, is the same for both. The remedy of the plaintiff, if discharged without cause, was not to force an entrance into the school-house in order to resume her duties as teacher, but to tender a continuance of her services, and recover her compensation as if those services had been actually rendered during the term of her employment. If she mistook her remedy the defendant was justified in resisting force by force, and was liable in this action only for excess of force employed. The error of the trial court was in holding and instructing the jury, in effect, that the trustee had no power to discharge the teacher from her employment except for good cause shown, and that the teacher, if discharged without such cause, had the right to continue in her employment without the consent of the trustee. For this error the judgment and order should be reversed, and a new trial granted, with costs to abide the event.

All concur.

GARFIELD NAT. BANK v. COLWELL.

(Supreme Court, General Term, First Department. June 26, 1890.)

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASERS.

Where a bank discounts a note with knowledge that the maker signed the note simply to make it in proper form, and with the understanding that he assumed no responsibility in doing so, there can be no recovery as against such maker in favor of the bank.

Appeal from circuit court, New York county.

Action by Garfield National Bank against Frank W. Colwell. There was a verdict and judgment for plaintiff, and defendant appeals. For former litigation between the same parties, see 8 N. Y. Supp. 380; 5 N. Y. Supp. 956; 4 N. Y. Supp. 5.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

W. B. Ellison, for appellant. L. C. Wachner, for respondent.

VAN BRUNT, P. J. This action was brought to recover the balance remaining due upon a promissory note made by the defendant to the order of S. S. Hepworth & Co., which note was discounted by the plaintiff. It appeared from the evidence that the defendant was an employee of Hepworth & Co., and knew the vice-president of the plaintiff, Mr. Robinson. At the time the note in question was made the defendant had a conversation about the need of Hepworth & Co. for money, and that Robinson thereupon suggested this note. The witness says: "I told him I understood from Hepworth & Co. that I would incur no liability in signing this note." Whereupon Robinson told him to have such a note made up, and that he would see that it was discounted. "He told me when it was signed and made up to take it up to the Garfield Bank, and he would leave instructions at the bank to have it discounted." The defendant further testified that he saw the cashier, and told him that he had a note signed by himself, and indorsed by Hepworth & Co., and that Mr. Robinson asked him to take the note up there and present it to him, and he would leave instructions to have it discounted; that he had told Robinson that he had been informed by Hepworth & Co. that he would incur no liability at all. The cashier replied that he so understood it, whereupon the defendant handed him the note. The defendant received none of its proceeds, nor any consideration whatever for its signature. The cashier testified that the conversation was that the defendant signed the note simply to make it in bankable form, and that he assumed no responsibility, and had no responsibility attached to him. "I accepted said note under these circumstances as cashier of the Garfield Bank." Proof having been given of the discount of the note by the plaintiff, and that it was then held by it, the court directed a verdict for the plaintiff. In this we think there was error. Undoubtedly it would be no defense to show that the plaintiff knew at the time of the discount of the note that it was accommodation paper. The mere fact that it was accommodation paper would in no way affect the right to recover, because the giving of the note as an accommodation, if no recovery could be had upon it by the holder of the note, would not be any accommodation to anybody, because nobody could use it. In the case at bar, however, the proofs show a different state of affairs; not only that it was accommodation paper, but also that there was a distinct understanding between the maker of the note and the payee that the maker should incur no liability by the signing of the note. The case of *Benton v. Martin*, 52 N. Y. 578, and *Seymour v. Cowing*, 40 N. Y. 532, establish the proposition that a person has the right in the use of an unsealed instrument to impose conditions the observance of which is essential to its validity. This rule is the foundation upon which those cases rest which hold that, where there has been a diversion of the note, unless the holder is a *bona fide* holder without notice he cannot recover. In the

case at bar it appears that the plaintiff knew that it was the understanding of the defendant that he should not under any circumstances be liable upon the note. Knowing that this was the agreement between the parties, it is difficult to see how with such knowledge it could acquire the right to enforce that which it knew had been agreed should not be enforced. The plaintiff did not therefore occupy the position of a *bona fide* holder without notice. The judgment and order appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

SPERB v. METROPOLITAN EL. RY. CO.

(*Supreme Court, General Term, First Department. June 26, 1890.*)

1. APPEAL—REVIEW—QUESTIONS OF FACT.

On an issue whether authority to settle an action had been revoked by plaintiff before a settlement was actually made, the finding of the referee, to whom the matter was referred, is not conclusive upon the general term, but it is the duty of that court to consider the evidence, and, if upon the whole case it thinks a different result should have been arrived at, to decide accordingly.

2. PRACTICE IN CIVIL CASES—STIPULATION—SETTING ASIDE.

A stipulation by a party may be set aside where it appears that it was given unadvisedly, that it would be inequitable to hold him to it, and that the other party has not been prejudiced thereby.

Appeal from special term, New York county.

Action by William Sperr, Jr., against the Metropolitan Elevated Railway Company. Defendant appeals from an order setting aside a stipulation for the settlement of the action.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Duvis & Rapallo, (Brainerd Tolles, of counsel) for appellant. Edwin M. Felt, for respondent.

VAN BRUNT, P. J. A motion was originally made for this purpose at the special term, but upon the hearing, the judge presiding not being willing to pass upon the conflicting statements made in the affidavits, a reference by consent was made to Stephen H. Olin to take proofs and report the same with his opinion thereon. The referee, after hearing the parties and the proofs which they produced, reported that early in the month of April, 1889, the plaintiff authorized his attorney to settle this action with the defendants upon the receipt from them of the sum of \$3,000, and that on the 19th of April the plaintiff, by notice in writing, revoked and annulled the said authority to settle the action; that an agreement for the settlement of the action was, on the 18th of April, 1889, signed by the defendants' attorneys, and delivered to the plaintiff's attorney, but that the said agreement was not on said day signed by the plaintiff's attorney and delivered to the defendants' attorney; that thereafter, and after April 19, 1889, and after the said revocation of his authority to settle the action, the plaintiff's attorney signed the said stipulation, and delivered the same to the defendants' attorney. Upon these facts the court vacated the stipulation, and from the order thereupon entered this appeal is taken.

It is claimed upon the part of the appellant that there is no evidence whatever to sustain the finding of the referee that the stipulation was not signed by the plaintiff's attorney until after the revocation of his authority. The counsel for the respondent claims that as the sole question to be determined upon the motion was one of fact, and that as a full opportunity was offered to the defendants to produce their proofs before the referee, and that after doing so both the referee and the judge at special term have concurred that the motion should be granted and the stipulation vacated, this court will not review the facts, and, unless some error of law is found, it will affirm the order appealed from. We think, however, that the learned counsel for the

respondent is mistaken in respect to the duty of this court upon the hearing of this appeal. We think that it is bound to consider the evidence, and, if upon the whole case it thinks that a different result should have been arrived at, it is its duty so to decide. There are no questions of law involved in this appeal, but simply a question of fact, and although the court in reviewing the facts should bear in mind the circumstance that the referee in examining the witnesses before him had the benefit of their oral testimony, had the benefit of their demeanor upon the stand in determining what credit should be given to their evidence, his findings thereon are not necessarily conclusive. There is unfortunately in this case a degree of uncertainty in reference to certain material features, which makes it somewhat embarrassing when the court considers the evidence taken before the referee as it appears in the record now presented. There was, from the evidence offered upon the part of the plaintiff, a presumption created arising from the admissions of the attorney, sworn to by the plaintiff and his witness, and which evidently was believed by the referee, that the stipulation in question had not been signed by the attorney until after the revocation of his authority. It is true upon his examination the attorney testified to a condition of affairs which is inconsistent with this idea, as, according to his testimony, the stipulation was signed immediately after Mr. Smith returned from his interview with the plaintiff, a day or two before the revocation. It is true that the attorney could not give the date upon which he claims this stipulation to have been signed; but we think that no great weight should be placed upon this fact, because if a date is fixed by testimony as to events it is equally as satisfactory as though the particular date had been given, because it is a familiar feature in respect to testimony that many persons cannot recollect dates, but whose recollection of events, and the sequence of events, is perfect. This testimony was entirely inconsistent with that given on behalf of the plaintiff by the plaintiff himself and Mr. Thomas, who saw the plaintiff's attorney subsequent to the revocation of the authority. And we are equally unfortunate in the want of memory of the representative of the defendants' attorneys, who had charge of this matter. Their blotter shows that undoubtedly, on the 18th of April, a stipulation was signed for the settlement of this case, but by whom does not appear, and it would seem to be probable that that entry was made at the time the stipulation in question was signed by the defendants' attorney, and sent to the plaintiff's attorney. This witness has no independent memory of the date when the exchange of stipulations took place. All that he could testify to after reading the entry was that he believed that on the 18th of April he exchanged written stipulations, and that all that he recollected positively was that stipulations were exchanged. It is true that certain letters from the plaintiff's attorney to the plaintiff were sought to be proved, but there was no satisfactory evidence that they had ever been received by the plaintiff, so as in any way to invalidate the testimony which he gave before the referee.

It is urged upon the part of the appellant that there was a radical misconception of the issue before the referee, and of the situation of the parties relative to the burden of proof. Upon this point we think there is also a misconception upon the part of the appellant. The right of the plaintiff to be relieved from this situation does not depend upon the strict rules of law; but, in view of the fact that the defendants have lost nothing by reason of the stipulation being given, the court could relieve the plaintiff from the stipulation even after it had been given by his own act, if it was given inadvisedly, and it would be inequitable to hold him to its terms. The burden therefore, is not entirely upon the plaintiff to show that this stipulation was absolutely signed after the withdrawal of the authority. If there was grave doubt upon that subject, the court would be justified in relieving the plaintiff from the situation, although he did not absolutely establish that it had been

signed subsequent to the revocation of the authority. Upon an examination of the evidence in this case, we see no reason for interfering with the order of the court below, and it should be affirmed, with \$10 costs and disbursements. All concur.

PEOPLE *ex rel.* CUNNINGHAM v. ROBB *et al.*, Park Commissioners.

(*Supreme Court, General Term, First Department. June 26, 1890.*)

MUNICIPAL CORPORATIONS—REMOVAL OF POLICEMAN.

The dismissal of a policeman on a charge of being on a certain occasion so much affected by the habitual use of alcoholic drinks as to be unfit for duty will not be disturbed on *certiorari*, though relator was not actually intoxicated on the morning in question, where there is sufficient evidence to show that his peculiar condition was due to chronic alcoholism.

Certiorari to review the action of the board of park commissioners of the city of New York in dismissing relator, Michael E. Cunningham, from the police force of the department of public parks.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

A. H. Purdy, for relator. G. S. Coleman, for respondents.

VAN BRUNT, P. J. There have been many cases brought to this court for review where policemen have been dismissed from the force upon the charge of incapacity for duty because of drinking, but this is the first instance in which a relator has presented a case to the court where he has been discharged for incapacity to do duty because he had not taken a drink. The relator was duly served with a notice whereby he was charged with improper conduct, and with conduct-unbecoming an officer, the specification being that he was, on a day therein mentioned, so much affected by the habitual use of alcoholic drinks as to be unfit to perform his duties, and that he was guilty of unbecoming conduct, the cause of which was that he was suffering from chronic alcoholism. It appears from the evidence that upon the day in question the relator could not maintain his position in the ranks, and that he was asked by the sergeant what was the matter, and the relator told him he had a pain, indicating that it was in his side; that the sergeant ordered the relator from the ranks to take a seat, subsequent to which the relator seemed to be all right, and afterwards he was sent on post. The sergeant testified that his condition in the ranks seemed to be that of a man about to have an epileptic fit; that he seemed all broken up from the hips up, but good enough in the legs. The evidence of the relator was that he was up all night the night before the parade, going from station-house to station-house looking for a child that was lost; that his wife was sick, and that he had had no breakfast; that he had reported for duty at 6 o'clock, and was nervous on account of his uncertainty as to his child, but otherwise was as well as ever; that he had a pain across his back like a knife going through it, and that the pain went away shortly after he stepped out of the ranks. The police surgeon who examined the relator upon the day in question testified that he was directed to make an examination of the officer to find out whether he was under the influence of liquor or not. The officer was then on post. He was sent for, and when he came in the surgeon informed him that he had been directed to examine him. He made the examination, and found that although he was suffering from what he considered to be chronic alcoholism, he was in a condition to enter upon his duty. His condition was such that he was not justified in saying that he was intoxicated. It was not an acute case of alcoholism, but his condition was due to the long-continued use of alcoholic stimulants. He was further asked whether the conduct of the relator before his removal from the ranks might have been due to chronic alcoholism, to which he responded that he would not pretend to say, because he didn't see him at that time, but from what he had heard he should say it might possibly have

been due to the fact of long-continued drinking. Upon the close of the oral testimony counsel for the relator suggested that the defendant be examined by an expert physician, and that such physician give his opinion as to whether the defendant was a sufferer from chronic alcoholism. It was so ordered, and the case was adjourned until such examination was made. He was examined by Dr. Hamilton, who reported that he was suffering, in his opinion, from chronic alcoholism, and his breath indicated that he had recently imbibed; that his physical condition was then such that if his habit continued it was only a question of time when he would be incapacitated for police duty. Upon this evidence the relator was dismissed, and we see no reason to interfere with the determination of the commissioners. There was sufficient evidence from which the commissioners might come to the conclusion that his peculiar condition on the morning in question arose from the effects of his indulgence in alcoholic liquors. It was not necessary that it should result from intoxication then present. If his habits were such that they rendered him liable to be unfit for duty, and such a result arrived, it was within the power of the commissioners to administer discipline therefor. With the extent of the discipline we have nothing to do. It was a matter within the discretion of the commissioners, and if we had the power, in the case at bar, we do not think that it should be interfered with. A person who has, by the constant use of alcoholic drinks, gotten into the condition in which the relator evidently was on the morning in question, does not seem to be a proper person to be upon any police force. The proceedings should be affirmed, and the writ dismissed, with costs. All concur.

CLARKE v. CRIMMINS.

(*Supreme Court, General Term, First Department. July 18, 1890.*)

NEGLIGENCE—EVIDENCE.

Defendant constructed a bridge over a trench he was digging in a public thoroughfare. A wagon passing over the bridge struck a loose beam lying thereon, causing it to tilt up and strike and injure plaintiff. There was evidence from which it might be inferred that the beam was placed on the bridge by defendant to divide the drive-way from the footpath, and it appeared that defendant's employer replaced the beam when it was knocked out of position. *Held*, that the question of defendant's negligence should have been submitted to the jury, though the driver of the wagon might have been more careful.

Appeal from circuit court, New York county.

Action by Kate E. Clarke against John D. Crimmins. From a judgment rendered in favor of defendant upon a dismissal of her complaint the plaintiff appeals.

Argued before BARTLETT and BARRETT, JJ.

Lowrey, Stone & Auerbach, for appellant. *Beekman & Ogden*, for respondent.

BARRETT, J. The real question upon this appeal is whether the defendant was responsible for the existence at the point in question of the piece of timber which injured the plaintiff. If he was, then I see no reason for the nonsuit. It was negligence to leave an unsecured beam loose at such a place. At all events, the question of negligence was plainly for the jury. At the time of the accident the defendant was digging a trench in Broadway, below Liberty street, and he had there constructed a bridge over such trench. This was some ten days or two weeks before the plaintiff was injured, and the subway work was still progressing when the accident occurred. A loose beam was left lying upon this bridge, and it had occasionally been knocked out of position prior to the accident, and replaced by laborers on the subway. The accident was caused by the hind wheel of a coal-cart running upon one of the ends of the beam and tilting the other end up. The end which was thus ele-

vated struck the plaintiff on her head, and injured her. It seems to us quite clear that a *prima facie* case was thus made out against this defendant. There was no presumption that a stranger had deposited the beam upon the bridge. On the contrary, there was a fair inference, for the consideration of the jury, that the defendant or his servants had placed it there to serve as a line of division between the footpath and the road-way. His employees, too, replaced it when it was knocked out of position, and, indeed, everything in the case tended to support the presumption that it was part of the defendant's bridge. Such was probably the fact, and the jury would have been quite justified in so finding. This beam should either have been removed altogether or securely nailed to the bridge, certainly, when it was seen that accidents might occur from its being knocked about by passing vehicles. The case in our judgment should have been left to the jury. Nor can the nonsuit be sustained upon the theory of the negligence of the driver of the coal-cart. He had a right to proceed freely upon the public highway, without being delayed, hindered, or embarrassed by illegal or negligent obstructions. The defendant, if guilty of negligence with regard to the beam, and thus the primary factor, cannot escape because the driver might have withdrawn from a position where he had a right to be, or deviated from his proper direction, or otherwise treated the obstruction with greater circumspection. The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

TAYLOR v. SAXE *et al.*

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

SALE—RIGHTS OF PURCHASER—DEFECTIVE QUALITY.

A purchaser of lumber who declines to accept the same because it is not of the stipulated quality can recover the money paid for freight and customs duties and for storage, but cannot at the same time recover damages for a breach of the contract, as such a claim would proceed on an affirmation of the contract.

Appeal from judgment on report of referee.

Action by Edgar B. Taylor against Charles G. Saxe and Frank J. Saxe. There was judgment for plaintiff. Defendants appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Harris & Rudd, for appellants. *Thompson & Loun*, for respondent.

DYKMAN, J. This action is based upon a violation of a contract made by the defendants with the plaintiff for the sale and delivery to them of a boat-load of pine plank. The cause was tried before a referee, who found that the defendants agreed to sell to the plaintiff a boat-load of pine plank, then in Canada, for 36 cents a plank, delivered at Poughkeepsie, and to induce the plaintiff to make the purchase the agent of the defendants who made the sale represented to the plaintiff that 80 per cent. of the plank should be of the quality known in the trade as "dressing," and 70 per cent. thereof should be of a quality known in the trade as "better than dressing;" and that the purchase was made by the plaintiff in reliance upon such representation as to quality; that the plaintiff was to pay the duty on the lumber when it passed the frontier, and the freight thereon upon its delivery, and deduct such payments from the purchase price of the lumber; that the lumber reached Poughkeepsie the forepart of October, 1888, and the agent of the plaintiff refused to accept the same upon a claim that it was not of the quality represented, and the plaintiff immediately telegraphed the defendants the refusal of the plaintiff to receive the lumber. Thereupon the defendants sent their agent to Poughkeepsie to act for them in the premises, and when he examined the plank he pronounced them of a kind and quality different from what the defendants had contracted to sell to the plaintiff. The agent of the plaintiff informed the agent of the defendants that the lumber was all culls, and that

he would not receive the same; and then the agent of the defendants requested the agent of the plaintiff to permit the captain of the boat to unload the plank, and whatever was right would be done. Thereupon, in reliance upon such statement, the plaintiff permitted the captain to place the plank upon the plaintiff's dock, and paid the freight, amounting to \$499.11. The plaintiff had before that paid the duties upon the lumber, amounting to \$333.80. On the 10th day of October the plaintiff again notified the defendants that he could not use the plank, that they were culls, and were not as represented. The referee found as a fact that there were 12,303 plank in the boat-load, and they would have been worth 44 cents apiece had they been of the quality and kind represented; that the plaintiff never received the plank, but permitted the same to remain on his dock at Poughkeepsie; and that the storage for the same had been worth \$25. As a conclusion of law the referee found that the plaintiff was entitled to recover from the defendants \$330.80, with interest, for the duties paid on the lumber; \$499.11, with interest, for freight paid thereon; \$25 for storage; and \$984.24 for damages for a breach of the contract.

The facts recited are easily deduced from the evidence, and are taken mainly from the findings of the referee. The contract between these parties was for the sale and delivery of property of a certain description, and was what the law terms an "executory contract;" and when the defendants came with an inferior article open to inspection, it became necessary for the plaintiff to take his position, and when he discovered that the lumber tendered did not answer the character required by the contract, there were two courses which he might adopt: He could refuse to accept the plank, and thus rescind the contract and recover the money paid for freight and duties, or he could keep the lumber, and rely upon the contract to recover the damages he sustained through its breach by way of counter-claim to an action for the price. But he could not pursue both these remedies, because they were inconsistent. Environed by such circumstances, the plaintiff exercised his right of choice, and declined to accept the lumber, and thus rescinded the contract, and such election gave him the right to recover back the money he had advanced. Upon that theory the lumber remained the property of the defendants, and the plaintiff might recover for its storage. But the plaintiff went further in this action, and sought to recover damages for a breach of the contract, and he has recovered upon that claim, but the recovery for that item cannot be sustained. His claim to recover back the money advanced for freight and duties rests upon the abrogation of the contract by his refusal to receive the lumber, while his claim for damages proceeds upon the affirmation and consummation of the contract, and a recovery by reason of a violation thereof. If the lumber had been accepted by the plaintiff the contract would have then been executed, and he could sustain no action for the recovery of the money paid for freight and duties, because that would have been a payment on account of the purchase price of the lumber, according to the agreement; but, having declined to accept the plank, he was in a position to sue for the money thus paid, upon the principle which justifies an action for the recovery of the purchase price of property upon the nullification of the sale where the price has been paid by the purchaser. After the rescission of the contract the defendants could sustain no action against the plaintiff for the price of the lumber, because it had not been accepted, and still belonged to the defendants. Otherwise, if it had been accepted, the defendants might sue for the price, and the plaintiff could recover his damages for a breach of the contract by way of counter-claim to such action. But now, since the abrogation of the contract, the plaintiff cannot recover damages for its violation because such a claim would proceed upon the affirmation of the contract. As therefore the claim of the plaintiff for damages can rest upon nothing but the contract, it has no basis for its support, and that portion of the judgment is er-

roneous. The following authorities justify the views we have expressed: 2 Kent, Comm. (10th Ed.) 660; *Sprague v. Blake*, 20 Wend. 64; *Hart v. Wright*, 17 Wend. 277; *Gallagher v. Waring*, 9 Wend. 28. The judgment should therefore be modified by striking therefrom the sum of \$984.24, allowed for damages, and, as so modified, affirmed, without costs to either party on this appeal. All concur.

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In re WILLETT'S ESTATE.

(Supreme Court, General Term, Second Department. July 18, 1890.)

WILLS—CONSTRUCTION—SPECIFIC BEQUESTS.

A testator directed the sale of his household furniture, and that the balance of the proceeds, after payment of the funeral expenses, be paid to a certain named church. He then bequeathed to one B. the joint note of herself and her husband. By the fourth clause of the will testator's estate was directed to be applied to the payment of certain legacies therein given, and that any residue should be divided among "the said legatees in the same proportion that the several legacies bear to each other," and that a deficiency, if the "sale of my property should prove insufficient for the payment of all said legacies in full," should be borne in like manner. *Held*, that the bequests of the note and the balance of the proceeds of the furniture were specific bequests.

Appeal from surrogate's court, Dutchess county.

This is an appeal taken by Wesley Brett, a residuary legatee under the will of Robert Willett, deceased, from that portion of a decree directing a distribution of the estate which allowed Susan A. Scott and the First Methodist Episcopal Church of Matteawan, N. Y., to share in the distribution of the surplus.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

S. K. Phillips, for appellant. W. R. Woodin, for respondent Susan A. Scott.

BARNARD, P. J. The bequest of the note to Susan A. Scott, which was described in the will as "the joint note of herself and John E. Scott, her husband, together with all moneys which may be due thereon at the time of my death," was a specific bequest. The language of the will distinguished the thing given from all others of the same kind. By the construction of the will it is excluded from any abatement on account of an insufficiency of property to pay other legacies in full. By the second clause of the will the testator directed the sale of his household furniture, and to apply the proceeds to the payment of the funeral expenses, and the balance remaining was to be paid to the First Methodist Episcopal Church of Matteawan, absolutely. By the third clause of the will the note in question was given, and by the fourth clause the rest, residue, and remainder was applied to the payment of certain legacies therein given. The will provides that if there is any residue it shall be divided among "the said legatees in the same proportion that the several legacies bear to each other," and that a deficiency, if the "sale of my property should prove insufficient for the payment of all said legacies in full," should be borne in like manner. Under this clause of the will the note could not be abated, and was not embraced with the legacies payable out of the residue of the estate, after its withdrawal from the estate. The same conclusion must be reached as to the gift of the balance of moneys realized from the sale of the household furniture of the testator, and given to the Methodist Episcopal Church under the second clause in the will. The church was given a part of the proceeds of certain definite property, and was intended to be wholly separate from his scheme for the distribution of the surplus of this balance of the estate, as effected by the fourth clause of the will. That clause created a class of legacies to be paid out of the residue of the estate, and it is only to this class that the excess was to go in proportion to the legacies. The decree of the surrogate should therefore be modified so as to exclude the church un-

der the second clause of the will, and Susan A. Scott under the third clause of the will, from participation in the excess of the estate over and above payments of the legacies in the fourth clause of the will. All concur.

NEW YORK RUBBER CO. v. ROTHERY *et al.*

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

WATERS AND WATER-COURSES—DIVERSION OF STREAM.

In an action by a riparian owner for diverting a stream which defendants had a right to use, the court properly charged that if defendants used the water, and left enough in the river to enable the jury to say that what they took away was immaterial, then the verdict must be for defendants; but that, if defendants used and diverted the water to a degree that appreciably and materially lessened the stream, then the verdict must be for plaintiff for six cents, there being no pretense of damages.

Appeal from circuit court, Dutchess county.

Action by New York Rubber Company against John Rothery and William Rothery to recover damages for the diversion of running water in a stream. There was a verdict for defendants, and from the judgment entered thereon plaintiff appeals. For former reports, see 14 N. E. Rep. 269; 20 N. E. Rep. 546; 6 N. Y. Supp. 954.

Argued before DYKMAN and PRATT, JJ.

Lee & Lee, for appellant. *H. H. Hustis*, for respondents.

DYKMAN, J. Upon the first trial of this action the complaint of the plaintiff was dismissed, and the judgment entered for the defendant was affirmed by the general term, but reversed by the court of appeals. There has now been a second trial of the action, and a verdict has been rendered for the defendant, and the plaintiff has appealed from the judgment entered upon such verdict. As we understand the decision of the court of appeals, the refusal of the trial judge to submit the case to the jury and the dismissal of the complaint were erroneous, because there was evidence in the case which tended "to show that the use made by the defendants of the water in the creek was such that at various times the quantity which would otherwise have flowed past plaintiff's lots was perceptibly and materially diminished;" and the trial judge evidently understood the decision in the same way, and intended to conduct the trial in obedience thereto. Upon that question the charge to the jury contained these directions, among others: "The Rotherys have a right to use this stream, and to divert it, provided they do not divert it to a material and appreciable degree, and that is the question that you are to decide. If the defendants left enough, if they have left enough, if they have left all that is material, and have taken the water to an inappreciable extent, they have done no wrong. It is like the case of a farmer who has the right to use a stream to water his cattle. He has a right to its use to an extent that is necessary for his business, and these defendants have the right to use this water to run their wheel, provided they do not interfere with the stream to an extent that you can say is both appreciable and material; * * * and it is your duty to say whether the Rotherys, at any time within the period covered by this complaint, used the lower dam at a time when but for its use this river would have been lower both appreciably and in a material degree. * * * That, gentlemen, is the case, and all the case that goes to you. If the defendants used this water, and left the river behind them sufficiently to enable you to say that what they took away was an immaterial thing, you will find for the defendants; but if you find that the defendants have used the water, and diverted it to a degree that has appreciably and materially lessened this stream, you will find a verdict for the plaintiff for six cents, there being, as I understand it, no pretense of any damage in the case at all." Thus the only question of fact involved in the case was submitted

to the jury upon the principles laid down by the court of appeals, and the verdict was rendered for the defendants. The question of equitable estoppel was disposed of by the court of appeals, and was not raised upon the second trial. We find no error in this charge as made, or in the refusals to charge as requested. The judgment and order denying the motion for a new trial should be affirmed, with costs.

SLOCUM v. SLOCUM.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

APPEAL—REVIEW—HARMLESS ERROR.

The admission in evidence of a deposition in violation of Code Civil Proc. N. Y. § 882, which provides that the deposition of a person not a party shall not be read in evidence until it is proved that the witness is dead, or is absent from the state, so that his attendance cannot be compelled with reasonable diligence by subpoena, is harmless error when the witness subsequently testifies orally to the same facts as were returned in the commission.

Appeal from judgment on report of referee.

Action by Charles Slocum against Edward M. Slocum to recover for moneys expended, and work and materials furnished, upon premises which plaintiff alleged had been leased to him for one year by defendant. There was a judgment for plaintiff and defendant appeals. Code Civil Proc. N. Y. § 882, provides that the deposition of a person not a party shall not be read in evidence until it has been satisfactorily proved that the witness is dead, or is unable personally to attend by reason of his insanity, sickness, or other infirmity, or that he is confined in a prison or jail, or that he has been and is absent from the state so that his attendance could not with reasonable diligence be compelled by subpoena.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

G. & G. H. Williams, for appellant. William Downing, for respondent.

BARNARD, P. J. The admission of the deposition of Ira Slocum was not proper. Code, § 882. The error did no harm. The witness whose deposition was taken was produced and testified orally before the referee to the same facts as were returned in the commission. The point in dispute was only whether the defendant rented the farm in question to the plaintiff or to the plaintiff's father, Ira Slocum. The plaintiff and Ira Slocum both testified to the renting to the plaintiff, and while the defendant wishes to state, and even does state, that the renting was to Ira Slocum, he virtually admits that Ira Slocum mentioned Charles in connection with the renting, and that the defendant cautioned his father, Ira Slocum, in respect to the plaintiff as an unreliable tenant. The plaintiff testifies to the hiring by himself. The defendant owned the farm, and ought to have the rent, and this fact supports the finding that the contract was really made by the owner to the party who was to pay rent to the owner for his use. The terms of the agreement are somewhat in dispute. The rent was to be \$200, and \$50 was to be abated if the tenant (plaintiff) made some wood into charcoal. The chief dispute arose as to the repair of certain buildings and appurtenances for a distillery. The plaintiff gave evidence to show that the lumber for this purpose, and the fixtures and labor other than his own, were to be paid for at cost. The witnesses vary in their testimony in this respect. The plaintiff and his father say that this work was to be repaid to the plaintiff, and the defendant testifies that the \$50 was to include both making of charcoal and the repairs to the building. The finding of the referee is justified by the probabilities of the case. The repairs actually cost \$379.98 apart from the plaintiff's own labor, and it is not a judicious inference that a tenant would bind himself to pay so

much in excess of the rent for the permanent betterment of the land upon a lease for one year only. The judgment should be affirmed, with costs. All concur.

THOMAS v. SAHAGAN et al.

(*Supreme Court, General Term, Second Department. July 18, 1880.*)

MECHANICS' LIENS—ENFORCEMENT—JUDGMENT.

In an action by subcontractors, the general assignee of the original contractor was made a defendant, and showed that the owner broke the contract by refusing to pay the second installment at the stage of the work agreed upon. *Held*, that the judgment properly directed the sale of the property for the liens, and that the difference between the liens and the second installment be paid to the assignee though the contractor had filed no lien; Laws N. Y. 1885, c. 842, § 15, providing that any claimant who fails to establish a valid lien may recover a judgment for whatever is due him against any party.

Appeal from special term, Westchester county.

Action to force a material-man's lien by Edwin L. Thomas, who furnished lumber to James P. Stewart and William T. Edmonds, the contractors for the erection of a building owned by defendant Astan Sahagan, who alone appeals from the judgment.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Joseph F. Daly, for appellant. *John H. Ferguson*, for respondent.

BARNARD, P. J. The defendant Sahagan made a contract with Stewart and Edwards for the erection of a house on his lot in Yonkers. The price to be paid the contractors was \$6,176, payable in installments on the certificate of the architect. The contractors inclosed the building, and thus became entitled to the first payment of \$1,500. The second installment was payable "when floor should be laid, partition set, and ready for the mason, \$1,500." The question litigated on the trial was whether the contractors had earned this second payment, for they failed to carry out the contract, and made an assignment. The architect refused the certificate, but the trial judge has found that the refusal was unreasonable, and unjustifiable, and that the second payment was earned. The appeal is taken from the judgment based upon the finding that the second installment was due and payable. The words of the contract are very general. The floors were to be laid, and partition set, and ready for the mason. The contract calls for pine for window-frames and light shafts to inside rooms. The house would not be ready for the mason until they were put in, and they were put in from cotton-wood, and not pine. The proof was contradictory as to the assent of the architect to the change. The contractor and architect were at variance, but as the refusal of the certificate by the architect was put on other grounds, and did not refer to the use of cotton-wood instead of pine, it is most reasonable to believe that the change was assented to. The deficiencies claimed by the architect were the subject of contradictory proof. Some of the items were proven to be outside of the requirements for the second payment, and some were done after the architect pointed them out, when a certificate was again asked for, and again refused. The owner was therefore in the wrong when he refused to pay the installment, and the lienors are entitled to payment out of the sum actually due by the terms of the contract when the owner refused to carry out its provisions. *Graf v. Cunningham*, 109 N. Y. 369, 16 N. E. Rep. 551. It was therefore of no moment as between the parties whether or not the building cost more to complete than the original contract price, and the refusal to find on that question was not error. The liens filed are not sufficient to absorb the whole \$1,500. The assignee of the contractor was made a party defendant. He answered that the owner broke the contract, and seeks to recover for a breach of contract. The judgment directs the sale of the prop-

erty for liens which are unquestioned, and the difference between these liens and the second installment to be paid to the general assignee of the contractor. This was right. The owner and contractors were necessary parties defendant; either could question the facts on which the lien was based. As to different liens the lien act provides that all shall be provided for by the judgment in their order of priority, and paid out of the proceeds of sale. The judgment must establish the amount of all the liens, and direct the sale of the land for their payment. The contractor made a claim for which he had filed no lien. By the fifteenth section of chapter 342 of the Laws of 1885, any claimant who fails to establish a valid lien may recover a judgment for whatever is due him against any party or parties. This appears to be broad enough to uphold the judgment. A multiplicity of suits is not favored, and with all the parties before the court, and every fact proven from which the rights of all parties could be determined, it seems not to be right to cut the contractors' claim off because the liens do not consume all which is due under the contract to the contractor. The judgment should be affirmed, with costs.

FLYNN v. WOOLSEY.

(Supreme Court, General Term, Second Department. July, 1890.)

PAYMENT—CHECKS.

Defendant being indebted to plaintiff sent his check to the latter expressing in terms on its face that it was "in full." The check was for less than the debt, and was neither presented nor returned until tendered back at the trial. Defendant suffered no loss by reason of plaintiff's failure to present the check. *Held*, that this was not a payment in full or *pro tanto*.

Appeal from judgment on report of referee.

Action by Peter T. Flynn against Edward J. Woolsey. The complaint was one to recover for work, labor, and services. There was judgment for plaintiff, and defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

S. B. & D. Noble, for appellant. *Benner & Benner*, for respondent.

BARNARD, P. J. The plaintiff is an expressman, and as such was employed by the defendant to carry and deliver various articles between the dates of June 20, 1885, and January 13, 1888. On January 8, 1888, the defendant sent his check to the plaintiff for \$48.75, and expressing in terms on its face that it was in full to January 1, 1887. In fact it was not in full, but was some \$12 less than the debt at that date. The check was never either presented or returned until it was tendered back on the trial. This was not a payment in full, or a payment at all. There are cases where the non-presentation of a check occasions a loss of its amount. The neglect to present will be sufficient to charge the holder with the amount of the check. No damage is proven in this case by the failure to present the check. *Bradford v. Fox*, 38 N. Y. 239. On the contrary, it appears that the check was never presented and paid, and that the defendant has voluntarily withdrawn the account from the bank where the check was payable. The services charged include no item for cash paid out, but there were small sums paid out in and about the employment, and really as part of the carrying. The expressman had to buy the goods ordered, and pay for the same, and the bill of particulars is made out for carting, and cash paid out. The complaint, in the absence of objection, was sufficient to admit the proof, and, the proof once in, the amount of the cash paid was justly called for in the judgment. The judgment should therefore be affirmed, with costs. All concur.

SUTHERLAND v. MCKINNEY *et al.*

(Orange County Court. February 14, 1890.)

1. SHERIFFS AND CONSTABLES—INSUFFICIENT LEVY—LIABILITY ON BOND.

Where a constable's bond, given under Laws N. Y. 1872, c. 788, providing that the constable and his sureties shall be liable to any person "for any damages which he may sustain from or by any act or thing done by said constable by virtue of his office," by its terms includes acts of omission as well as commission, the constable and his sureties are liable for the deficiency where the constable levies an attachment on part only of the property of a debtor who at the time has sufficient property to satisfy plaintiff's claim, and after judgment against the debtor the property attached does not sell for enough to satisfy the judgment, though the property attached was appraised at a sufficient valuation.

2. JUSTICES OF THE PEACE—JURISDICTION—PUBLIC OFFICERS.

Under Code Civil Proc. N. Y. § 2865, providing that "an action cognizable by a justice of the peace may be brought * * * by or against a town or county officer in his official character," a justice has jurisdiction of an action on the official bond of a constable to recover damages for an insufficient levy of an attachment.

Appeal from justice court.

Action by William Sutherland against George B. McKinney and Silas H. Dickerson and Charles S. Puff, the sureties in his official bond as constable, to recover damages for the insufficient levy of an attachment theretofore sued out by plaintiff. It appeared that defendant McKinney levied the attachment on part only of the property of the attachment defendant, who then owned sufficient property to satisfy plaintiff's claim, but after the judgment was recovered, and execution issued, the property taken under the attachment proved insufficient, and defendant McKinney returned the execution unsatisfied in part. In answer to the complaint defendant set up several defenses, as follows: That the property taken under the attachment was appraised at a valuation sufficient to satisfy plaintiff's claim against defendant therein; that the property was sacrificed at the execution sale; that defendant McKinney was informed that the attachment defendant had no other property than that seized under the attachment, and that he (McKinney) did not know of any other; that a justice of the peace has no jurisdiction in actions against public officers; and that the omission on the part of defendant McKinney was not within the conditions of his official bond. Laws N. Y. 1872, c. 788, referred to in the opinion, in pursuance of which the bond sued on was given, is as follows: "Every person chosen or appointed to the office of constable, before he enters on the duties of his office, and within eight days after he shall be notified of his election or appointment, shall take and subscribe the oath of office provided by the constitution, and shall execute, in the presence of the supervisor or town-clerk of the town, with at least two sufficient sureties, to be approved of by such supervisor or town-clerk, an instrument in writing by which such constable and his sureties shall jointly and severally agree to pay to each and every person who may be entitled thereto all such sums of money as said constable may become liable to pay on account of any execution which shall be delivered to him for collection, and shall also jointly and severally agree and become liable to pay each and every such person for any damages which he may sustain from or by any act or thing done by said constable by virtue of his office of constable. Every constable so chosen or appointed shall, in good faith, be an actual resident of the town or ward in which he shall be chosen or appointed." Code Civil Proc. N. Y. § 2865, provides that "an action cognizable by a justice of the peace may be brought * * * by or against a town or county officer in his official character." There was a verdict for defendants, and plaintiff appeals.

S. S. Gowdley, for appellant. *A. Bowen*, for respondents.

BEATTIE, J. The justice had jurisdiction of this action. Code, § 2865. The bond given by the defendant McKinney, as constable, was drawn in com-

pliance with the comprehensive language of the act of 1872. By that form of bond the sureties were made liable for any breach of it by the constable, either of omission or commission on his part. The evidence is uncontradicted that there was sufficient property to satisfy the claim of plaintiff in the possession of the defendant at the time and place of levy. The defendant in the attachment (Cohen) had a place of business, and it was the duty of the constable to levy upon such property as he could find upon the premises of value sufficient to satisfy the claim under the attachment. Failing to do so, he and his sureties are liable in this action. Kneel. Attachm. 401, 402. The judgment must be reversed, with costs.

In re BAILEY.

(*Surrogate's Court, Chenango County. December, 1889.*)

WILLS—CONSTRUCTION—RIGHTS OF LEGATEES.

Testatrix left her residuary estate to her executor in trust, to convert into bonds, and from the income thereof to pay such sums as he should in his judgment think necessary for the support of her sister, but only in case she should be in "absolutely needy circumstances;" the surplus in any year to be paid the trustees of a certain church, to be used solely for the purpose of paying the salary of the minister, and the whole of the income to be so paid, if not needed for the support of the sister. The will further provided that after her sister's death, if the said church should be in good standing, and her executor should regard it safe, and for the best interests of her estate, he should in that event hand over to the trustees of the church the residue of her estate, or the securities representing it, and the church trustees should thereafter be the trustees of the fund under her will, and be governed in all respects by the directions therein in regard to the fund, in no event using any part of the principal for any purpose, and only appropriating the income in the manner and for the purpose indicated and directed in her will, and, from the time of handing over and delivering the fund to the church trustees, her executor should be discharged from the care of and liability for the fund. It was further provided that, if at any time such investments as the will prescribed could not be made, the executor or the church trustees, whichever should then have control of the fund, should invest it under the direction of the surrogate. *Held* that, after the sister's death, the church was the sole beneficiary of the fund, the trust to continue in the executor unless he decided to pass it over to the church.

Proceedings for the probate of the will of Catharine Bailey, deceased.

Will C. Moulton, for the Methodist Episcopal Church of McDonough.
Thomas Watts, for contestant, Charles Roe. *William F. O'Neil*, for petitioner, Harvey Roe.

JENES, S. Objections were filed to the proof and probate of the will which were afterwards withdrawn, and the due execution of the will was proven without objection; but the validity, construction, and effect of the said will, and especially the seventh clause thereof, were put in issue by Charles Roe and Harvey Roe, as provided by section 2624 of the Code. The testatrix left no parents, husband, or descendants. After providing for her burial, funeral expenses, the erection of a monument for herself and her parents, giving a fund of \$50 for the care of the cemetery lot, she gives to a niece her silver spoons, and to her sister Abigail her household furniture and wearing apparel. By the seventh clause, she devises and bequeaths all the rest of her property, real and personal, to her executor and trustee in trust to sell, convey, and convert the same into money, and invest in United States bonds, or bonds and mortgages, and from the income thereof pay such sums as the executor and trustee may in his judgment think necessary for the support of her sister Adeline Youngs, but only in case she shall be in "absolutely needy circumstances;" the surplus in any one year, if any, to be paid to the trustees of the Methodist Episcopal Church of McDonough, to be used by them solely for the purpose of paying the salary of the minister of said church; the whole of such income to be so paid, if not needed for the support of such sister. The eighth clause of the will is as follows: "After the decease of my said

sister Adeline, and after all other claims on my said property and estate, as provided for and directed in this my last will and testament, shall have been fully met and disposed of as herein directed, if the said Methodist Episcopal Church of McDonough shall be and remain incorporated and in good standing, and my said executor and trustee shall regard safe and for the best interests of my estate, he may then, and in that event, hand over and deliver to the then trustees of the said Methodist Episcopal Church, the said residue, rest, and remainder of my estate, or the security or securities representing the same, and the said trustees of said church shall from thence thereafter become and be the trustees of such fund, under this my last will and testament, be governed in all respects by the directions herein in regard to said fund, in no event using any part of the principal of said fund for any purpose, and only appropriating the income thereof in the manner and for the purpose indicated and directed by me in this my last will and testament, and from the time of handing over and delivery of the said fund to the said trustees of said church, and the receipt thereof by them, my said executor and trustee shall be discharged from all care of and liability for said fund." The ninth clause provides that if the time shall come when such investments as prescribed cannot be made, the executor and trustee, or the trustees of said church, whichever shall then have control of the fund, shall invest the fund in such securities as shall be approved of by the surrogate. No question is raised by the contestants over the incorporation or standing of the church. It must be conceded therefore that the donee of this trust is competent to take and use the bequest for the purpose indicated by the testatrix. Laws 1813, c. 60, § 1; Laws 1875, c. 443. Like the bequest in *Williams v. Williams*, 8 N. Y. 525, 580, "the object of this bequest is the support of a minister, which is one of the prominent objects for which these corporations are created. It is not essential to the validity of a bequest to a religious corporation that it should be given generally for all the purposes for which it may be legally used, or for any to which the trustees may see fit to devote it. *Holmes v. Mead*, 52 N. Y. 335, 343; *Wetmore v. Parker*, Id. 450, 457. The trustee is directed to sell the real estate, and invest the proceeds together with the personal estate in government bonds, or bonds and mortgages. It is therefore an equitable conversion of the real estate into personal, and the provisions of the Revised Statutes relating to the devise of real estate do not apply. *Pouss v. Cassidy*, 79 N. Y. 602; *Wetmore v. Parker*, 52 N. Y. 450, 456. The provision in the will that the income only should be used by the trustees, does not invalidate the bequest, and is not affected by the statute against perpetuities. *Wetmore v. Parker*, *supra*; *Robert v. Corning*, 89 N. Y. 225, 241.

The first principle in interpreting wills is that the intention of the testator as expressed in the will shall prevail, in case no rule of law is violated. In this case there is no room for doubt that the testatrix intended that the Methodist Episcopal Church of McDonough should have the benefit of her entire residuary estate, after satisfying the absolute needs of her sister during her life. The estate vested in her executor and trustee upon her death. The mode of investment and the disposition of the income is very clearly expressed. No person save the sister and the church has any claim upon such income in any event. The right of the trustees of the church to enforce payment of that portion of the income of the fund not needed for the support of the sister, so long as she shall live, is not questioned by the contestant. During her life-time the executor has no discretion to withhold that portion of the income not absolutely needed for the support of the sister. During the sister's life-time there can be no doubt that the trustees of the church can appeal to a court of equity to enforce their rights by a judicial decree, for, by the terms of the seventh clause of the will, the only discretion reposed in the executor is to determine how little will answer to satisfy the absolute needs of the sister. The balance must be paid over to the trustees. This discretion

is very carefully guarded in the interests of the church, and clearly indicates the intention of the testatrix to devote as large a portion as possible of the residuary fund towards the support of its minister. Is there any reason for supposing that she was not equally solicitous for the welfare of the church, after her sister should cease to have any claim upon her bounty? The eighth clause of the will clearly shows her intention to vest the whole residuary fund in the trustees of the church upon the death of her sister for the same purpose as before, the support of the minister, and the discharge of her executor and trustee from any further duty relating to the trust, provided he should regard it safe, and for the best interests of her estate to make such transfer. The discretion was merely to determine whether it would be better for the due protection of the estate for the executor to continue to hold the fund in his own hands, or to pass it over to the trustees of the church as the substituted trustees of this trust; but there is nothing in the language of this clause, or in the general scheme of this will, to indicate any intention of the testatrix to confer any power upon the executor to withhold the income of the fund from the trustees of the church. Because of this discretion the trustees of the church might not have the right to demand the custody and control of the principal of this fund; but, if the income therefrom should be withheld from them, I have no doubt of their right to appeal to the courts for the enforcement of their rights. A testamentary direction requiring some portion of an estate to be applied by an executor to a charitable object, the plan of the charity, and the sum necessary for its execution, to be designated by some person not the executor, might perhaps be enforced if the person named elected to accept the personal trust, and make the designation or appointment. *Beekman v. Benson*, 23 N. Y. 298, 305, Comstock, C. J. There is no occasion in this case for the exercise of the *cy pres* power, for there is no indefiniteness of the object and purpose of the trust, and nothing in the way of effectuating the intention of the donor. A direction by the donor that the principal shall be kept inviolate, and the income only expended, will not invalidate the gift. *Wetmore v. Parker*, 52 N. Y. 458. In the case at bar, any other course would defeat the purpose the donor had in view. Direction to permanently invest the principal, and to continue for all time, does not suspend the ownership for a day. The fact that power is conferred upon the executors to designate the beneficiaries, does not render the will void for uncertainty. Had there been a failure to make the selection, the court would have power to decree the execution of the trust. *Power v. Cassidy*, 79 N. Y. 602. Numerous authorities sustain devises and bequests to executors which confer upon them authority to divide the same among such persons as they may select from certain classes which are designated, and among such children or relatives who are intended to be provided for, whom they may deem proper. *Id.* 611. Where there is a good trustee to take the funds in the first instance, a succession of new trustees may be provided by the court by new appointment, as often as circumstances may require. *Bascom v. Albertson*, 84 N. Y. 591. Discretionary powers are usually in the nature of a trust, and are designed for the benefit of the declared objects, whether as a class or as individuals, and for that reason courts will endeavor to adopt a construction by which the object of the testator's bounty will take a vested interest in the gift. *Tiff. & B. Trusts*, 738. Here are donees capable of taking the subject-matter of the trust. The objects of the trusts are legal, and sufficiently definite to admit of enforcement by a court of equity. Although the income is to be devoted to the support of the minister in charge, whoever he may be, it is really for the benefit of the church, as it is partially relieved from that duty. Besides, it is an essential feature of a charitable or public trust that the beneficiaries are uncertain, fluctuating, and changing.

In the Tilden will, to which my attention is especially called by the contestants, the beneficiaries take nothing by virtue of the will itself, but only by

virtue of the action of executors. The executors were requested to obtain an act of the legislature incorporating an institution to be called the "Tilden Trust," for the purpose of establishing a free library and reading-room in the city of New York, and to promote such scientific and educational objects as the executors and trustees might designate. If the act of incorporation should be obtained during the lives of two persons named, in form and manner satisfactory to such executors, they were authorized to organize the corporation, select the first trustees, and convey to or apply to the use of the same the remainder of his estate, "or so much thereof as they may deem expedient;" but, if the institution should not be incorporated, "or if for any cause or reason my said executors and trustees shall deem it inexpedient to convey said rest, residue, and remainder, or any part thereof, or to apply the same or any part thereof to the said institution, I authorize my said executors and trustees to apply the rest, residue, and remainder of my property to such charitable, educational, and scientific purposes as in the judgment of said executors and trustees will render the rest, residue, and remainder of my property most widely and substantially beneficial to the interests of mankind." No estate is vested in the beneficiaries by virtue of the will itself. It requires the action of the trustees to vest any interest in the beneficiaries. They may give or withhold in their discretion. The "Tilden Trust," if incorporated in form and manner satisfactory to the trustees, takes nothing unless the trustees deem it expedient. They may direct the whole or any part of the residuary estate to such charitable, educational, and scientific purposes as in their judgment will be most beneficial to the interests of mankind. There is no certain beneficiary who can claim the enforcement of the trust. The "Tilden Trust," even after an act of incorporation satisfactory to the executors, could demand nothing at their hands as a matter of right. It would be a perfect answer to any application this corporation might make for the enforcement of the trust, that the executors and trustees did not deem it expedient to convey any portion of the fund to such corporation. It is very clear that no other person or corporation would have any standing in court in the interests of general charity, education, or science. The provisions of the Tilden will are very unlike those under consideration. The subject and object of the trust in question are definite and certain. There is but one beneficiary in any event. The executor and trustee has no discretion to direct the principal or income of the fund, or any part of either, from the church to any other object or purpose. It is conceded that the draughtsmen of the will might have expressed more clearly the idea that in case he did not deem it safe and for the best interests of the estate to deliver the principal of the fund to the trustees of the church, he should continue to invest the fund in the manner already provided, and pay the income to the trustees of the church, to be used for the benefit of its minister; but it is perfectly clear from the whole scheme of the will that such was the intention of the testatrix. No other thought or intention is apparent from the whole instrument, than that the church should be the sole beneficiary of the fund. The executor must give the trustees of the church the income, but may in his discretion retain the control of the principal. This intention is made still more clear by the provision in the ninth clause of the will, that whenever it shall become impracticable or impossible to loan the trust funds as directed in the seventh clause, the executor and trustee, or the trustees of the church, whichever shall have control of said fund according to the terms and conditions thereof, shall loan the trust funds and keep them invested in such securities as shall be approved of by the surrogate of Chenango county. This provision is utterly inconsistent with any other construction than that the trust should continue in the executor and trustee unless he decided to pass it over to the trustees of the church. A decree will be entered admitting the will to probate, and adjudging the validity of the bequests for the benefit of said church.

In re SQUIRE.

(Supreme Court, General Term, Second Department. July 18, 1890.)

EMINENT DOMAIN—COMPENSATION—CONTIGUOUS LANDS.

Under Laws N. Y. 1883, c. 490, authorizing the construction of the new aqueduct, and providing that the owner of lands contiguous to land taken, "which may be affected by the construction and maintenance" of the aqueduct and its appurtenances, may present a bill for damages, damages cannot be recovered for injury to contiguous lands by reason of the noise, dust, and smoke made by the building of the aqueduct.

Appeal from special term, Kings county.

An appeal by Asbury Lester from an order confirming the report of the commissioners of appraisal disallowing his claim for damages to his contiguous real estate from the construction and maintenance of the new aqueduct.

Argued before BARNARD, P. J., and DYKMAN, J.

George C. Coffin, for appellant. *W. H. Clark*, for respondent.

BARNARD, P. J. The appellant, Asbury Lester, presented a claim for damages to his property in the city of New York contiguous to lands actually taken for the purpose of a public aqueduct, under chapter 490, Laws 1883. The Lester property, for which the damages were claimed, was not a part of a lot taken, but was only adjacent after the land of other owners was taken. The act requires the commissioners of public parks to make maps on which shall be numbered the various parcels of land "on, over, or through which the same are to be constructed and maintained, or which may be necessary for the prosecution of the work authorized by this act." Section 4. Commissioners appointed to appraise the damages are "to ascertain and appraise the compensation to be made to the owners and all persons interested in the real estate laid down on said maps as proposed to be taken or affected for the purpose indicated in this act." Section 8. By section 11 the commissioners are to report such damages to the court. The act provides that the owner of lands contiguous to land taken "which may be affected by the construction and maintenance" of the aqueduct and its appurtenances may present a bill for his damages. The question, therefore, is whether an owner of land whose lands are contiguous to the aqueduct, and whose only injury to his land is the noise, dust, and smoke made by the building of the aqueduct, can recover damages. Such damage we think is not within the act. The language is similar to that used in the general railroad act. The railroad company was authorized to obtain a title to lands, and compensation was to be made for the title. The rule of damages established by this act was held to be the value of the land taken and the diminution of value occasioned by the taking for the piece remaining after the railroad strip was taken in addition. *In re Poughkeepsie, etc., R. Co.*, 63 Barb. 151; *Railroad Co. v. Barnard*, 9 Hun, 104; *In re New York, etc., R. Co.*, 27 Hun, 151. The aqueduct case increases the area of damages, but not so as to take in the appellant's claim. The act provides that water-rights may be taken, and the construction of the aqueduct may interfere with, injure, or destroy water-rights, such as streams diverted and wells drained by the construction of the work itself, although the stream was not needed nor the well intentionally drained. This and similar damages are intended to be embraced in the clause of section 18, c. 490, Laws 1883, which provides for payment to "any owner or person interested in real estate contiguous thereto," after providing for damages for lands taken. If the work of building the aqueduct was properly done, under legislative authority, the city was only liable for acts done unskillfully or negligently. *Bellinger v. Railroad Co.*, 23 N. Y. 42; *Moyer v. Railroad Co.*, 88 N. Y. 357. The finding of the commissioners that the claim of the appellant is not within the act is therefore affirmed, with costs.

v. 10 N. Y. S. NO. 12—56

EARL v. CROUCH.

(Supreme Court, General Term, Fifth Department. June 30, 1890.)

NEGLECT—DANGEROUS PREMISES—SUFFICIENCY OF EVIDENCE.

Where defendant caused lumber to be placed in a street, the mere fact that a child about five years old, in attempting to climb upon the pile, pulled it over upon himself, was sufficient evidence of defendant's negligence to make a question for the jury.

Appeal from circuit court, Monroe county.

Action by William E. Earl, as administrator, etc., against George W. Crouch, Jr. The court directed a verdict for the defendant, and dismissed the complaint, from which plaintiff appeals.

Argued before DWIGHT, P. J., and CORLETT, J.

Thos. Raines, for appellant. Wm. F. Cogswell, for respondent.

DWIGHT, P. J. The action was for damages by the death of the plaintiff's intestate, caused by the alleged negligence of the defendant. The only question presented on this review is whether a case was made for submission to the jury on the question of the defendant's negligence. The defendant, who was a lumber dealer, had sold lumber to a neighbor of the plaintiff to be used in the construction of a house, and, there not being room on the lot for piling the lumber, had piled it on the street in front of the lot. The plaintiff's intestate, a boy of four years and eleven months old, playing on the street, in attempting to climb upon the pile, had pulled it over upon himself, and was killed. There was no charge of contributory negligence either on the part of the child or of his mother, who had a few moments before permitted him to go out to play. The only question in the case as submitted to us was whether there was actionable negligence on the part of the defendant in respect to piling the lumber. The result demonstrated that it was piled in such a manner that the weight of a little child climbing upon it on the side towards the curbstone was liable to throw it down, and other evidence was given as to the manner in which the pile was constructed. We think the question above stated should have been submitted to the jury. Assuming that the defendant had a right, under the circumstances, to pile the lumber in the street, it was undoubtedly his duty to pile it in such position and in such manner as not unnecessarily to impede the public use of the highway, and still more so as not to endanger the life or limb of those passing therein. He was bound to know that young children were likely to be at play on the street, and it is probably not unreasonable to charge him with the knowledge that a pile of new lumber is a very attractive object to such children, and is likely to become the scene of their exploits and sports. Unquestionably, reasonable care is required of the person erecting such an object on the public street that it shall not be a source of danger to any person using the street in any reasonable or ordinary manner. It was for the jury to say whether precisely what this little boy did was not one of those things that was to have been expected to occur, and against the fatal consequences of which the defendant ought to have used reasonable care to provide. That this lumber could have been piled in such a way as not to have been precipitated by the weight of a child of five years of age is undoubtedly true. Whether, in the exercise of reasonable care, it would have been so piled seems really to be the only question in this case. The cases of *Kunz v. City of Troy*, 104 N. Y. 844, 10 N. E. Rep. 442; *Bransom's Adm'r v. Labrot*, 81 Ky. 638; *Lynch v. Nurdin*, 41 E. C. L. 422,—are all in the line of the reasoning here suggested. As we have indicated, no question of contributory negligence was made. It was of course conceded that the child himself was *non sui juris*, and therefore incapable of negligence, and any possible question of the negligence of the person having him in charge was expressly waived, at least for the purpose of this appeal.

We think it was error to take the question of the defendant's negligence from the jury, and that for that reason the judgment must be reversed, and a new trial granted. Judgment reversed, and a new trial granted, with costs to abide the event.

DAVIS v. WILLIS.

(Supreme Court, General Term, Fourth Department. July 1, 1890.)

1. VENDOR AND VENDEE—RESCISSION OF CONTRACT—RIGHTS OF VENDOR.

A contract for the sale of land was rescinded on the vendee's default at his request, and it was orally agreed between him and the vendor that he should retain possession of the land a few months longer, cut the hay on the premises, and feed it to the vendor's cows. Held, that the rescission of the contract discharged the vendee's equitable right in the land, and constituted him the vendor's servant in cutting and feeding the hay, and that his subsequent assignment of the contract of sale to a third person was ineffectual to pass title to the hay as against the vendor.

2. TROVER AND CONVERSION—EVIDENCE.

In an action by the vendee's assignee against the vendor for the conversion of the hay, a written statement by the vendee that an order drawn by him in the vendor's favor after the oral rescission of the contract was intended to be applied on the contract is inadmissible, as it is but an unverified declaration by the vendee, not binding on the vendor.

3. APPEAL—REVIEW—MATTERS NOT APPARENT ON RECORD.

Questions of fact will not be reviewed by the general term where the appeal-book fails to show that it contains all the evidence.

Appeal from circuit court.

Action by Edward J. Davis against Warren G. Willis for the conversion of a quantity of hay. There was a verdict in plaintiff's favor, and defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Warren G. Willis, pro se. James R. Baumes, for respondent.

MARTIN, J. This was an action to recover damages for the conversion of a quantity of hay to which the plaintiff claimed ownership. Whether the title to this hay was in the plaintiff or whether it was in the defendant at the commencement of the action was the question chiefly litigated. The legal title to the premises upon which it was cut was in the defendant. He had, however, by contract under seal, agreed to sell them to one Vanderhule, and given him the right of possession. The hay grew on the premises while Vanderhule was in possession under that contract. The plaintiff claimed title under and by virtue of an assignment of the contract to him by Vanderhule. The defendant claimed title under a contract alleged and proved to have been made between the defendant and Vanderhule previous to Vanderhule's assignment to the plaintiff, whereby Vanderhule agreed to regard the contract as rescinded and void, and to surrender up the premises to the defendant, and to cut the hay and feed it the cows on the premises for the defendant. Upon the question of title, the jury found for the plaintiff.

As the appeal-book in this case fails to show that it contains all the evidence, the questions of fact will not be reviewed by this court, even if they were otherwise reviewable here. *Averill v. Hurd*, 2 N. Y. Supp. 166; *Mulenhoff v. Sherer*, 1 N. Y. Supp. 759; *Wellington v. Improvement Co.*, 5 N. Y. Supp. 587; *Porter v. Smith*, 107 N. Y. 531, 14 N. E. Rep. 446.

The only questions we are required to consider on this appeal arise upon the exceptions of the appellant taken on the trial. On the trial the defendant requested the court to charge "that if the minds of Willis and Vanderhule met in July, 1887, upon a parol agreement to abandon and declare the contract void, such an agreement was valid, and operated at that time to rescind the contract;" also, "if there was a parol agreement to rescind and abandon the written contract, then nothing that the parties afterwards did, as shown by the evidence, would have the effect to waive the same." The court declined

so to charge. The court charged as follows: "Now, gentlemen, if this was only an agreement to rescind this contract, and not consummated or carried out by their actually entering upon the new agreement, which it is claimed was made there, then it was an executory agreement, and was void, and the plaintiff could recover." This portion of the charge and the refusals to charge as requested were excepted to by the defendant. We think these exceptions were well taken. As we have already seen, the defendant's title depends upon an agreement made between himself and Vanderhule, who was in default in not having performed the contract upon his part. The evidence discloses that Vanderhule, while thus in default, came to the defendant, and stated to him that he could not keep the farm; that he could not pay for it; that it was then and there agreed between the parties that the contract should be declared forfeited, canceled, and void, and that the farm should be the defendant's; that Vanderhule should cut the hay on the premises, and feed to the cows until March, and pay the interest on the purchase money until that time. The evidence tended to show that this new agreement was based on a good consideration, and accepted by the parties in satisfaction of their obligations under the former contract; that that contract was rescinded by mutual consent of both parties; that it was agreed that the defendant should be restored to the legal rights which he possessed before the contract was made; and that it was also agreed that the grass should be cut by Vanderhule for the defendant, and fed to the cattle on the premises. If this contract was rescinded by the mutual and voluntary consent of both parties, and without fault on the part of the defendant, he must be deemed to be thereby restored to the same condition as to the title of the premises and grass thereon in which he would have stood if no contract had been made. *Battle v. Bank*, 3 N.Y. 88, 91; *Graves v. White*, 87 N.Y. 463. The new agreement, even if not performed, having been founded on a good consideration, was a satisfaction if accepted as such. *McCreery v. Day*, 23 N. E. Rep. 198; *Kromer v. Helm*, 75 N. Y. 574. We think the effect of the agreement as testified to by the defendant and his witnesses was to rescind the contract, thereby discharging any equitable right which Vanderhule had in the premises, and constituting him the defendant's debtor for the interest on the purchase price until the following March, and making him the defendant's servant in cutting and feeding out the hay cut on the premises. If such was the agreement the defendant became the owner of the hay in question, and was entitled to the instructions asked for. It was, we think, error to decline to charge as requested, and to charge that such an agreement was void if not consummated or carried out by actually entering upon it.

The court also erred in admitting in evidence the written statement signed by Vanderhule to the effect that an order given to the defendant by him was to apply on the contract between them dated February 22, 1886. It was but the unverified declaration of Vanderhule, and was not evidence against the defendant. The exception to the reception of that evidence was valid. There are several other rulings which it is claimed were erroneous, but as the judgment must be reversed for the errors already pointed out it is unnecessary to examine the other exceptions in the case. Judgment reversed, and a new trial ordered, with costs to abide the event. All concur.

BACH v. TUOH.

(Supreme Court, General Term, First Department. June 26, 1890.)

1. SALE—RESCISSION—PURCHASER'S INSOLVENCY.

That the purchaser of goods on credit knew that he was insolvent does not entitle the seller to rescind, and replevy the goods, unless the insolvency was of such a hopeless character that the purchaser must have known that he would not be able to pay for the goods when the credit expired.

2. SAME—FALSE REPRESENTATIONS.

Representations made by the purchaser to persons other than the seller as to his financial condition cannot be considered as made with a fraudulent intent, in the absence of proof that he defrauded any of the persons to whom they were made.

Exceptions from circuit court, New York county.

Action by Elias Bach against Simon Tuch as assignee for benefit of creditors of Rudolph Moeller. A verdict was directed for defendant, and plaintiff moves for a new trial on exceptions to be heard in first instance at general term. For former report, see 7 N. Y. Supp. 611.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Townsend, Dyett & Einstein, (B. F. Einstein, of counsel,) for plaintiff.
Seaman & Spader, (E. E. Wise, of counsel,) for defendant.

VAN BRUNT, P. J. This action was in replevin, brought to recover the possession of certain personal property. The goods were taken from the sheriff, and delivered to the plaintiff, who still holds them. It appeared upon the trial that on the 27th of October, 1885, the plaintiff sold and delivered to one Moeller the merchandise in question, for which Moeller gave his promissory note, which was tendered to the defendant at the trial, and refused. Two months after the sale Moeller made an assignment to the defendant, Tuch, for the benefit of creditors, in which he gave various preferences. The plaintiffs commenced an action in the city court of New York for the purchase price of said goods, and obtained and issued an attachment therein against Moeller on the ground of fraudulent statements made by Moeller at the time of and for the purpose of inducing the sale and the fraudulent removal of his property. In the affidavit upon which the attachment was granted, Bach, one of the plaintiffs, set forth various representations made by Moeller, and then alleges that said representations so made were false and untrue in every particular, and the defendant must have known the same were untrue when he made the same. This attachment was vacated by the general term of the city court,¹ and the suit discontinued. The plaintiff then began this suit in replevin, after making demand for their goods upon the sheriff, on the ground that they now desired to rescind the sale of the goods for the price of which they had begun the attachment suit. Upon this state of facts the jury were directed to render a verdict for the defendant for the return of the goods, and for damages for their retention. To this direction exception was taken, which exception was ordered to be heard in the first instance at the general term.

We see no error in the disposition of the case by the circuit court. The only evidence tending to show fraud offered upon the part of the plaintiff was that of an expert accountant, tending to prove what the books of Moeller showed as to his financial condition at or about the time of the sale. This evidence showed that he was probably at that time insolvent, but this insolvency was not of such an utter and hopeless character as would justify any finding by a jury that any purchase of goods made by him was fraudulent, and with intent not to pay for the same. There was nothing shown in his condition which could possibly justify a finding that Moeller knew that he could not pay for the goods at the time the credit expired. It is not sufficient that a debtor should know that he was insolvent, but that insolvency must be of that extreme character, in order to avoid a sale, that the debtor must have known that he must fail before the time for the payment of the goods arrived. The evidence in this case shows no such condition, and there was nothing which would justify a jury in coming to any such conclusion.

It is claimed by the expert that stale claims aggregating a large amount appear upon these books, which made the defendant Moeller hopelessly insolvent; but there is no proof whatever in this case going to show that at the time

¹ Not reported.

these goods were bought the financial condition of these debtors of the defendant were of such a character as that he had no reasonable ground to suppose that he might make collections. There is no evidence whatever of any representation in respect to the defendant's condition at the time of this purchase. It is true that the plaintiffs sought, by proof of representations to other parties of Moeller's financial condition, to show that he had a fraudulent intention, but there is no evidence whatever that he defrauded any of the persons to whom such representations were made; and, if he did not, then it is clear that these representations could not be considered as made with a fraudulent intent. We see no reason to interfere with the rulings of the court below, and the exceptions should be overruled, and judgment entered upon the verdict for the defendant, with costs. All concur.

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MARTIN et al. v. BLISS.

(*Supreme Court, General Term, First Department. June 26, 1890.*)

FACTORS AND BROKERS—RIGHT TO COMMISSIONS—BAD FAITH.

A real-estate broker employed to sell land concealed the fact that the proposed vendee had accepted the vendor's terms, and endeavored to persuade the vendor to accept a less price, which she refused to do. Afterwards she refused to complete the contract, though her price was to be paid. *Held*, that the broker was guilty of such bad faith towards his employer that he could not recover his commission.

Appeal from circuit court, New York county.

Action by Charles G. Martin and another against Hattie W. Bliss. Plaintiffs appeal from a judgment dismissing their complaint after trial at circuit. For former report, see 5 N. Y. Supp. 686.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

C. N. Bovee, Jr., for appellants. L. R. Bockley, for respondent.

VAN BRUNT, P. J. The material facts proved upon the trial were as follows: The plaintiffs in this action were real-estate brokers, and the defendant was the owner of premises No. 31 West Thirty-Second street, in this city. Early in May, 1886, the plaintiff Charles G. Martin called at the house of defendant, and asked her if she wanted to sell her house, and told her that he had a party that wanted to buy, and would give a good price for the house. She said that she would not sell it. The plaintiff told her that if she changed her mind he would be glad to hear from her. On the 12th of May, in consequence of a message received, Mr. Martin called upon the defendant again, who told him that she had concluded to sell her house if she could get her price, which was \$50,000. Mr. Martin then told her that he had just left a gentleman at his office, a Dr. Bozeman, whom he thought would buy her house, but he did not know whether he would give \$50,000 for it, but that he would go and see. The defendant replied that she did not want anybody brought there unless he was willing to give \$50,000, because that was the lowest that she would take. When Mr. Martin returned to his office Dr. Bozeman had left, and he left word with his son, the plaintiff William C. Martin, when the doctor came in to take him to see the house. On the same day Mr. William C. Martin went with Dr. Bozeman to see the house. They were shown the house by the defendant. Mr. William C. Martin asked her if any less offer than \$50,000 would be accepted for the house. Her reply was: "Not one penny. I will sell it for \$50,000, and no less." After some further conversation Dr. Bozeman left Mr. William C. Martin, stating to him that he would be around to see him in a few minutes. Mr. Martin, then, after vainly striving to get the defendant to take less for her house, said to her: "If I can get you \$50,000 from the doctor, will you pay me a thousand dollars?" She said: "Why, no. Why should I pay you a thousand dollars?" Mr. Martin asked her if she would pay him \$750, and she refused. Finally, she said: "

will give you a check for \$600 if you can sell the house for me for \$50,000." Mr. Martin then left her, stating that he would go and see the doctor, and if he could get an offer out of him he would be back in half an hour. Mr. Martin then saw the doctor, who told him to go back and close the bargain; that is, buy the house for \$50,000. Mr. Martin then went back to see the defendant, and said to her that he could offer \$45,000, or \$46,000, or \$47,000, a little less than \$50,000, spot cash, for her house, if she would throw in the coal in the house and some other things. She replied that it was a waste of time to talk less than \$50,000, and that she would not throw in the coal; that she would include the other things. Mr. Martin then asked her if she would take \$48,000. She said, "No." "Forty-nine thousand dollars cash?" She refused, and, finding that he could not beat her down in her price, Mr. Martin finally said: "Very well, we will take the house at \$50,000." She replied: "Very well, I am glad I had no more trouble about it." It was arranged that the defendant should sign the contract at 10 o'clock the next morning. The next morning Mr. Martin called, with a contract drawn up for the defendant to sign, which she refused to do, and, the defendant having refused to complete the contract, the plaintiffs brought this action to recover the \$600 which it is claimed was due because of their production of a customer willing to pay \$50,000 for the house of the defendant. The only relation existing between Dr. Bozeman and the plaintiffs was that they had called his attention to the house in question, and invited him to go to the house and see it. They were not working for Dr. Bozeman expecting a commission, and were not his employees. Upon this state of facts the complaint was dismissed, and from the judgment thereupon entered this appeal is taken.

In order to entitle a broker to his compensation, it is not necessary that a conveyance of the property intrusted to him for sale should actually be consummated between his employer and customer. All that is necessary for a broker to show is that he has been employed by the owner, and that he has produced to his principal a customer who is willing to purchase upon the terms fixed by the principal, and who is able to comply with those terms. This being done, a broker is entitled to his compensation under ordinary circumstances. In the case at bar the broker shows employment, and production of a customer able and willing to comply with the terms fixed by the principal. It is claimed upon the part of the defendant that, notwithstanding the existence of these facts, the broker is not entitled to recover, because in the course of his employment he has been guilty of bad faith towards his principal; that instead of using his best efforts to further the interest of his principal, the broker in the case at bar worked against them, used his utmost efforts to induce the defendant to take less for her house than the price fixed by her, when the defendant's terms had already been accepted by the proposed customer. The plaintiffs claim that this defense is not available because not pleaded, and in support of the proposition cite the case of *Durfee v. Lester*, 75 N. Y. 442, in which it was held that in that case the question of double employment could not be considered, because no such objection was taken in the court below, and it is further stated that the matter properly should have been pleaded. In the case at bar the question was raised in the court below. The proof as to the bad faith of the broker was received without objection. No question as to the sufficiency of the answer was suggested, and it is now too late to raise that objection, as in order to support the judgment the court would now, if necessary, direct the pleadings to conform to the proof. The plaintiffs further urged that there was no bad faith upon their part, because the defendant knew that they were employed by Dr. Bozeman. Even if the plaintiffs had been employed by Dr. Bozeman, which the proof shows they were not, yet they owed some duty to the defendant. They knew when they were trying to beat down the defendant in her price that Dr. Bozeman had accepted the defendant's terms; that he was not only

willing to pay the price asked, but anxious to get the house upon those terms. They had his directions to close the bargain, the direction to do the best they could for him, given by Dr. Bozeman, evidently relating only to the throwing into the bargain of the coal and other things. The plaintiffs, however, instead of stating to the defendant that Dr. Bozeman had accepted her proposition, endeavored to beat her down in her price, and get her to take less, fraudulently concealing from her the fact that Dr. Bozeman had acceded to her terms. Certainly some good faith is required as between employer and employe. An agent owes some duties to his principal, and because a man is a real-estate broker he is not relieved from the ordinary principles governing the relation of principal and agent. It is undoubtedly true that a broker may in some instances act for two parties where they have conflicting interests, as in the case of exchange of property, which was the fact in the cases cited by appellants' counsel. *Rouse v. Stevens*, 58 N. Y. 621; *Jarvis v. Schaefer*, 105 N. Y. 289, 11 N. E. Rep. 634. But even then he is bound to fair dealing, and it has never yet been decided, even in such a case, that a broker could conceal from one principal the acceptance of an offer by the other, and endeavor, with knowledge of that acceptance, to get lower terms from that principal, and yet recover his commission as compensation for services rendered. But the plaintiffs in this action were not employed by Dr. Bozeman. They themselves say they were not. The relation of employer and employe, principal and agent, did not exist between them. Dr. Bozeman says he wanted a house, and at the plaintiffs' request went to see the house in question. The plaintiffs say that they expected no pay from Dr. Bozeman, and yet they seem to have been more zealous for his interests than for those of their principal. The plaintiffs, therefore, were the agents of the defendant, and of the defendant only, and owed to her their best endeavors. This she was entitled to receive, and, unless they gave them to her, they have not fulfilled their obligations to her. That she did not receive their best efforts is conceded, as after they knew that Dr. Bozeman had accepted her offer they endeavored to beat her down in her price. This clearly was a fraudulent act upon their part, and simply because they did not succeed in cheating their employer, having used their best efforts to do so, can it be said that they have fulfilled their obligations to her? The servant who tries to cheat and defraud his employer, but fails, stands in the same category as the servant who succeeds. The act is the same, whether successful or not. It seems to me that a court cannot countenance such a breach of fidelity as the facts of this case exhibit. If it does, it would seem to hold that, as between employer and employe, good faith and honest service are not required to entitle the employe to compensation which was supposed to depend upon his fidelity to the interests of his employer. The judgment appealed from should be affirmed, with costs. All concur.

WAINWRIGHT v. LOW et al.

(Supreme Court, General Term, Second Department. July 18, 1890.)

1. DEED—PROOF OF EXECUTION.

A finding in favor of the genuineness of the signature to a deed is not justified where the evidence shows that three weeks prior to her death the grantor showed the deed to a witness, and stated that her husband got it and signed her name to it, and it was not like her writing; and the witness also testifies that the writing was not like that of the grantor, and there is no proof to the contrary, except the testimony of an expert based upon his comparison with the grantor's bank-book.

2. SAME—DELIVERY.

An antenuptial trust-deed of land reserved to the grantor a power of appointment to be exercised by deed or will, under her hand and seal, and duly made and executed in the presence of two or more witnesses. At the grantor's death there was found in her bureau a deed, purporting to execute the power in favor of her

husband, but bearing no certificate of acknowledgment, and not subscribed by any witness. The deed had been retained by the grantor for more than 20 years with her husband's consent. *Held*, that the instrument had never been delivered.

3. POWERS IN TRUST.

A grantor conveyed land to a trustee to receive the rents and profits, or to permit her (the grantor) to hold and use the same at her election, and at her death to convey it to such person as she should appoint by deed or will. *Held*, that, though the deed was void as attempting to create a passive trust, which 1 Rev. St. N. Y. p. 727, § 45, and page 728, § 55, abrogate, it was valid as a power in trust, under section 53, which provides that if a trust, which is void because not enumerated in the preceding section, directs the performance of an act which may be lawfully performed under a power, it shall be valid as a power in trust, since the dormant power to convey might become active under a proper appointment by the grantor.

4. ALIENS—DISABILITY TO INHERIT LAND—RETROSPECTIVE LAWS.

A. died intestate in 1871, seised of certain real estate, and leaving her surviving her husband, and plaintiff, her sister, who was an alien, and, as such, incapable of inheriting the premises. On April 27, 1874, the New York legislature passed a law (Laws 1874, c. 261) declaring that "if any alien or citizen * * * has died or shall hereafter die leaving persons who, according to the statutes of this state, answer the description of heirs of such deceased persons," they shall inherit it, whether they were citizens or aliens. On April 27, 1876, the legislature passed an act (Laws 1876, c. 184) authorizing A.'s husband to take the premises, and, releasing the interest of the state acquired by escheat upon the death of A., provided that nothing contained in the act should be construed so as to affect the right in the property of any heir at law. *Held*, that the act of 1874 was retroactive, and removed the disability of plaintiff to inherit the real estate as sole heir of her sister, and that, therefore, prior to the passage of the act of 1876, the state had parted with all its interest in the property, and had nothing left to release.

Appeal from judgment on report of referee.

Action by Charlotte Wainwright against William G. Low and the Sailors' Coffee House Company, Limited, to recover possession of real estate. There was judgment in favor of plaintiff, and defendants appeal. For opinion on motion to take deposition, see 1 N. Y. Supp. 786.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Moore, Low & Wallace, for appellants. *Ten Eyck & Remington*, for respondent.

DYKMAN, J. This is an appeal by the defendants from a judgment entered upon the report of a referee in an action for the recovery of real property located in the city of Brooklyn. On the 18th day of July, 1846, Sarah Ann Wood was the owner of the premises in question, and, being about to marry George G. Ackley, she then executed an antenuptial trust-deed of the property to Edward F. Sanderson, in trust to receive the rents, or permit her to take, hold, and use the same for her use and benefit at her election, and at her death to convey it to such person as she should appoint by deed or will. Sarah Ann Porter was born of English parents in England in the year 1836, and was married to a man named Wood, who was a citizen of the United States, and after his death she was married to George G. Ackley, in July, 1846. After the death of Mrs. Ackley, in 1871, there was found in her bureau, rolled up in a piece of old bed-tick, a written instrument bearing her name, and a seal reciting the execution of the trust-deed, her subsequent marriage to Ackley, and the desire of the trustee to divest himself of the trust, and then authorized and directed the trustee to convey the property to her husband. There was no certificate of acknowledgment upon the instrument, and it was not subscribed by any witness, and the referee found that it was not signed with intent to impart to it any legal effect or operation, and that it was never delivered, but was retained by Mrs. Ackley in her possession during her life-time, and that she continued in possession of the property down to the time of her death, in 1871, and her husband continued to reside upon the property until he died, in 1876. The trustee, Sanderson, died in 1866, without having conveyed the property, and without a request to do so. Mrs. Ackley died intestate without having conveyed the property except by the

trust-deed, leaving the plaintiff, who is her sister, but who never became a citizen of the United States, her only heir at law. In the year 1876 George G. Ackley presented a petition to the supreme court, praying for the appointment of a trustee in the place of Sanderson, and that such new trustee be directed to carry into effect the directions contained in the instrument already mentioned, purporting to have been signed by his wife, to convey the property to him. Upon that petition a trustee was appointed with the directions prayed for, who qualified, and executed and delivered a deed of conveyance of the property to Ackley. The plaintiff had no notice of such proceedings. The defendant Low traces his title from Ackley through several mesne conveyances, and Low is a purchaser in good faith. Upon the foregoing facts the referee decided that Sarah Ann Ackley made no valid appointment under the power reserved to her for that purpose in her antenuptial deed of trust, and that she died seised of an estate in fee in the premises in question. Also that, at the time of the death of Sarah Ann Ackley, the plaintiff, Charlotte Wainwright, her sister and only heir, was an alien, and had never become a citizen of the United States, and that by reason of her alienage she had not then capacity to take the premises by descent, and that they escheated to the state of New York; but that such disability of Charlotte Wainwright was removed, and the title of the state to the premises released to her by chapter 261 of the Laws of 1874, and that she thereupon became seised of the premises in fee, and entitled to the possession thereof. That George G. Ackley never acquired title to the premises by virtue of chapter 184 of the Laws of 1876, or by the deed made to him by the substituted trustee, under the antenuptial deed of Sarah Ann Ackley, or otherwise, and that the defendant never had any valid title to the premises. Such are the conclusions of the referee, upon which he directed a judgment in favor of the plaintiff, and our examination conducts us to the same determination.

It will be in order to consider now whether Mrs. Ackley exercised and executed the power of appointment reserved in her antenuptial trust-deed. If she did, the plaintiff could not take the property by inheritance, and so the inquiry is of vital importance in the determination of the case. By the terms of the trust-deed the power of appointment was to be exerted by Mrs. Ackley, by the execution of a deed or instrument in writing in the nature of a last will and testament under her hand and seal, duly made and executed in the presence of two or more witnesses; and the statute required the execution of any deed by a married woman to be acknowledged apart from her husband. The referee has found that the signature to the instrument is genuine, but we do not concur in that conclusion. Mrs. Ackley had the paper in her possession three weeks before her death, and showed it to Mrs. Jane Young, and said her husband got it and signed her name to it, and it was not like her writing; and the witness says also it was not like her writing. There is no proof to the contrary except the comparison with the bank-book, and the testimony of the expert, which is entitled to slight consideration only. Signatures are made by no rule or measure, and they always differ, and are therefore easily counterfeited, and it always is difficult to distinguish the genuine from the spurious. The point, however, is not very important, for the referee has found that the instrument was not delivered, and he is well sustained in that conclusion. But we go further, and find from the undisputed facts and the surrounding circumstances that the paper never was executed for the purpose of imparting to it any legal force or effect, even if it was signed by Mrs. Ackley. All the parties were familiar with the terms of the trust-deed, and with all the formalities essential to the due execution of the power of appointment reserved therein, and if Mrs. Ackley intended to execute the deed of appointment, and impart to it validity and effect, it is fair to presume that all the requisites of the trust-deed and of the law would have received compliance, and the trustee would have received a request to

execute the power. Instead of that, however, the trustee received no request to make the deed, and the paper remained in the possession of Mrs. Ackley more than 20 years, until she died; and her husband acquiesced in her retention of the paper. We have no hesitation, therefore, in holding that the instrument never was executed with any view to its delivery, and that it never was delivered. We have not overlooked the *ex parte* proceedings of Ackley for the appointment of a substituted trustee, and the procurement of a deed from the new trustee; but all the circumstances now developed satisfy us that an imposition was practiced upon the court by the petitioner, and that the order was obtained by fraud. Moreover, the action of the court was based upon the false assumption that Mrs. Ackley had exercised the power of appointment reserved in the trust-deed, and we now find that such assumption was false, and that the instrument signed by her for that purpose never became effective. No appointment having been made by Mrs. Ackley in her life-time, the power vested in the trustee never became operative, and upon her death it ceased to exist, and could not be exerted thereafter. Its execution became impossible, and it was practically extinguished. *Hotchkiss v. Elting*, 36 Barb. 38. As, therefore, there was no trust, and no valid power in trust, and no trust-estate, there was no occasion or authority for the appointment of a new trustee, and when he was appointed he was destitute of power, and his action was nugatory.

Such being our conclusion upon the first question, it becomes essential next to inquire whether Mrs. Ackley died seised of the premises. By the antenuptial trust-deed Mrs. Ackley undertook to convey her property to Sander-son, in trust to receive the rents thereof, or to permit her to take hold, receive, and use the same at her election; and she did elect to use the property in question, and did occupy it during her life-time. Some embarrassment is created by the alternative provision in the instrument; but, in view of the purposes to be subserved, and of the recitals in the deed, and the actual election of the grantor, we think the instrument was designed to create a trust to hold the property, and permit its occupation and use by the beneficiary. The trustee took no right to the possession, or to the rents and profits of the land, and the trust is therefore void, because it is not authorized by the statute. 1 Rev. St. pp. 727, 728, §§ 45, 55. The parties endeavored to create a passive trust, and such trusts were abrogated by the Revised Statutes. Yet the instrument was not wholly void. It bestowed upon the trustee a dormant power to convey land, and the power might become active and operative under a proper appointment of a person to receive the conveyance. He became the trustee of a power, and the instrument was converted into a power in trust by section 58 of that statute, which provides that where an express trust shall be created for any purpose not enumerated in the preceding sections, as this is not, no estate shall vest in the trustee; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions in relation to such powers contained in the article respecting powers. By section 47 of the statute every person who, by virtue of any grant, assignment, or devise, now is or hereafter shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein of the same quality and duration, and subject to the same conditions, as his beneficial interest. Then follows section 49, which provides that every disposition of lands, whether by deed or devise hereafter made, shall be directly to the person in whom the right to the possession and profits shall be intended to be invested, and not to any other to the use of or in trust for another. No estate or interest, legal or equitable, shall vest in the trustee. If any elucidation of the design of these sections of the statute is essential, it is furnished by the note of the revisers to section 47, in which they say: "This section will convert all formal

trusts into legal estates in the beneficial owner, and thus effectuate the original intent of the statute of uses." Then they add an extract from the famous speech of Lord Brougham on the state of the law, in which he said: "I would restore the statute of uses to what it was clearly intended to be. Our ancestors made that law, by which, if land was given to A. for the use of B., the latter was deemed the legal owner, the use being executed in him just as if A. did not exist." These two sections of the statute are aimed against the creation of legal estates impressed with trusts or trust duties, except such as are authorized by section 55, and they show that the legislature intended to turn what would otherwise have been a passive trust into a legal estate in the *cestui que trust*. *Rawson v. Lampman*, 5 N. Y. 462; *Dry-Dock v. Stillman*, 30 N. Y. 194. The antenuptial trust-deed offended against section 49 of the statute, which made it imperative that every disposition of lands thereafter made should be directly to the person in whom the right to the possession was intended to be invested, and not to any one for the use of or in trust for such person, and abridged the effect of every disposition of land made in violation of the section by declaring that no estate or interest should vest in the trustee thereby. The trust-deed, therefore, was valid as a power, and had no further legal operation, and left the title to the property in the donor of the power. Whether the trust created is active or passive, is quite immaterial; for if it was the former it was a power in trust, and the title remained in the donor, and if it was the latter the statute executed the use by carrying the title to the beneficiary, and vesting the same in her. The trustee took no right of possession and no interest in the rents and income, for both were retained by the grantor under her right of election. Our conclusion, therefore, upon this question is that the trustee took no interest in the premises, and that the title remained in Mrs. Ackley, subject to be defeated by her exercise of the power of appointment reserved in the deed, and a conveyance in pursuance thereof by the trustee. It follows, therefore, that Sarah Ann Ackley died seised of the premises; but, as the plaintiff was then an alien, she had not the capacity to take the premises from her sister by descent, and therefore they passed to the state by escheat.

It becomes, therefore, necessary now to inquire how and to whom the title was transferred by the state. Mrs. Ackley was a citizen of the United States before her marriage with Ackley, by virtue of her prior marriage with Wood, who was a citizen. Such citizenship was conferred by the act of congress of February 10, 1855, which enacted as follows: "And be it further enacted that any woman who might be lawfully naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen." In the case of *Halsey v. Beer*, 5 N. Y. Supp. 334, we decided that the language employed in this law referred to the inherent capacity of the woman, and not to her present qualifications, and that any woman possessing the capacity, such as race and blood, to enter upon the path leading to judicial naturalization, became, by marriage with an American citizen, invested with his citizenship, and with all the rights and privileges incident thereto. On the 27th day of April, 1874, the legislature of this state passed a law amending section 4 of the act to enable resident aliens to hold and convey real estate, and for other purposes, passed April 30, 1845, so as to cause it to read as follows: "If any alien resident of this state, or any naturalized or native citizen of the United States, who has purchased or taken, or hereafter shall purchase and take, a conveyance of real estate within this state, has died, or shall hereafter die, leaving persons who, according to the statutes of this state, would answer the description of heirs of such deceased person, such persons so answering the description of heirs of such deceased person, whether they are citizens or aliens, are hereby declared and made capable of taking and holding, and may take and hold, as heirs of such deceased person, as if they were citizens of the United States,

the lands and real estate owned and held by such deceased alien or citizen at the time of his decease." Then follows a provision respecting males of full age, which has no application to this case. We think that the statute fits this case, and operated as a surrender by the state of the title which it had acquired by escheat to the premises in question before the passage of the law. *Luhre v. Elmer*, 80 N. Y. 180. Mrs. Ackley was a naturalized citizen of the United States, and had taken the premises by purchase between the passage of the law of 1845 and the law of 1874. She died after the law of 1874, leaving the plaintiff, who, according to the statutes of this state, would answer the description of her heir, and, as she thus answered the description of an heir to the deceased Mrs. Ackley, whether she was a citizen or an alien, she was by the statute made capable of taking and holding as such heir the property in question.

The examination of the case thus far having resulted favorably to the plaintiff, it becomes essential to determine the legal effect of another statute designed to aid the husband of Mrs. Ackley. On the 27th day of April, 1876, the legislature of this state passed a law authorizing and empowering George G. Ackley to take, hold, and convey the property in question, and granting and releasing all the estate, right, and interest of the people of the state of New York acquired by escheat at the time of the death of Mrs. Ackley in the premises to George G. Ackley, his heirs and assigns, forever. But the second section of the act contained a proviso that nothing contained in the act should be construed so as to affect the right in the property of any heir at law. Chapter 184, Laws 1876. If we are right in our view of the effect of the law of 1874, and that act operated to release the interest of the state to the plaintiff as the sole heir of Mrs. Ackley, and vest the title to the premises in the plaintiff, then the state had no interest in the premises in 1876 to release, and George G. Ackley took nothing under the act of 1876. The disability of the plaintiff by reason of alienage was removed by the law of 1874; and, her relationship of sole heir to Mrs. Ackley being undisputed, we think the plaintiff became vested with the title *eo instante* upon the passage of that law, by virtue of the following language: "Such persons so answering the description of heirs of such deceased person, whether they are citizens or aliens, are hereby declared and made capable of taking and holding, and may take and hold, as heirs of such deceased person, as if they were citizens of the United States, the lands and real estate owned and held by such deceased alien or citizen at the time of his decease." This act is plainly retrospective in its operation, and preserves the rights of persons who before its passage had acquired interests and rights to lands which they were unable to enjoy by reason of the disability of alienage. After a most careful examination we are led to an affirmation of the judgment. Its operation is harsh, and it would have been a pleasant duty to decide in favor of a *bona fide* purchaser for a very praiseworthy purpose, but, in our view of the present state of the law, such a result was impossible. The judgment should be affirmed, with costs.

All concur.

DALY v. BEER *et al.*

(Supreme Court, General Term, Second Department. July 18, 1880.)

ALIENS—RIGHT TO TAKE LAND.

P. died intestate, seised of certain real estate devised to him by his father, leaving surviving him two maternal aunts and the children of deceased maternal aunts, who were all aliens. *Held*, that they took an absolute title to the land under Laws N. Y. 1845, c. 115, as amended by Laws 1874, c. 261, and Laws 1875, c. 83, declaring that "if any alien resident of this state, or any naturalized or native citizen of the United States, who has purchased and taken, or hereafter shall purchase and take, a conveyance of real estate within this state, has died, or shall hereafter die, leaving persons who, according to the statutes of this state, would answer the description of heirs of such deceased person, or of devisees, under his last will, and being

of his blood, such persons so answering the descriptions of heirs or of such devisees of such deceased person, whether they are citizens or aliens, are hereby declared and made capable of taking and holding, and may take and hold, as heirs or such devisees of such deceased person, as if they were citizens of the United States, the lands and real estate owned and held by such deceased alien or citizen at the time of his decease."

Appeal from special term, Suffolk county.

Action for partition of land, brought by William Thomas Daly against Margaret Beer, Catharine Powles, Elizabeth Sarah Russell, and the people of the state of New York. Defendant Margaret Beer appeals from an interlocutory decree entered therein for report of former litigation. See *Halsey v. Beer*, 5 N. Y. Supp. 334. Laws N. Y. 1845, c. 115, as amended by Laws 1874, c. 261, and Laws 1875, c. 38, declares that "if any alien resident of this state, or any naturalized or native citizen of the United States, who has purchased and taken, or hereafter shall purchase and take, a conveyance of real estate within this state, has died, or shall hereafter die, leaving persons who, according to the statutes of this state, would answer the description of heirs of such deceased person, or of devisees, under his last will, and being of his blood, such persons so answering the descriptions of heirs or of such devisees of such deceased person, whether they are citizens or aliens, are hereby declared and made capable of taking and holding and may take and hold as heirs or such devisees of such deceased person, as if they were citizens of the United States, the lands and real estate owned and held by such deceased alien or citizen at the time of his decease. But if any of the persons so answering the description of heirs, or of such devisees, as aforesaid, of such deceased person, are males of full age, they shall not hold the real estate hereby made descendible or devisable to them as against the state, unless they are citizens of the United States, or, in case they are aliens, unless they make and file in the office of the secretary of state the deposition or affirmation mentioned in the first section of this act."

Argued before DYKMAN and PRATT, JJ.

R. E. Tapping, for appellant. *Rabe & Kellar*, for respondent Daly. *Edward Brown* and *M. E. Tapping*, for respondents Powles and Russell.

DYKMAN, J. This is an appeal from an interlocutory judgment in an action for the partition of real property. The facts of the case are undisputed, and are substantially as follows: David E. Pierson, who died seised and possessed of the property in question, was the common source of title. He was 21 years of age at the time of his death in February, 1838, and he received this property by devise from his father, David Pierson, who died in October, 1871. David E. Pierson died intestate, and left no father or mother, brother or sister, or descendant of any brother or sister, no paternal uncle or aunt, or descendant of any such uncle or aunt. He left two maternal aunts, Margaret Beer and Catharine Powles, two of the defendants in this action, and also two cousins, William Thomas Daly, the plaintiff, and Elizabeth Sarah Russell, one of the defendants, both the children of a deceased maternal aunt. All of these persons are of English parentage, and none of them had been in the United States previous to the death of David E. Pierson. The plaintiff became a resident of the state of New York in February, 1839, and and at that time declared his intentions to become a citizen of the United States, and filed in the office of the secretary of state of New York the deposition required by the statute that he was a resident of the state of New York, and intended to reside permanently in the United States, and become a citizen thereof as soon as he could be naturalized, and that he had taken such incipient measures as the law requires to enable him to obtain naturalization. Catharine Powles and Elizabeth Sarah Russell are both aliens. Margaret Beer is a citizen, although the court found she was not. *Halsey v. Beer*, 5 N. Y. Supp. 334. She became such by virtue of her marriage with

John Beer in July, 1876; and her claim in this action is that she is the sole heir of David E. Pierson and entitled to the whole of this property, and that the other parties have no interest therein. She has been in possession of the premises since the death of David E. Pierson. The cause was tried before a judge without a jury, and he decided that the parties were seised in fee of the premises as tenants in common, and the defendant Margaret Beer has appealed from the judgment entered upon such decision.

We had occasion to examine the question involved in this appeal in the case of *Maynard v. Maynard*, 36 Hun, 227, and our conclusion was that under section 4, c. 115, Laws 1845, as amended by chapter 261, Laws 1874, and chapter 38, Laws 1875, alien heirs at law might take an absolute title to land. The same question was involved in the case of *Watnwright v. Low*, ante, 888, (decided at the present term of this court,) where we held that the amendatory statute of 1875 was retroactive in its operation, and preserves the rights of persons who before its passage acquired rights to land which they could not enjoy by reason of the disability of alienage. Our views were fully expressed in those cases, and require no repetition here. But the defendant Beer also contends that David E. Pierson took the property by descent, and not by purchase, and that the plaintiff and the other defendants were therefore excluded from the succession to his estate. The language is: "If any alien resident of this state, or any naturalized or native citizen of the United States, who has purchased and taken, or hereafter shall purchase and take, a conveyance of real estate within this state;" and the construction for which the appellant contends is inadmissible. In judgment of law, a purchase is the acquisition of land by act of the parties in contradistinction to acquisition by operation of law, and includes title by deed and title by devise. The question was involved in the decision of the case of *McCauley v. Palmer*, 40 Hun, 38, and it was then said that "acquisition by purchase includes every mode of taking title except descent or inheritance." In the case of *Hall v. Hall*, 81 N. Y. 186, it was said, in relation to this same law, that "the section expressly authorizes a resident alien to take a conveyance of lands; and there seems to be no public policy which would justify the inference that the legislature intended to discriminate between a title by deed and by devise." Our conclusion therefore is that the judgment should be affirmed, with costs.

WILLIAMS et al. v. FOLSOM et al.

(Supreme Court, General Term, First Department. June 6, 1890.)

1. PLEADING—MOTION TO STRIKE OUT.

Where it reasonably appears that the allegations in a complaint constitute a full exposition of plaintiffs' case, giving more details than is necessary, but germane to the subject, they cannot be properly stricken out as irrelevant, especially where the action is one in which fraud is alleged, and there is no evidence that the retention of the allegations would embarrass defendant in his defense.

2. SAME—WAIVER OF OBJECTIONS.

By answering a complaint defendant waives his right to move that portions thereof be stricken out as irrelevant, or made more definite.

Appeal from special term, New York county.

Action by Louisa Williams and others against Samuel D. Folsom and others. Defendants appeal from an order denying their motion to have certain portions of amended complaint stricken out. For former litigation, see 3 N. Y. Supp. 681; 5 N. Y. Supp. 211; 7 N. Y. Supp. 568.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Davenport, Smith & Perkins, for appellants. *Carter, Hughes & Cravath*, for respondents.

BRADY, J. This action was brought to recover the sum of \$10,000, to which the plaintiffs considered themselves entitled by reason of the treacher-

ous conduct of the defendants, who, as their agents, had induced them to sell certain real estate for a sum less than its value in order to resell the same at an advanced price for their own benefit, and which they accomplished by improper representation, and the use of a vendee who was connected with the fraudulent scheme. The allegations in the complaint designed to make this apparent are in part objected to, and the defendants seek to have them stricken out in the first place, or made in some respects more definite and certain. The allegations as a whole are not, nor is any part of them, irrelevant. They constitute a full exposition of the plaintiffs' case, giving, perhaps, more details than would be necessary, but nevertheless germane to the subject, and may be items of importance in establishing the course of action set up. When this reasonably appears they cannot be properly stricken out as irrelevant, more especially if the action be one in which fraud is alleged. Aside from this, the disposition of a motion made for such a purpose is discretionary, and should be granted only where no doubt exists of the irrelevancy charged. This is the rule, although the pertinency of some of the allegations is not directly apparent, but there is a possibility that they may become so in explanation of or as connected with the history of the subject-matter of the litigation. There is still another rule applicable to such a motion, and that is: there must be some evidence that the retention of the allegations would embarrass the defendants in their defense,—something shown establishing harm or injustice. *Lugar v. Byrnes*, 15 Civil Proc. R. 72.

There is still another objection to the success of this motion, namely, that the defendants have answered. An answer can have no other effect in reference to such a motion than to waive the right to make it. This must apply whether the complaint be amended or not, if the answer remain. The issues are framed when that pleading is put in and the preliminaries are closed. The allegations are not subject to the charge of indefiniteness. They are definite and certain. There can be no misunderstanding as to what is meant by them, and the evidence to sustain them cannot be called for. It may be said, indeed, that the defendants well know what is charged against them, and are desirous of ascertaining, if they can, the particulars of the proof by which they will be established. Besides, allegations of fraud are not required to be stated with great particularity. The array of facts and circumstances, but not minutely, is sufficient. *Passavant v. Cantor*, 21 Abb. N. C. 259, 264. The court may in some instances grant on a proper motion therefor a detailed statement, but not on such a motion as was made herein in such a case as this. A general statement, if comprehensive and complete, although it may in the proof involve details, cannot be arraigned as indefinite or uncertain. For these reasons the learned judge in the court below properly denied the motion, and it should be affirmed, with \$10 costs, and disbursements of this appeal. All concur.

HOGAN v. WOLF.

(Supreme Court, General Term, First Department. June 6, 1900.)

LIMITATION OF ACTIONS—RUNNING OF STATUTE.

The statute of limitations begins to run against a cause of action for enticement away plaintiff's husband and depriving her of his society and assistance from the time of the enticement, and is not in the nature of a continuing trespass.

Exceptions from circuit court, New York county.

Action by Catherine A. Hogan against Caroline Wolf. The complaint was dismissed, and the exception taken by plaintiff ordered heard in the first instance at general term.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Benjamin Patterson, for plaintiff. *Edward C. James*, for defendant.

VAN BRUNT, P. J. This action was brought to recover damages because of the enticement of the plaintiff's husband from her in the year 1858, and the depriving the plaintiff of his comfort and society and assistance from that time until the time of his death, which occurred in 1885, 27 years after said alleged enticement. Among other defenses the defendant set up the six-years statute of limitation. Upon the opening of the plaintiff's counsel the counsel for the defendant moved to dismiss the complaint on the pleadings, which motion was granted, and exception duly taken, which was ordered to be heard in the first instance at the general term. The ground upon which the plaintiff seeks to avoid the statute of limitation is that her rights are similar to those of the owner of land upon which a continuing nuisance is maintained, and a cause of action is renewed each day as long as the nuisance causing the damage continues. I think that it would be difficult to assimilate actions for personal injuries to actions for trespass upon lands. In the one, all the damages suffered or to be suffered can and must be recovered in one action; in the other, future damages cannot be recovered. In a case similar to the one at bar, if a recovery is once had, without showing that a new cause of action has arisen, no new action can be maintained. The cause of action arises from the enticement, and without any new enticement no new cause of action arises. In the case at bar but one enticement is alleged. A cause of action then arose and should have been enforced within six years. As now no cause of action can be maintained because of that enticement, and no new one is alleged, the subsequent injuries resulting from that enticement cannot revive the right to sue. The exception should be overruled, and judgment entered in favor of the defendant with costs. All concur.

SPERO v. WEST SIDE BANK.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

DISCOVERY—EXAMINATION OF PARTY BEFORE TRIAL.

Plaintiff's motion to vacate an order for his examination before trial is properly denied where it appears from the affidavit that it is defendant's intention to use plaintiff's testimony on the trial, and that the knowledge of the facts established by the evidence are peculiarly possessed by plaintiff, and cannot be obtained by defendant in any other way.

Appeal from special term, New York county.

Action by David Spero against the West Side Bank. Plaintiff appeals from an order denying his motion to vacate order for his examination before trial. For report on former appeal, see 7 N. Y. Supp. 546.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

W. F. Severance, for appellant. Gibson Putzel, for respondent.

PER CURIAM. Although the affidavit upon which the order for the examination of the plaintiff was granted does not contain in as direct terms as might be advisable all the allegations required in most of the cases to sustain an order for the examination, sufficient appears to show that it is the intention of the defendant to use the evidence of the plaintiff upon the trial, and that the knowledge of the facts established by the evidence of the plaintiff is peculiarly possessed by the plaintiff, and the defendant cannot obtain them in any other way. The order should be affirmed, with costs to abide the event.

DAVIS v. DAVIS et al.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

PARTNERSHIP—DISSOLUTION—CUSTODY OF BOOKS.

On the dissolution of a partnership between plaintiff and his father, it was agreed that the latter should retain the books of the firm, collect the accounts, and pay its v.10N.Y.S.no.12—57

debts. Subsequently plaintiff made a general assignment to his father for the benefit of creditors. On the death of the father, plaintiff brought suit against the next of kin and executors, to recover possession of the books. *Held*, that an order made therein, giving plaintiff the absolute and unrestricted custody of the books, should be modified so as to have them placed in the custody of some person, where both parties could have access to them.

Appeal from special term, Westchester county.

Action by Benjamin T. Davis against *Jemima S. Davis*, individually, *Rebecca D. McKay*, and *Jemima S. Davis*, and *William W. Ambler* as executors of *Gilbert T. Davis*, to recover possession of the books of account of the late firm of *Davis & Co.*, composed of plaintiff and his father, said *Gilbert T. Davis*. The partnership was dissolved by mutual consent, and it was agreed that deceased should retain the books, collect the accounts, and pay the debts of the firm. Subsequently plaintiff made a general assignment to his father for the payment of debts. The court made an order directing defendants to deliver possession of the books to plaintiff, and they now appeal therefrom.

Argued before *BARNARD, P. J.*, and *DYKMAN* and *PRATT, JJ.*

Henry C. Griffn, for appellant. *Edward T. Lovatt*, for respondent.

PRATT, J. It is very doubtful if the plaintiff has any right, title, or interest in the books in question. In any view, however, he ought not to have the absolute and unrestricted custody of them. As matter of law, the interest in the accounts passed to *G. T. Davis* in his life-time, in trust to pay debts, and the plaintiff only retained an equitable interest therein. We think it was proper to give the plaintiff access to the books; at the same time, also, the defendant should have been allowed to have the books where they could be used in furtherance of the trust, and in settlement of the estate of *G. T. Davis*, deceased. The order should be so modified as to have them placed in the custody of some officer or person where both parties can have access to them at all reasonable times. No costs to either party. All concur.

BOAK v. BLAIR *et al.*

(*Supreme Court, General Term, Second Department. July 12, 1890.*)

ASSIGNMENT FOR BENEFIT OF CREDITORS—DIRECTORY PROVISIONS OF STATUTE.

Laws N. Y. 1888, c. 294, amending the general assignment act (Laws 1877, c. 466) so as to provide that in an assignment for benefit of creditors the residence, kind of business carried on by the debtor at the time, the place where conducted, and, if in a city, the street and number, should be specifically stated, is merely directory, and the failure of the assignor to fully comply therewith will not render the assignment void. Following *Taggart v. Stason*, 9 N. Y. Supp. 758.

Appeal from circuit court, Orange county.

Action by *Abram V. Boak* as receiver of *Eugene A. Blair* to set aside an assignment for benefit of creditors executed by said *Eugene A. Blair* to defendant *Thomas Watts*. There was judgment for plaintiff on the ground that the assignment did not state the kind of business, or the place where the assignor was in business at the time of the assignment. Defendants appeal. Laws N. Y. 1888, c. 294, amending Laws 1877, c. 466, declares that every conveyance or assignment made by a debtor of his estate, real or personal, or both, to an assignee for the creditors of such debtor, shall be in writing, and shall specifically state therein the residence and the kind of business carried on by such debtor at the time of making the assignment, and the place at which such business shall then be conducted, and if such place be in a city the street and number thereof, and if in a village or town such apt designation as shall reasonably identify such debtor.

Argued before *DYKMAN* and *PRATT, JJ.*

William Vanames and *William F. O'Neill*, for appellants. *T. A. Read*, for respondent.

PRATT, J. Since the decision appealed from was made the general term of the fourth department in *Taggart v. Sisson*, 9 N. Y. Supp. 758, have considered the same question, and have concluded that the statute of 1888 does not render void an assignment failing to state the business, location, etc., of the assignor. The respect we owe to the carefully considered opinion of that branch of the court requires us to follow their decision. It follows that the judgment appealed from must be reversed, but, as the question is new, without costs, and the plaintiff receiver should be allowed to discontinue the action without costs.

In re KAVANAGH'S ESTATE.

(Supreme Court, General Term, First Department. June 6, 1890.)

APPEAL—SURROGATE'S DECREE—NOTICE OF ENTRY.

Code Civil Proc. N. Y. § 2572, relating to appeals from surrogates' decrees, provides that an appeal by a party must be taken within 30 days after the service upon him or his attorney of a copy of the decree from which the appeal is taken, and a written notice of the entry thereof. *Held*, that affidavits as to the service of a surrogate's decree adjudging certain legacies void, which failed to show that written notice of the entry of the decree had also been served, were insufficient. Reversing 9 N. Y. Supp. 448.

Appeal from surrogate's court, New York county.

Appeal from an order of the surrogate directing the executors of the estate of Benjamin A. Kavanagh to distribute among his next of kin, within 10 days from the service of a copy of the order, the sum of \$9,062.85, after deducting \$75 from the share of each person to provide for the expenses of an appeal by another party, and, in case of default on their part, then directing their punishment for a contempt upon the filing of an affidavit of such default. Code Civil Proc. N. Y. § 2572, relating to appeals from surrogates' courts, declares that "an appeal by a party must be taken within 30 days after the service upon the appellant, or upon his attorney, if any, who appeared for him in the surrogate's court, of a copy of the decree or order from which the appeal is taken, and a written notice of the entry thereof." For former reports, see 5 N. Y. Supp. 676; 6 N. Y. Supp. 669; 9 N. Y. Supp. 448.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

James B. Campbell, for appellants. *George W. Carr*, for next of kin, respondents.

DANIELS, J. The decree was made by the surrogate upon notice to all the parties to be affected by it, on the 21st of December, 1889, settling the accounts of the executors of this estate, and a balance was found in their hands of \$14,725.64, subject to a deduction of \$389.20. This balance was divided by the decree into two different amounts. One of the amounts represented a third of the estate, which had been directed by the testator's will to be paid over to the Sisters of the Poor of St. Francis. This direction was held by the surrogate to be void on account of the decease of the testator within two months after the time of making his will. An appeal was taken from that part of the decree to the general term, where it was affirmed. The other two-thirds of the residue of the estate were in like manner directed to be paid to the Home for the Aged of the Little Sisters of the Poor, and that direction was held by the surrogate to be void and inoperative for the same reason. The executors failed to comply with these directions of the surrogate, and an application upon an order to show cause was made to punish them for this failure to distribute the funds of this estate. Prior to the hearing of the application, it appeared that an appeal had been taken from the final decree by the Sisters of the Poor of St. Francis, and an undertaking was given which was held by the surrogate to stay the proceedings as to so much of the decree as included this one-third of the amount directed to be distributed. But as to

the remaining two-thirds, no appeal was taken from the final decree, and for that reason those two-thirds were directed to be distributed by the executors among the next of kin of the testator in the manner provided in the final decree settling the executors' account; and from the order containing this direction, and providing for the punishment of the executors by way of contempt if they failed to make the distribution of these two-thirds, the executors have appealed. And various grounds have been taken in their favor in support of the appeal, but it is not necessary to devote attention to the consideration of many of these objections. It is, however, essential for the protection of the executors that it be made to appear by the proceedings that they will be protected in making these payments against future liability on their part. And to afford them that protection, it is necessary that it should be shown that the time had expired in which an appeal might be brought in favor of the Home for the Aged of the Little Sisters of the Poor from the decree admitting the will to probate, and adjudging the direction for the payment of these two-thirds to be void, as well as from the final decree made by the surrogate for the settlement of the executors' accounts; for, if the time has not expired within which such appeals may be taken, it is possible, notwithstanding the decisions which have already taken place, that the executors may yet be required to pay two-thirds of this balance of the estate to the Home for the Aged of the Little Sisters of the Poor. And they should not be required to distribute this fund among the next of kin without the fact first being made to appear that they cannot afterwards be called upon for the money by this residuary legatee. And that fact has not been established by the papers and proofs which were produced before the surrogate on the application for the order in controversy. To extinguish the right to bring an appeal from either of these decrees it has been required by section 2572 of the Code of Civil Procedure that a copy of the decree shall be served with written notice of the entry thereof, and from the time of that service the party on whom it shall be made has 30 days within which to bring an appeal. What the papers stated before the surrogate did not establish the fact that the right of appeal had been extinguished by a compliance with this direction. As to the final decree, it is stated in the affidavit of the attorney for the executors that, on the 28th of December, 1889, he caused copies of the final decree and notice of the filing thereof to be served upon the attorney of the Little Sisters of the Poor. Where or how the service was made, or what were the contents of the notice stated to have been served, were not mentioned by him. The affidavit of Mr. Carr, which is replete with information and conclusions, is equally defective. His statement is that the decree admitting the will to probate decreed the residuary legacies null and void. "A copy of said decree with notice of its filing was duly served upon each of said legatees." A further statement was made by him in his affidavit that a copy of the final decree was served by him "on the Home for the Aged," etc., "through their attorney, William C. Orr, Esq., on January 2, 1890, so that, as to my clients, * * * the time to appeal from the decree of December 1, 1889, will expire February 1, 1890." These affidavits prove no compliance, but what has been directed for terminating the right of appeal. That of the attorney for the executors proves no service whatever of the decree, and that of the attorney for the legatees fails to prove how the service was made, or the service of the notice prescribed by this section of the Code to limit the time of appeal. The contents of the notice have not been stated, except by the most general reference to it, and no notice in either instance was given that the decree had been entered. The notice is stated to have been a notice of the filing of the decree, which decree may or may not have been complete. What this section requires is that the notice to be given shall be a notice of the entry thereof, and that entry is defined by section 2551 of the Code as a record of the decree to be made in a book provided for

that object. And to terminate the right to appeal the law has been construed to require strict practice on the part of the party endeavoring to secure that result. *Kelly v. Shehan*, 76 N. Y. 825. That practice has not been observed in the service either of the decree admitting the will to probate and declaring this residuary legacy void, or in the service of the final decree settling the accounts of the executors. And if no more has taken place than has been mentioned in these affidavits, the Home for the Aged of the Little Sisters of the Poor is still entitled to appeal from each one of these decrees. And as long as no final decision has been made establishing the invalidity of the direction given by the testator for the disposition of this part of his estate, and the time for appealing has not been terminated, the executors, if they distribute this sum of money to the next of kin, most of whom reside out of the United States, may, by a final adverse decision, be yet required to pay the money again to the Home for the Aged of the Little Sisters, and the law will not place them in the position where they will be subjected to that risk. Before payment can strictly be required from them of this part of the estate, it should either be made to appear that the time for the Home for the Aged to appeal from these decrees has expired, or else provision should be made for reimbursing them in case of any final determination requiring them to make a different disposition of this part of the estate. Certainly they cannot be regularly adjudged to be in contempt for failing to make the disposition which has now been directed, and the order should therefore be reversed, with \$10 costs, and the disbursements of the appeal. All concur.

COPPELL *et al.* v. PHILLIPSON.

(*Supreme Court, General Term, First Department. July 18, 1890.*)

NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER.

C. & Co., doing business in Mexico, were accustomed to draw on defendant in New York, who would accept their drafts, and credit them with goods they shipped to him from time to time. These drafts would not be drawn against any particular shipment. In a letter notifying defendant of the shipment of a large quantity of coffee C. & Co. mentioned that they had drawn on him in favor of a Mexican bank, which would cash the draft on receiving telegraphic advice of acceptance. The bank indorsed the draft generally to plaintiffs, its New York correspondents, and, defendant having accepted it without objection, plaintiffs immediately telegraphed to the bank, which thereupon paid C. & Co. the face value of the draft, and plaintiffs credited the bank with the amount of it. The course of dealing between the bank and plaintiffs was for the former to make remittances from time to time to plaintiffs, and then draw on them. *Held*, that plaintiffs were *bona fide* holders of the draft.

Appeal from circuit court, New York county.

Action by George Coppel and others against Paul Phillipson to recover on an acceptance of defendant. Plaintiffs are bankers under the firm name of Maitland, Phelps & Co. Defendant, in 1888, was engaged in business in New York under the name of P. Phillipson & Co. He had had for some time previous extensive dealings with a firm in Vera Cruz, Mexico, known as Caraza & Co. The course of business between them was that Caraza & Co. would draw on P. Phillipson & Co., and the defendant would accept these drafts, keeping an open running account with Caraza & Co., in which he credited them with goods which they shipped to him from time to time. The drafts do not seem to have been drawn against any particular shipment, nor were the bills of lading or invoices annexed to the drafts. On October 9, 1888, Caraza & Co. notified the defendant (in a letter relating also to many other transactions) that they had procured some coffee he had telegraphed for, and would ship it, weather permitting, by the steamer *Saratoga*; and they inclosed invoices giving the weight and price of the coffee, and charging defendant \$25,583.81 in all for these goods. In another part of the letter, and without any reference to the shipment of coffee, Caraza & Co. notified the defendant that they had

drawn on him for \$7,000 in favor of the National Bank of Mexico, in Vera Cruz. They added that the bank had taken this draft, and would cash it on receiving telegraphic advice of acceptance. On October 11, 1888, Caraza telegraphed: "Saratoga takes 400 bags only; cause, bad weather." On October 16, 1888, they telegraphed again: "400, Saratoga, your consignment, are shipping rest in Spanish to the same address." And on October 19, 1888, they telegraphed: "On account of bad weather cannot ship rest, will do so in next Spanish." On the same day, October 19, 1888, the defendant accepted the draft in suit. The defendant says that the rest of the coffee was not shipped, but there is no evidence whatever to show the reason of non-shipment. The draft, as above stated, was drawn on the defendant in favor of the Vera Cruz branch of the National Bank of Mexico. It is dated October 9, 1888. The bank on the same day indorsed the draft generally to the plaintiffs, who were its correspondents in New York. The course of business between the National Bank and the plaintiffs was that the bank made remittances from time to time to the plaintiffs, and drew on them. It was proved that the course of business corresponded to the usual course of business between a bank and its customers. The draft in suit was duly accepted by the defendant on October 9, 1888, without objection, and without notifying plaintiffs of the telegrams from Caraza & Co. The plaintiffs immediately telegraphed to the National Bank that the draft was accepted, and the National Bank on the next day, October 20, 1888, in reliance upon the telegram, cashed the draft by paying Caraza & Co. its face and 34 per cent. premium, in Mexican currency. The draft, by its terms, became due on November 12, 1888. It was not paid, and this action was begun in December, 1888. The complaint is in the usual form. The answer puts in issue the copartnership of the plaintiffs and the indorsement of the draft to them. It further sets up that the draft was not accepted for value; that the plaintiffs are not the real parties in interest, and the draft, if indorsed to them at all, was only indorsed for collection, and not otherwise; that the draft was neither drawn, indorsed, nor accepted for value, and the consideration for acceptance wholly failed, inasmuch as Caraza & Co. had induced the defendant to accept the draft by false and fraudulent statements in regard to the shipment of certain coffee. Upon the trial the facts above set forth were proved, when defendant moved to dismiss the complaint on the ground that the plaintiffs were not the real parties in interest, which was denied. Defendant then asked that judgment be directed in his favor, on the ground that the drafts were procured by fraudulent representations, and plaintiffs were not holders for value, which was denied. Defendant then asked to go to the jury upon the question of fraud and want of consideration, which was also denied. The learned judge directed a verdict for the plaintiffs, and the defendant excepted to all these rulings. Judgment was entered for \$7,850.84, and defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
Lewis Sanders, for appellant. *G. L. Rices*, for respondents.

BRADY, J. The draft in question was drawn by Caraza & Co. upon the faith of shipments of coffee which were to be made, consigned to the defendant, by whom it was accepted. The understanding, as we have seen, between Caraza & Co. and the bank at Vera Cruz, was to cash their draft on receiving telegraphic advice of its acceptance by the defendant. It does not appear that the draft in controversy was drawn against any particular shipment, but prior to acceptance the defendant was advised of the acceptance to be made. This mode of doing business was one agreed upon between Caraza & Co., as we have seen. The course of business between the bank and the plaintiffs was for the former to make remittances from time to time to the plaintiffs, and to draw against them. When the draft of Caraza & Co. was drawn payable to their order, it was indorsed to the plaintiffs, who are the bank's cor-

respondents in this city. When it was accepted by the defendant without objection, and without notifying the plaintiffs of aught to the contrary, the plaintiffs telegraphed the bank that the draft was accepted, and the bank on the next day, October 20th, in reliance upon the telegram, cashed the draft by paying Caraza & Co. its face and 34 per cent. premium in Mexican currency, as the defendant was advised it would on receiving notice of such acceptance. The consideration of the draft is thus perfectly shown. The bank paid the amount of it upon the faith of the defendant's acceptance, and the plaintiffs credited the bank with the amount of it in the usual course of business between them, and thus the consideration passed from the bank to Caraza & Co. and from the plaintiffs to the bank. A statement of the facts of this case would seem to make it entirely unnecessary to add anything to establish the propriety of the judgment rendered in favor of the plaintiffs. These facts destroy at once the attitude of the defendant that the plaintiffs are not owners in good faith of the draft. If the payee or any intermediate holder has paid value for the instrument sought to be enforced, that consideration will support the plaintiffs' title. 1 Daniel, Neg. Inst. 174; 2 Rand. Com. Paper, § 653. The other defense of fraud, the plaintiffs being the owners of the draft for value without notice of any infirmity, is not entitled, under the circumstances to any consideration. But it may be said with regard to it there is no evidence whatever establishing any such fraud as would affect the relations between the plaintiffs and the defendant, or the bank and the defendant. The omission to keep a promise to send goods is not fraud *per se*. We see no reason for interfering with this judgment, and it should be affirmed, with costs. All concur.

COPPELL *et al.* v. PHILLIPSON.

(Supreme Court, General Term, First Department. July 13, 1890.)

Appeal from circuit court, New York county.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
Lewis Sanders, for appellant. *G. L. Rives*, for respondents.

BRADY, J. This case is controlled by the case of *Coppell v. Phillipson*, *ante*, 901, (decided herewith.) The judgment must be affirmed, with costs. All concur.

PRATT v. MONTEGRIFFO.

(Supreme Court, General Term, First Department. June 6, 1890.)

1. INJUNCTION—VIOLATION OF CONTRACTS.

Injunction will lie to restrain a singer of reputation from violating his contract with an opera company by singing under other employment or management during the period covered by the contract, where the moving papers allege, with a fair degree of probability to sustain the allegation, that defendant intends to identify himself with a rival organization.

2. CONTRACT—PERFORMANCE.

Plaintiff, as manager of an opera troupe, engaged defendant, a tenor of repute, under an agreement stipulating that defendant should be as well advertised in programmes and newspapers as the other tenor. A performance was to be given at the city where defendant resided, and he was assured by plaintiff that he should take the part of tenor on the opening night, and defendant joined the company, and rendered services under that assurance. Defendant did sing on that occasion, but the other tenor was advertised and received the credit of the performance in the morning papers, the mistake being corrected in the afternoon papers. *Held*, this was such a violation of the agreement as absolved defendant from its further performance.

Appeal from special term, New York county.

Action by Charles H. Pratt, manager of the Emma Abbott Grand-Opera Company, against Agostino Montegriffo. Defendant appeals from an order continuing a preliminary injunction restraining him from violating his contract with plaintiff.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Headly, Lauterbach & Johnson, (William N. Cohen, of counsel,) for appellant. *Dunning & Fowler*, (William F. Dunning and De Lancy Nicoll, of counsel,) for respondent.

DANIELS, J. The injunction herein restrained the defendant from singing or performing for any person or company other than the one under the supervision and direction of the plaintiff at any time, and from in any way publicly singing or performing on any stage, or in any operatic entertainment or concert, for any person or company other than the one under the management of the plaintiff; and it was in this manner allowed, under a contract entered into between the defendant and the plaintiff on the 6th of May, 1889, by which the defendant covenanted and agreed to sing and perform all parts which might be requested of him by the plaintiff for the "Abbott season" of the years 1889 and 1890. And the season has been shown to include the period between the last of August and the end of the month of May. And for the services which the defendant agreed to perform he was to be paid the salary of \$130 per week on the regular salary day. The defendant also covenanted and agreed that during the continuance of the agreement he would not sing or perform under any other management, nor allow his name to be advertised to do so, without having first obtained the written consent of the plaintiff. And it was further agreed by the defendant to give the plaintiff the right to engage his services for the season of 1890 and 1891 on the same terms, provided notice should be given to him by the plaintiff before the close of the season of 1889 and 1890 that his services would be so required. And by an affidavit made by the defendant he has stated that the plaintiff exercised the option for the next year, contained in this contract, about the 1st of the month of March, 1890, and the plaintiff in his own affidavit states the same fact, although it does not appear that notice of the election to continue the contract through the next season was given to the defendant in writing. Still, as the season does not close until the end of the present month, there is ample time remaining for the service of notice in that manner. The defendant entered into the service of the plaintiff as manager of the opera troupe under his control, and continued in that service until the 24th of February, 1890; and then he left it at the city of Washington, and has performed no services for the plaintiff since that time, but refuses to continue in his employment.

Objection has been taken that these facts are not sufficient to entitle the plaintiff to the injunction which has been issued, and the cases of *Hamblin v. Dinneford*, 2 Edw. Ch. 529, and *Sanquirico v. Benedetti*, 1 Barb. 315, appear to support this objection. And other authorities are contained in the books maintaining the same conclusion, and that was the early tendency of the courts both in England and in this country. But since those decisions were made the subject has received more deliberate consideration, and the inclination of the courts now appears to be in a decidedly different direction, and the reason of the case supports this inclination. For, while the party cannot be obliged to perform the contract he has entered into by performing the services he has agreed to render, he may yet be restrained from entering the employment of a rival company, and rendering services to that company, to the injury and detriment of his employer under the contract; and the only remedy to prevent that is an injunction. It is entirely clear that the law can afford no redress by way of damages for the injury which the party entitled to the benefit of the agreement may sustain by the other party's identifying himself with a rival enterprise, and in that manner diminishing the patronage and profit of the party entitled to the services under the agreement. The only adequate remedy is to prevent the wrong, and that can be no otherwise administered than by an injunction. The defendant is shown to be a person of superior abilities and acquirements in his pursuit of a tenor singer, and his ad-

dition to an operatic troupe as one of its members would not fail to be an attraction to the public, and a source of profit to the manager in whose employment he should render his services. And it has been alleged in support of the action that the diversion which would follow the attachment of the defendant to a rival organization would be productive of irreparable loss to the plaintiff. And, while the allegations upon this subject are by no means extended, yet it can be reasonably seen that this conclusion is well supported by the facts, and the case accordingly does present the right to an injunction under the rules which have been made applicable to the issuing of that order. By section 608 of the Code of Civil Procedure an injunction has been permitted to be issued where it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act which, during the pendency of the action, would produce injury to the plaintiff. And it has been alleged, with a fair degree of probability to sustain the allegation, that the defendant does intend to identify himself with an organization mentioned as a rival of that under the management of the plaintiff, which would not fail to be productive of loss and injury to him. And the authorities in which the reason and foundation of this principle have been considered sustain the right to make use of an injunction to prevent that act. In *De Rivafrinoli v. Corsetti*, 4 Paige, 264, the object of the action was to oblige the defendant to perform a contract, entered into by him with the plaintiff, for singing, gesticulating, and reciting in the capacity of *prima-basso* in operatic and other performances; but, while the court held itself unable to enforce a specific performance of the agreement, it was not held that the defendant could not be restrained by injunction from identifying himself during the period of his contract with another organization. On the contrary, the tenor of the decision tends to support this right to an injunction; but the action there entirely failed on account of the fact that it was prematurely commenced. In *Fredricks v. Mayer*, 18 How. Pr. 566, this subject was still more fully examined, and the authorities upon it collected and considered, and, as the modern authorities indicated the law to be, they were regarded as justifying an injunction to prevent a party from performing similar services during the term of his agreement for any other person than the party entitled to them under the contract. This was still further and very fully considered again in *Daly v. Smith*, 49 How. Pr. 150, and the result was that an injunction to this extent was held entitled to be maintained, where the facts were such as to justify its allowance. This principle was again followed in *McCall v. Braham*, 16 Fed. Rep. 37; and the case of *Butler v. Galletti*, 21 How. Pr. 465, has a decided tendency to support the same conclusion. And, as courts of equity, as a general rule, permit the order of injunction to be issued where its effect will be to restrain or prevent what would otherwise prove to be irreparable mischief or injury to the plaintiff, cases of this description appear to be fairly within the principle.

The defendant, however, has further resisted the allowance of the injunction in this action on the ground that the plaintiff himself has violated the agreement in such essential respects as entitle the defendant to be discharged from its further performance. This objection has been mainly placed upon the latter paragraph of the eighteenth division of the contract, by which the plaintiff agreed to have a lithograph of the defendant made and distributed as largely as that of any other tenor in the Abbott company, and that he should be as well advertised in programmes and newspaper advertisements. Each of these obligations, it has been charged, the plaintiff failed to observe or perform. He did, however, distribute lithographs of the defendant, but they were not of himself alone. They contained eight leading members of the company, while the defendant insisted that the lithograph of himself should be distinct and separate from that of other persons. It is not, however, important to determine whether he is entitled to this construction of this part

of the agreement, for the reason that he did not sever his connection with the Abbott company on this account, but that resulted from the failure of the plaintiff to advertise him as well as the other tenor in the Abbott company had been advertised, and in this respect he seems to have well-grounded cause for complaint. There was another person employed as a tenor singer in the Abbott company, and preferences, in at least one of the programmes or bills, and in certain advertisements, were given to this tenor over the defendant. They have, it is true, been explained by the affidavit of the plaintiff, and other affidavits in the case, in such a manner as to indicate that this was not intentional, but in most instances the result of circumstances; but, at the same time, the defendant was placed at a disadvantage by these circumstances, concerning which he had just ground of complaint, for that led to public comments injurious to himself, and to his standing as the superior tenor singer of the company. But the defendant was not justified in severing his connection with the company by reason of any of these mistakes or failures prior to February, 1890, for he was promised that they should be avoided in the future, and no discrimination of a similar character permitted to be made against him; and upon the promises to him he continued in the service of the plaintiff, and waived the grounds of complaint previously existing. But on the 24th of February, 1890, a performance by the troupe was given in the city of Washington, where the defendant resided, and where it would have been a matter of pride to him to have had the advantage of the advertisement secured by this part of the contract. Prior to the performance in Washington the troupe was in the city of Baltimore, and the defendant has stated in his affidavit that the plaintiff informed him that he was booked to sing at Washington on the opening night of February 24th, and that he could go there whenever he desired; that he left on the morning of the 21st, and on the 24th received a letter from the plaintiff, stating that he supposed the defendant was in Washington, and would be on hand that night; that he did appear, and took the part assigned to him in the performance, but that it turned out afterwards that the other tenor singer of the company had been advertised instead of himself for this performance, and that the commendations of the press were on that account given to the other person instead of himself, and for that reason he discontinued his connection with the plaintiff's company, although the latter, in the afternoon papers, had corrected the mistake of attributing the performance to the other tenor instead of the defendant. The plaintiff, in his own affidavit, stated that the defendant was not to be assigned to this position at the opening night in Washington, but that it had been given to the other tenor with the knowledge of the defendant, and Mr. Cosadine, who was connected with the company, states in his affidavit that he had been directed by the plaintiff to put the other tenor in the cast in the role of Ernani, which was finally, in this manner, taken by the defendant. But it is not pretended by this person that the defendant was present when this direction was given, or was made aware of it either by himself or by the plaintiff, and the defendant's wife corroborates him in the statement that he was informed by the plaintiff before they left Baltimore that this part was assigned to the defendant, and the letter which was written by the plaintiff to the defendant on the 24th of February confirms the probability that the defendant is right in the statement which he has made concerning this occurrence. The plaintiff swears that he explained to the defendant on the 24th inst. that he was to take the place of the other tenor on account of his inability to fulfill the engagement, but that the defendant has denied; and this letter tends to sustain the truth of the defendant's denial, for its statement is: "I have not seen or heard from you since last Thursday, but suppose you are and will be on hand to-night." This excluded the possibility of the information stated to have been given to the defendant, for the reason that the plaintiff had not seen him, and, accordingly, could not have made the communica-

tion to him which it is stated by him that he did make. The further fact has been shown by the affidavits that the name of the other tenor was upon the bill in that part of the theater to which the actors had access, but the defendant denies having seen that, or knowing anything of the fact, until the following morning, when the credit of the performance was given by the press to the other tenor of the company. The probabilities therefore are decidedly with the defendant in these statements, and prove the fact with reasonable certainty to have been that he was assured by the plaintiff that this position was to be assigned to him in the performance at the city of Washington on the evening of the 24th of February, and that he joined the company, and rendered services, under that assurance, while the fact was that the position had not been assigned to him either in the advertisement or on the bills, and that the credit due to himself had in this manner been given to another. This was a violation of the part of the agreement requiring him to be as well advertised in the programmes and newspapers as the other tenor. It at least entitled him to be advertised and named on the bills as the person who was to perform this role on the evening of the 24th of February, and, in failing to advertise him and place his name upon the bills, the plaintiff violated his agreement, and that violation was of so essential a character as to absolve the defendant from further liability by way of performing this contract. For that reason the injunction, which otherwise might be legally issued, is deprived of its support. On the 1st of March, 1890, the plaintiff sent to the defendant an account of the week ending that day, in which he credited the salary and deducted the charges for performances and rehearsals missed, and stated a balance of \$5.20 to be due to the defendant; and this balance was paid to him, but no intention appears from the receiving the money to surrender his right to abandon the contract for what had previously occurred. In and of itself it is entitled to no effect in the disposition of the appeal, but the order should be reversed, with \$10 costs and the disbursements, and the motion denied.

VAN BRUNT, P. J., concurs. BRADY, J., concurs in result.

PEOPLE v. ATLANTIC AVE. R. CO.

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

1. CORPORATIONS—DISSOLUTION—DISCONTINUANCE OF BUSINESS.

Code Civil Proc. N. Y. § 1785, provides that an action to dissolve a corporation may be maintained "where it has suspended its ordinary and lawful business for at least one year." Section 1798 provides that the attorney general may sue to vacate the charter of a corporation, on the ground that it has "forfeited its privileges or franchises, by a failure to exercise its powers." *Held*, that there is no conflict between the two sections, and an action by the attorney general to dissolve a corporation, on the ground that it has suspended business, can be brought only after the lapse of a year, as prescribed by section 1785.

2. SAME—VIOLATION OF LABOR LAW.

A street railroad company does not forfeit its charter by requiring its employees to work more than 10 hours a day in violation of Laws N. Y. 1887, c. 529, which provides that "it shall be a misdemeanor for any officer or agent of any such corporation [street railway company] to exact from any of its employees more than 10 hours labor" per day.

Appeal from special term, Kings county.

An action by the attorney general to vacate the charter of the Atlantic Avenue Railroad Company of Brooklyn. A demurrer to the complaint was sustained, and final judgment directed in favor of defendant. Plaintiff appeals. Laws N. Y. 1887, c. 529, § 2, provides that "it shall be a misdemeanor for any officer or agent of any such corporation [street railroad company] to exact from any of its employees more than 10 hours labor" per day.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Charles F. Tabor, Atty. Gen., for appellant. *Tracy, McFarland, Boardman & Platt*, for respondent.

BARNARD, P. J. By section 1785 of the Code, it is provided that an action may be maintained to dissolve a corporation "when it has suspended its ordinary and lawful business for at least one year." This is the only provision of law which authorizes a dissolution for a suspension of the business of the corporation. Section 1798 of the Code is not in conflict with section 1785. Section 1798 permits the attorney general to bring an action against a corporation created under the laws of this state, and among the causes specified for vacating a charter of a corporation is when a corporation has forfeited its privileges and franchises by a failure to exercise its powers. This makes no different rule from the one established in section 1785, and it is to that section the attorney general must look for a declaration as to what constitutes a forfeiture of a franchise, by a failure to exercise its power. It may therefore safely be conceded that an action will lie for an omission of duty amounting to a breach of trust by a corporation, but the legislature has plainly given a period of one year, during which an omission to transact its business shall not be sufficient to annul the charter. There is therefore no cause of action stated in the complaint under that breach of it which avers a discontinuance of business for six days, and there is no averment that the company had not the power and wish to continue the business. *Bradt v. Benedict*, 17 N. Y. 93.

By chapter 529, Laws 1887, 10 hours' labor to be performed within 12 hours was the standard day's work to be exacted by the defendant from its employes, and the act made a violation of same a misdemeanor as to all officers and agents of the corporation who exacted more than 10 hours a day. The complaint avers a failure to observe that law as a reason for annulling the charter of the defendant. It is not a legal cause for a forfeiture of the charter. The act does not so provide, but it does provide a criminal punishment for its violation as to its officers and agents who offend against its provision. The act is not in terms an amendment to the railroad act, and it is not an amendment by implication. A corporation must act by agents, and these agents cannot destroy the corporation by a criminal act, in the absence of the expression of a legislative intent to that effect in the legislative act which creates the crime. The judgment should therefore be affirmed, with costs. All concur.

HEYNE v. DOERFLER.

(*Supreme Court, General Term, Second Department. July 13, 1890.*)

1. EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF CLAIMS.

A claim against the estate of a decedent was composed of two items, one arising out of a special contract to furnish board to two nieces of decedent, and the other was for nursing decedent. Three witnesses testified to statements by decedent that she would pay plaintiff the amount claimed for the board of her nieces, and deceased was also proven to have said that plaintiff was attending her as a professional nurse, and she would pay him "all he lost," "and the same as any professional nurse." *Held*, that the claim was fully proven.

2. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Under Code Civil Proc. N. Y. § 829, which forbids a party to be examined in his own behalf against the executor of a deceased person "concerning a personal transaction or communication between the witness and the deceased person," it is not reversible error to permit the claimant in a statutory claim case against the estate of a decedent to prove that he had a conversation with decedent, unless the mere fact that there was a conversation is a material fact to be proved.

Appeal from special term, Kings county.

An action by Carl R. E. Heyne against John Doerfler, as executor of Maria F. Arlt, brought under the statute relating to claims against estates of de-

ceased persons. The referee reported in favor of plaintiff, and defendant appeals. Code Civil Proc. N. Y. § 829, forbids a party to be examined in his own behalf against the executor of a deceased person "concerning a personal transaction or communication between the witness and the deceased person."

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

A. H. Goetting, for appellant. Jackson & Burr, for respondent.

BARNARD, P. J. The plaintiff presented a claim against the estate of Maria F. Arlt, deceased. The claim was composed of two items, one arising out of a special contract to furnish board to two nieces of testatrix, and the remainder of the claim was for personal service as nurse rendered by plaintiff for deceased at various dates between June, 1887, and March, 1888, when she died. The claims were fully proven so far as the same were allowed by the judgment. As to the \$200 claim, it was proven by the witness Stenitz that the deceased shortly before her death stated to the plaintiff that she would pay the \$200 "that I promised to you for the board of Anna and Emil." The deceased was proven to have stated to the witness Fillsey that she would give the plaintiff \$200 to take away from her two parties who had come from Germany. The deceased made substantially the same statement to Mrs. Heyne. As to the remainder of the claim, the deceased is proven to have said to her physician that the plaintiff was attending her as a professional nurse, and she would pay him all he lost, "and the same as any professional nurse." The deceased is proven to have told the plaintiff's wife that "she would pay for the service as nurse whatever plaintiff lost, and more than that." The plaintiff was a journeyman cigar-maker, and earned at his business \$15 a week.

The question put to the plaintiff, whether he had had a conversation with deceased about Emil and Anna Jones coming to his house before they came, was not improper. The answer proved nothing more than that there was a conversation. This was held to be on the verge of offense original, (section 829 of the Code,) but was not sufficient to reverse a judgment in favor of a plaintiff. *Hier v. Grant*, 47 N. Y. 278. The mere conversation would be improper when that was the material fact to be proved. *Maverick v. Marvel*, 90 N. Y. 656. The conversation was subsequently proven by the defendant. Anna Jones testified to a conversation with deceased favorable to the defendant. The plaintiff then testified as to his version of the conversation favorable to himself. The conversation was on a Sunday afternoon, and was overheard by Mrs. Jones in the yard. The plaintiff was upstairs with the deceased. There is no claim that there was more than one conversation between the plaintiff and deceased on the subject. There are no other exceptions which call for a reversal of the judgment. Judgment affirmed, with costs. All concur.

PEOPLE *ex rel.* VITAN v. VITAN.

(Court of General Sessions, New York County. February, 1888.)

1. HUSBAND AND WIFE—ABANDONMENT.

Where a wife leaves her husband in another state, they being at that time residents of that state, and comes to and resides in New York county, and he afterwards comes and lives in another county in New York, he is not guilty of abandoning her in New York county by reason of his refusal, when calling upon her at her request in New York county, to live with or support her. Her offer to return to him should have been made at his residence.

2. CRIMINAL LAW—APPEAL—COURT OF SPECIAL SESSIONS.

Code Crim. Proc. N. Y. § 515, abolishes *certiorari* in criminal actions, and provides that "hereafter the only mode of reviewing a judgment or order in criminal action is by appeal." Laws N. Y. 1884, c. 372, provides that the only mode of reviewing a judgment or order in a criminal action or special proceeding of a criminal nature is by appeal. Code Crim. Proc. N. Y. § 740, provides that "a judgment upon conviction rendered by a court of special sessions may be reviewed by the

court of sessions of the county upon an appeal." Laws N. Y. 1882, c. 410, (consolidation act,) § 1456, provides that "any appeal from or amendment to an order of a police magistrate, convicting one as a disorderly person, shall be exclusively for the action of the court of special sessions." Held, that the court of general sessions of New York county has jurisdiction of an appeal from an order of the special sessions affirming a conviction by a police magistrate of one as a disorderly person.

Appeal from special sessions.

William C. De Witt and Rufus O. Catlin, for appellant. *William A. Boyd*, Corp. Atty., for the commissioners, respondents.

SMYTH, R. The defendant was arrested upon a warrant granted by one of the police justices of this city upon the complaint of the relator, Julie Vitan, in which she charged the defendant, her husband, with having abandoned her in the city of New York, without adequate support. On being brought before the justice, an examination and inquiry into the facts and circumstances of the case was had before him; and upon the proofs taken the justice adjudged the defendant to be a disorderly person, and thereupon ordered the defendant to pay to the commissioners of charities and correction, weekly, the sum of five dollars for, and towards the support of, his family. From this order the defendant appealed to the court of special sessions of the peace, which court thereupon proceeded to try the case, took the testimony of various witnesses produced before it, and made an order affirming the conviction of the defendant by the police justice, and required him to pay to the said commissioners of charities and correction the amount adjudged by the police justice to be paid by the defendant for the support of his family, and also requiring him to find surety for the performance by him of the order, and committing him until he should find such surety, or, in default thereof, ordered that he should be imprisoned for the term of six months at hard labor. From the judgment and order of the special sessions, the defendant appealed to the court of general sessions of this county, a judge of which court allowed the appeal.

The first question presented for the determination of this court is as to whether an appeal lies to it from the court of special sessions, the respondent's counsel insisting that the court of special sessions alone has exclusive jurisdiction of such appeals, under the provisions contained in section 1456, c. 410, of the Laws of 1882, (New York city consolidation act.) So much of that section as refers to the question presented by the respondent's counsel is as follows: "And that any appeal from or amendment to said order [of conviction of the person as a disorderly person] shall be exclusively for the action of the court of special sessions." On the part of the defendant, it is insisted that the language of that section of the statute did not, prior to the amendment of section 749 of the Code of Criminal Procedure by chapter 372 of the Laws of 1884, preclude the supreme court from reviewing the decision of the court of special sessions on a common-law *certiorari*, and he refers to the cases of *People v. Commissioners*, 9 Hun, 212, and *People v. Sanders*, 3 Hun, 16, which sustain the position taken by him, as do also the later cases of *People v. Walsh*, 33 Hun, 345, 2 N. Y. Crim. R. 325; *People v. Carney*, 1 N. Y. Crim. R. 270, 29 Hun, 47. Prior to the amendment of section 749 of the Code of Criminal Procedure by chapter 372 of the Laws of 1884 the Code contained no provision for an appeal in proceedings of this character; and prior to the passage of the consolidation act there was no method by which these proceedings could be reviewed except by *certiorari*.

By section 515 of the Code of Criminal Procedure before its amendment, writs of error and *certiorari* in criminal actions were abolished, and appeal substituted for such writs. By chapter 372 of the Laws of 1884 this section of the Code was amended so as to abolish writs of error and *certiorari*, not only in criminal actions, but also in proceedings and special proceedings of

a criminal nature, and declaring that hereafter the only mode of reviewing a judgment or order in a criminal action, or special proceeding of a criminal nature, is by appeal; and it has been held, since the amendment of that section of the Code, that an appeal is now the proper and only method by which special proceedings of a criminal nature can be reviewed. *People v. Court of Sessions*, 45 Hun, 54. Prior to the passage of the consolidation act, it seems that the method of reviewing the conviction of a person as a "disorderly" person, in the city and county of New York, was by *certiorari*, and, since the passage of that act, the right to review the justice's judgment in such cases was by appeal to the special sessions of the county of New York, and the right of the supreme court by *certiorari* to review the proceedings of the court of special sessions. It is claimed by the counsel of the appellant that by the amendment of section 749 of the Code of Criminal Procedure the right of review, which the supreme court undoubtedly possessed, is conferred upon this court. Section 749 of the Code of Criminal Procedure, as it was originally adopted, applied only to an appeal from a judgment of conviction in a criminal action rendered by a court of special sessions, but, since the amendment of said section by chapter 372 of the Laws of 1884, it authorizes an appeal, not only from a judgment of conviction in a criminal action rendered by a court of special sessions, but also from a judgment of conviction by a police court, police magistrate, or justice of the peace, in proceedings or special proceedings of a criminal nature; and, as the case under consideration is a special proceeding of a criminal nature, I am of the opinion that the right of the appeal from the judgment of the court of special sessions rendered therein to this court is given, and that this court has the right to review the judgment of the special sessions in the proceeding. More especially does this appear to be so, as the right which a defendant has to review of the proceedings of the special sessions by the supreme court has been taken away by the abolition of the writ of *certiorari*.

Having arrived at the conclusions that this court has the right to entertain the appeal, and review the proceedings of the special sessions, an examination of the evidence becomes necessary for the purpose of determining whether the charge of abandonment has been sustained, and, if so, whether it took place in the city and county of New York. The parties, prior to their marriage, were residents of the city of Philadelphia, in which city they were married on September 20, 1878, and they continued to reside there for about five months after their marriage. The wife left her husband in that city, having, as she testified, "decided that she would live separated from the defendant for a while," and came to the city of New York to reside with her relatives. She resided here for a short time, and returned to Philadelphia, where she resided for a short time, and again returned to this city in 1881, and has since resided here. Since the separation of the parties in Philadelphia, they have never lived together; nor has the defendant contributed anything towards the support of his wife. The cause of the separation, according to the wife's testimony, was acts of cruelty perpetrated by her husband, his inability to support her, and her inability, by reason of sickness, to prosecute her business as a dress-maker. The alleged acts of cruelty are positively denied by the husband; and, if they were perpetrated, they appear to have been condoned by the wife. The defendant remained in the city of Philadelphia for a short time after the separation, and then resided in Greenpoint from the end of 1879 to 1881. From there he went to Europe on business, and on his return to this country resided, from March to July, 1882, in the city of New York, and from 1882 to the present time he has resided in Williamsburgh, Kings county, where he has ever since been employed in a factory at that place. In 1884, the defendant took his meals at a house in this city, but did not reside here. In that year he called upon his wife at her place of residence, in response to a letter from her inviting him to do so. A conversation occurred

between them in which the wife testifies: "I then asked him,—told him that we were both young, and there might be hope of us living happy together yet, and I asked him for support. I was very sick at the time. He said he would never live with me again, and I offered to go and live with him." The husband denies that any such conversation took place. No other demand was made for support, or offer on the part of the wife to return to and live with her husband. The evidence clearly shows that at this time, and down to the time the wife commenced these proceedings, in December, 1887, she had knowledge of the fact that her husband was a resident of Kings county, and that he was employed there. Upon this evidence, it is very clear, if there was any abandonment, it took place in the city of Philadelphia. The evidence does not establish abandonment of the wife in this city. At the time of the alleged offer by the wife to return to her husband, and the demand for support, and refusal on his part to live with or support her, they were living separate and apart, and had been for years doing so. Indeed, the evidence establishes the fact that the wife, without legal cause, left her husband in the city of Philadelphia, with the determination to live separate from him, and that, although she knew him to be a resident of another county, she made no offer to return to and live with him at his place of residence. It was her duty, under the circumstances of this case, if she desired to compel her husband to support her, to go to his place of residence, and offer, at least, to resume the duties and responsibilities of a wife; and if he then refused to live with or support her she had a remedy. The defendant committed no offense within this county. He did not abandon his wife here. On the contrary, the wife voluntarily selected this city as her place of residence. Nor is this county bound to support her here. The right of the husband to select his own and his wife's residence is undoubted. *People v. Pettit*, 74 N. Y. 320. The magistrate who issued the warrant for the arrest of the defendant did not acquire jurisdiction of either the person of the defendant, or of the subject-matter of this proceeding. The fact that the wife lived in this city on and prior to the time of the issuing of the warrant against the defendant, and his refusal to support her upon a demand made here, did not confer jurisdiction upon the magistrate. If it were otherwise, a wife, who had at some time been abandoned by her husband in another county or state, might, by taking up her residence in this county, confer jurisdiction upon a justice here to punish him for that offense. No authority sustaining such a proposition can be found. *Bayne v. People*, 14 Hun, 181. See, also, sections 1453–1455 of the New York consolidation act, (Laws 1882, c. 410.) A careful examination of the evidence leads me to the conclusion that the offense of abandonment was not committed in this city and county, and an examination of the statutes and authorities regulating and bearing upon proceedings of the character of the one in question, convinces me that the magistrate before whom the proceeding was instituted acquired no jurisdiction of either the person of the defendant, or of the subject-matter of the proceeding. The judgment of the special sessions must be reversed.

RULAND v. CANFIELD PUB. CO.

(City Court of New York, Special Term. July 12, 1890.)

WRITS—SERVICE OF PROCESS—CORPORATIONS.

Under Code Civil Proc. N. Y. § 481, subd. 8, providing that a summons shall be served on a domestic corporation by delivering a copy thereof to the president or other head of the corporation, the cashier, treasurer, or managing agent, service on an employe of a domestic corporation who attends to the publication of a periodical issued by it, and to its printing, binding, and mailing, under instructions received immediately from the officers of the company, is insufficient.

Action by Manly A. Ruland against the Canfield Publishing Company on a promissory note made by defendant and indorsed by the payee to plaintiff. Defendant is a domestic corporation, and has its office in New York city. Its president and secretary attend at said office for the purpose of transacting the business of the company. The summons in the action was served on one Ernest Young, it being contended that he was the managing agent of defendant. It appeared that said Young was employed by defendant to attend to the publication of a periodical issued by it, its printing, binding, and mailing, which he did under the supervision of the company's officers. A judgment was entered against defendant by default, and thereupon it moved to set aside the same on the ground that it had not been served with process. The matter was then referred to Thomas McAdam, Esq., who filed the following opinion:

"The Code provides that a summons shall be served upon a domestic corporation by delivering a copy thereof to the president or other head of the corporation, the cashier, the treasurer, or managing agent. Code, § 481, subd. 8. The process in this action was served upon Ernest Young, as 'managing agent' of the defendant. This term requires that the person on whom the process is served be more than a mere agent. He must be an agent possessing general powers, and must in a measure have direction and control of the corporate business. To be a managing agent one must be invested with general power as distinguished from special branches. *Brewster v. Railroad Co.*, 5 How. Pr. 183. A superintendent of a railroad whose orders govern all the servants and agents of the company within that division is a managing agent of the railroad, within the meaning of section 481 of the Code. This is so, because the company had no other representative at the division in question, and the superintendent was in control there. An agent of an insurance company authorized to effect insurance, receive premiums, and issue policies, is a managing agent. *Bain v. Insurance Co.*, 9 How. Pr. 448. This was so decided, because the agent resided at a different place from where the principal office of the company was located. These two decisions do not apply to this case, because the defendant herein is a corporation having its principal office in the city of New York, and the general management of the business devolved upon the officers of the company, and it is not to be inferred that their management and control were devolved upon Mr. Young, their subordinate, an employe of the company. Thus, service cannot be made on a baggage-master, although the action be for loss of baggage. (*Flynn v. Railroad Co.*, 6 How. Pr. 308;) nor on a person employed by a street railroad company to superintend the running of cars, whose only authority to make contracts for the company extends to the purchase of feed and harness. (*Emerson v. Railroad Co.*, 13 Hun, 150;) nor on an assistant treasurer of a corporation, (*Winslow v. Railroad Co.*, 2 N. Y. Supp. 682.) A corporation, being an artificial person, a creature of the law, can only be brought into court in the manner pointed out by statute. Mere knowledge that a service has been attempted and was irregularly made, does not bind the corporation for the purpose. Held, that the irregular service should be set aside on its application. Mr. Young, the person on whom the service was made, was an employe of the defendant at a weekly salary, and

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his duties were to get up the weekly publications issued by the defendant, and see to the printing and binding and mailing of the same, and to do such other acts as the officers of the defendant might direct him to do. He had no control outside of his duties, and those were not of that general character as to make his position one of managing agent under the law. In *Donadi v. Insurance Co.*, 2 E. D. Smith, 519, there were conflicting affidavits as to the nature and extent of the agency of the person served, and it was held that the *onus* was on the corporation to show the precise relations of the agent towards it. This decision simply determines the question of burden of proof, as a corporation cannot conceal itself. *Hahn v. Steam-Ship Co.*, 2 City Ct. R. 25. The decision in *Southwell v. Marryatt*, 1 Abb. Pr. 218, as to the effect of avoiding service, need not be considered. The plaintiff relied to a large extent upon *Palmer v. Pennsylvania Co.*, 35 Hun, 869, affirmed, 99 N. Y. 679, but in that case it appeared that the defendant was a foreign corporation having offices here which were managed by one Pollock, whose name appeared on the freight-bill as agent, and the court held that as the defendant held Pollock out to the world as its agent, it was plain he had a large authority, and within a wide field his acts were binding on the defendant. The service on Pollock as managing agent was sustained. The case cited does not go to the extent of holding the service made in this case on Mr. Young was binding as a service upon a managing agent. The defendant did not hold Young out as its agent. His name nowhere appeared as such; and the statements made by the defendant as to his limited powers and duties are not inconsistent with its acts. See *Winslow v. Transit Co.*, 4 N. Y. Supp. 169. Under all the circumstances, I am of the opinion that the summons was not served in the manner directed by the Code, and that the judgment entered on the service ought to be set aside."

Samuel Campbell and *Adolphus D. Pape*, for defendant and motion. *E. H. Kissam*, for plaintiff, opposed.

HOLME, J. I have examined the papers and the testimony taken before the referee in this case with great care, and do not see my way to come to any other conclusion than that the person served was not the "managing agent" of the defendant, within the meaning of the Code. The testimony shows that he was a mere clerk. The officers of the company were present at its place of business when Young was served, and the reasons assigned for not serving one of them seem to be insufficient. The testimony that Young's duties were limited, and that he acted upon instructions received immediately from the company's officers, is uncontradicted. He seems to have had no general control over the affairs of the corporation, and acted only at the company's principal place for transacting business, where the officers of the company had their offices and personally attended to the business of the company. No matter how extensive Young's duties might be, so long as they were performed under the eyes of the officers of the company, and pursuant to their instructions, and at the very place where the officers themselves were attending to the business of the corporation, he cannot be regarded as the "managing agent" of the company. I think the "managing agent" contemplated by the Code is a person having an independent discretionary control in the locality where his duties are performed, as was the case with the agent in *Bain v. Insurance Co.*, 9 How. Pr. 448. For aught that appears in this case, Young's duties were confined to routine details, the president and secretary being present to pass upon matters requiring the exercise of judgment and discretion. *Brewster v. Railroad Co.*, 5 How. Pr. 183. Defendant did not represent Young to be its managing agent. The testimony shows that the president had the management of its affairs at the place where Young was acting. Motion granted.

RICH v. ROBERTS *et al.*, (two cases.)

(City Court of New York, Special Term. March 28, 1890.)

PARTNERSHIP—POWER OF PARTNER TO BIND FIRM—OFFER OF JUDGMENT.

Code Civil Proc. N. Y. § 738, providing that "defendant may, before trial, serve on the plaintiff's attorney a written offer to allow judgment to be taken against him for a sum * * * therein specified," and that "if there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken," does not authorize one partner, on whom process against the firm is served, to bind his copartners by an offer of judgment against the firm.

Actions by Irving H. Rich against Herbert A. Roberts and Delia C. Rich for the value of services rendered, and by William A. Rich against the same defendants on a promissory note. Defendant Roberts moves that the judgment rendered therein be vacated as to him. Code Civil Proc. N. Y. § 738, is as follows: "The defendant may, before the trial, serve upon the plaintiff's attorney a written offer to allow judgment to be taken against him for a sum, or property, or to the effect, therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken. If the plaintiff, within ten days thereafter, serves upon the defendant's attorney a written notice that he accepts the offer, he may file the summons, complaint, and offer, with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If notice of acceptance is not thus given, the offer cannot be given in evidence upon the trial; but, if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time."

Blumenstiel & Hirsch, for plaintiffs. *Ramsen & Parsons*, for defendant Roberts.

FITZSIMONS, J. This is a motion to vacate and set aside, as against the defendant Roberts, the judgment entered in above actions. These judgments, in the aggregate, amount to \$1,688.80. It appears that the defendants are copartners, carrying on business under the firm name of Roberts & Co. On March 18th the summons and complaint in each of these actions (the attorneys for each plaintiff being the same law firm, viz., Messrs. Blumenstiel & Hirsch) were served upon the defendant Delia C. Rich, who is the sister of the plaintiff. One action is based upon a promissory note alleged to be a firm note, and the other for services alleged to have been performed for the benefit of said firm. On March 18th a notice of appearance was served by Miss Rich, and on the same day she offered to allow judgment to be taken against her business firm for the full amount claimed in both actions, with costs. On the day following, these offers were accepted by the attorneys for both plaintiffs and judgments entered, and exceptions issued. I may not be an expert judge of handwriting, but a careful examination of the body of the offers of judgment herein, the acknowledgment following, and the signatures of the defendant Miss Rich and the notary public, I think, are remarkable for their exact similarity. This peculiarity, and other facts set forth in the moving papers of Roberts, and not denied by plaintiffs, in my opinion, sustain the contention of the defendant Roberts that these judgments are the result of a scheme to ruin his credit and business. These judgments, as above stated, were entered upon two offers of judgment, neither one of which the defendant Roberts saw or was aware of, and he emphatically denies that the causes of action alleged in the complaint exist against his firm. The section of the Code under which said offers were made is section 738. This section allows the defendant Rich to offer to allow judgment to be taken against herself, but it certainly does not allow her to make an offer whereby judgment may be entered against a business firm of which she is a member. *Garrison v. Gar-*

rison, 67 How. Pr. 271. Where copartners are sued, one partner cannot bind the other members of his firm by offering to allow judgment in any action against the firm, (*Weed v. Bergstrasser*, 2 Law Bull. 55; *Binney v. Le Gal*, 19 Barb. 592,) except where there is evidence that the other partner authorized such offer, or assented to it. It is evident that the defendant Roberts did not authorize the offers made in these cases, nor does he assent thereto. For the reasons that I believe, as a matter of fact, that these judgments are fraudulent against the defendant Roberts, and, as a matter of law, one copartner cannot make the offer permitted by section 738 of the Code against his firm without consent of such firm, I order and direct that these judgments be vacated and canceled as against the defendant Roberts, and that they stand only against defendant Rich individually. Submit an order.

BURNS v. BRICKLAYERS' BENEVOLENT & PROTECTIVE UNION.

(City Court of Brooklyn, Special Term. February 17, 1890.)

BENEVOLENT SOCIETIES—FINES—REMEDIES.

The Bricklayers' Benevolent & Protective Union, an incorporated association, designed to secure fair wages for its members, prescribes certain fines for violations of its laws, and provides for an appeal from the imposition of fines. *Held*, that a member could not sue to annul fines imposed on him until he had appealed as prescribed by the laws of the association.

Action by John Burns against the Bricklayers' Benevolent & Protective Union of the city of Brooklyn. The complaint is as follows: "The plaintiff above named, complaining of the defendant, alleges: (1) That at the times hereinafter mentioned the defendant was and now is a domestic corporation, duly organized and existing by and under the laws of the state of New York. (2) That the object of said corporation, as appears by its constitution and by-laws, which plaintiff begs leave to refer to and hereby makes a part of this complaint, is to obtain by legal means a fair remuneration for the labor of its members. (3) That plaintiff has been a member of said corporation for the past ten years, and as such is entitled to all privileges and rights of members. (4) That on or about the 2d day of January, 1889, plaintiff, with other fellow-workmen, members of the defendant corporation, was ordered by the duly-appointed walking delegate of the defendant 'to strike' on the job where they were then working, and plaintiff, in obedience to said order, did 'strike;' that plaintiff, under the orders of the defendant, its agents, servants, or employes, remained on the 'strike' for a period of two weeks; that at the expiration of said two weeks, plaintiff, being poor and the head of a family wholly dependent upon him for support, and not having been allowed the compensation allowed to married men when on a 'strike' pursuant to article 12 of the constitution of the Bricklayers' and Masons' International Union of America, which plaintiff begs leave to make a part of this complaint, returned to work on the job aforesaid, and for so returning and so working plaintiff was fined several times by the defendant, aggregate amount being seventy-five dollars. (5) That the infliction of said fine was arbitrary, capricious, unreasonable, and contrary to the spirit and policy of the constitution and by-laws of defendant. (6) Plaintiff further alleges on information and belief that the defendant or its officers never duly made application for authority to 'strike,' and never received the permission to order a 'strike' of its members, as required by article 12 aforesaid; that said strike was therefore unauthorized, illegal, and improper, and all acts and proceedings of defendant under color of said 'strike' were null and void. (7) That by reason of said 'strike,' and all acts and proceedings of defendant thereunder, to-wit, the infliction of the fines aforesaid, and the refusal of defendant to issue to plaintiff such credentials as would allow him to resume work with union employes, plaintiff has been, and is now, incapacitated

tated in obtaining work, to his damage four hundred dollars. Wherefore plaintiff demands judgment against the defendant: (1) That the 'strike' ordered on or about January 2, 1889, be declared irregular, unauthorized, and void, and all acts and proceedings of defendant under color of said 'strike' be declared null and void. (2) That the three separate fines, or as many as there were affecting plaintiff, aggregating the sum of seventy-five dollars, be declared null and void, and of no force and effect. (3) That the amount paid by plaintiff on account of said aggregate amount of fines be credited to plaintiff on the books of the association as and for dues and assessments that may legally arise hereafter. (4) That plaintiff be reinstated to said union and to its rights and privileges to the extent of being allowed to resume work as a union man, and that he be given such credentials as will show that he is a member of defendant in good standing. (5) That the defendant pay to the plaintiff the sum of four hundred dollars as his damages, besides costs."

The answer is as follows: "The defendant answering the plaintiff's complaint herein: *First.* Admits it is a domestic corporation; and admits that its objects are to obtain by legal means a fair remuneration for the labor of its members; and it further admits that plaintiff was at one time one of its members; but it denies that plaintiff is now entitled to all the privileges and rights of members. Defendant further denies that plaintiff was ordered by its walking delegate or any one else to 'strike' on the job where he was working on or about January 2, 1889; and it denies that the plaintiff did 'strike.' Further answering the plaintiff's complaint, defendant denies that plaintiff, under orders of the defendant, its agents, servants, or employes, remained on 'strike' for a period of two weeks or any other period; and defendant admits that it imposed fines upon the plaintiff, but denies that said fines were imposed for the plaintiff's returning to work upon said job after such alleged 'strike.' Defendant, further answering the complaint, denies that the infliction of said fine was arbitrary, capricious, unreasonable, or contrary to the spirit and policy of the defendant's constitution and by-laws. Defendant, further answering, admits that it never made application for authority to 'strike,' and further admits that it never received permission to order such alleged 'strike;' and, further answering, defendant alleges that no 'strike' was ordered or authorized by it upon such job. *Second.* Further answering, the defendant denies each and every allegation in said complaint not hereinbefore expressly admitted or denied. *Third.* Further answering the plaintiff's complaint, and for a separate answer and defense thereto, defendant alleges that the plaintiff has not, before invoking the aid of this court in his behalf, exhausted his remedies against this defendant for its alleged illegal proceeding against him, as provided for by its constitution and by-laws and by the constitution and rules of order of the Bricklayers' and Masons' International Union of America, to which body the defendant is subordinate, and by which body the defendant is governed, both of which constitution and by-laws and constitution and rules of order, respectively, the defendant begs leave to make a part of this answer. Wherefore defendant demands that the complaint herein be dismissed, with costs."

The court found as facts the incorporation of defendant for the purposes alleged in the complaint; that defendant had been a member thereof for nine years prior to February 11, 1889; that plaintiff was in the employ of one Thomas H. Robbins as a bricklayer; that on Saturday, December 22, 1888, said Robbins failed to pay plaintiff his weekly wages, and did not pay said wages until December 24th, and did not pay plaintiff for his detained time; and that Robbins, after December 22, 1888, and until February 11, 1889, failed to pay his employes their weekly wages, and employed non-union men, —all of which plaintiff knew was in violation of defendant's laws; that on December 24, 1888, plaintiff left said Robbins' employ, but returned again on January 2, 1889, and continued to work for said Robbins, which plaintiff

knew was a violation of defendant's laws; that for so violating the defendant's laws charges were duly presented, and hearings were had upon said charges after due notice thereof had been given to plaintiff, and plaintiff was thereupon found guilty of the charges so made, and was fined as follows: January 7, 1889, the sum of \$10; January 14, 1889, the sum of \$25, leaving a balance unpaid on said fines of \$50, making in all the sum of \$75; that there is still an unpaid balance of \$50 due on account of such fines; that defendant's laws provide for an appeal from the imposition of fines, and that defendant did not appeal; and that defendant is a member of the Bricklayers' & Masons' International Union of America, and is subject to its laws. The court filed the following conclusions of law: "(1) That the fines aggregating the sum \$75 imposed upon the plaintiff by the defendant between January 7, 1889, and February 11, 1889, were duly and legally imposed; (2) that there remain due and unpaid to the defendant from the plaintiff the sum of \$50 balance of said fines; (3) that before invoking the aid of this court the plaintiff must first exhaust the remedies provided for him by the defendant within the power of the defendant itself; (4) that the complaint of the plaintiff must be dismissed, with costs."

Charles E. Brandt, for plaintiff. *Thomas E. Pearsall*, for defendant.

No opinion. OSBORNE, J., directed judgment in favor of defendant dismissing the complaint on the merits, with costs.

TOWNSHEND v. LOEW et al.

(Superior Court of New York City, General Term. July 8, 1890.)

EJECTMENT—TITLE TO SUPPORT—POWERS IN TRUST.

C. conveyed mortgaged property to R., her heirs, etc., in trust to receive the income, and apply it to the use of C. for life, and after her death to convey the property to C.'s children and grandchildren. *Held* that, under 1 Rev. St. N. Y. p. 724, § 59, providing that land to which a power in trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the power, R.'s power to convey not having been exercised, the legal title to the land passed to the purchaser at the sale under the mortgage during C.'s life, and C.'s children and grandchildren, after her death, had no such title as would support an action of ejectment. Following *Townshend v. Frommer*, 5 N. Y. Supp. 443.

Exceptions from jury term.

Action in ejectment by John Townshend against Edward V. Loew and others. A verdict was directed for defendants, and plaintiff's exceptions were ordered to be heard in the first instance at general term.

Argued before TRUAX and INGRAHAM, JJ.

John Townshend, plaintiff, *in pro. per.* *John C. Shaw*, for defendants.

PER CURIAM. The exceptions taken by the plaintiff are overruled, and judgment is ordered for the defendants on the verdict, on the authority of *Townshend v. Frommer*, 5 N. Y. Supp. 442, with costs.

TOWNSHEND v. MCGUIRE et al.

(Superior Court of New York City, General Term. July 8, 1890.)

Exceptions from jury term.

Action in ejectment by John Townshend against Catherine J. McGuire and others. A verdict was directed for defendants, and plaintiff's exceptions were ordered to be heard in the first instance at general term.

Argued before TRUAX and INGRAHAM, JJ.

John Townshend, plaintiff, *in pro. per.* *John C. Shaw*, for defendants.

PER CURIAM. The exceptions taken by plaintiff are overruled, and judgment is ordered for the defendants on the verdict, on the authority of *Townshend v. Frommer*, 5 N. Y. Supp. 442, with costs.

WALLACE v. NODINE.

*(Supreme Court, General Term, Fourth Department. July 1, 1890.)***1. FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION—EVIDENCE.**

Under 8 Rev. St. N. Y. (7th Ed.) p. 2228, § 5, which provides that a non-change of possession on a sale of chattels shall be "conclusive evidence of fraud" in favor of the vendor's creditors, unless the vendee shall make it appear that the sale was made in good faith, and without intent to defraud, the payment of an adequate price by the vendee is not, as a matter of law, sufficient to overcome the presumption of fraud arising from the non-change of possession, but is evidence to be considered by the jury in passing on the question of fraudulent intent.

2. SAME—ADMISSIBILITY

In an action by the vendor's creditors, attacking as fraudulent, on the ground of non-change of possession, a sale of farm produce on the vendee's farm, which had been operated by the vendors as lessees, a declaration by one of them, on abandoning the farm, that he delivered possession to the vendee, is admissible in evidence, as it is a statement of a matter of fact, and not the vendor's opinion on a question of law.

MERWIN, J., dissenting.

Appeal from circuit court, Onondaga county.

Action by John Wallace against George Nodine. Plaintiff had a verdict for \$141.72, and from a judgment therein, and order denying a motion for a new trial on the minutes, defendant appeals. The action was for taking and selling personal property alleged to belong to the plaintiff. The defense was that the defendant is a constable, and took the property by virtue of an execution issued upon a judgment in favor of Charles King, and another against James Wallace and Earl Hazard, and that the property belonged to the defendants in the execution at the time of the levy and sale, and that "plaintiff's claim thereto is through a sale of the property to him, by James Wallace, with intent to hinder, delay, or defraud the King brothers, and other creditors." Plaintiff was the owner of a farm in the town of Spafford, which, in 1885, he leased to James Wallace, his son, and Earl Hazard, his son-in-law, at the agreed rent of \$300, payable on the 1st of April, 1886. On the 15th day of February, 1886, Earl Hazard and James Wallace executed to the plaintiff their promissory note in the sum of \$512.54, and they executed a chattel mortgage upon certain personal property to secure the payment of the note. The genuineness of the indebtedness represented by the note was abundantly proven, and was conceded and not disputed by the defendant. In the fall of 1886, Earl Hazard and James Wallace seem to have come to the conclusion to give up the possession of the farm, and Hazard, who had kept house on the farm, moved off from it with his family, and James thereafter boarded with his father, some two miles distant, and performed some labor upon the farm taking care of the stock. On the 30th day of November, 1886, James Wallace executed and delivered to the plaintiff an instrument as follows:

"SPAFFORD, Nov. 30th, 1886.

"I, for a valid consideration, have sold and conveyed to John Wallace the following property, viz.: One bin of oats; one do. of barley; one lot of loose hay; one lot of loose straw; together with all my right, title, and interest in a lot of baled hay, all of which is now in his barns, and is now in his possession. Received pay,

JAMES WALLACE."

And at the same time plaintiff took possession of certain articles of personal property covered by the chattel mortgage upon an agreed valuation of \$350, which was indorsed upon the note of \$512.54; and simultaneously with that the plaintiff, as a part of the consideration for the property purchased, took up and paid a note given by James Wallace and Earl Hazard to one Prindell of about \$50, and the interest thereon; and on the 6th of December, 1886, James Wallace made, executed, and delivered to Edgar I. Bishop a bill of sale of the other articles of personal property described in the complaint, taking from Bishop his promissory note for \$102, payable in a year, which

was subsequently paid at maturity by Bishop. Bishop made an oral agreement for the purchase of the personal property, and also for the purchase of the farm, and on the 8d of February he made a written agreement for the purchase, and on the 3d of March the plaintiff conveyed to him, by deed, the farm, Bishop taking possession of the same in March, 1887, under his deed. George King and another recovered a judgment January 10, 1887, issued an execution which was levied upon the property described in the complaint, and the same was sold for the sum of \$122.06. On April 24, 1889, Bishop assigned his interest in the property sold, or his right of action for the same, to the plaintiff. Earl Hazard, when on the stand as a witness for plaintiff, testified on his cross-examination (folio 172 of the appeal-book, referred to in the opinion:) "*Question*. Don't you remember that that note was to come due in November of that year? Isn't that your recollection? *Answer*. I don't remember when it became due. *Q*. It was given so as to become due in the fall after you got your crops off? [*Objected to their giving the contents of this note. Excluded, and exception for the defendant.*]"

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.
T. K. Fuller, for appellant. Franklin Pierce, for respondent.

HARDIN, P. J. 1. Plaintiff was called as a witness in his own behalf, and stated that Hazard left the premises in October, 1886, before the giving of the bill of sale, and before the levy; and the plaintiff stated that before he left he came to his house, and spoke to him upon the subject of leaving. When the witness was asked what Hazard said in that interview defendant objected and excepted, and thereupon the counsel for the plaintiff allowed that by the evidence he wanted "to show whether he delivered possession or not," and thereupon the court intimated that the witness might answer, and he did state as follows: "He said that he was going over the lake to drive stage, and he would not stay on the farm any longer, and he gave me possession. I let him have the team to move him there." We think no prejudicial error was committed by receiving the evidence. In *Hardenburgh v. Crary*, 50 Barb. 82, the actual occupation of the premises which were the subject of dispute was directly in issue. Here the question of who was in occupation of the farm, or how the possession of the farm was given up, arose incidentally. We think the opinion of DENIO, C. J., in *Knapp v. Smith*, 27 N. Y. 281, supports the ruling made by the trial judge. He says, viz.: "Trask, a witness examined for the plaintiff, was asked whether she had been in the possession of the farm since the deed to her, and the defendant objected that the inquiry called for an opinion on a question of law. The objection was overruled, and the witness answered that they (the plaintiff and her husband) had been on the place ever since. I do not perceive any well-grounded objection to the question, but the answer was a statement of a simple matter of fact, and one in respect to which, upon the whole case, there was not the slightest question."

2. Nor do we think it was error to receive the testimony of the plaintiff to the effect that he had made an arrangement with Bishop to sell him the farm and personal property for \$4,000 after Hazard had left the farm, and before the plaintiff purchased the personal property; nor in refusing to strike out the evidence after the same had been given.

3. When Earl Hazard was upon the stand as a witness he said that he left the farm about the middle of October, 1886, and that on the morning that he left he saw the plaintiff. He was then asked to state: "What did you say to him about giving up possession of the premises?" This was objected to, and the objections were overruled, and the defendant excepted. The witness answered: "I said to him that I was going away, and he had better see about his property. I was going away, going to move off from the place; and I asked him that morning for his wagon to move with. I said: 'You had better see

to your property. I shall not have anything more to do with it.' I went away that day. I left the stuff there with James. I didn't disturb any of it." We see no error in receiving this evidence which would warrant us in disturbing the ruling.

4. The ruling at folio 172 seems to have been placed upon the ground that the question asked for the contents of the note, and the objection was taken in effect that the note was the best evidence. We see no error in the ruling.

5. Nor do we think it was error to allow the witness John Wallace to state that, at the time Hazard went away, he, in a conversation held with James, stated that "he would leave the property in my hands, and I could dispose of it, pay the debts, and do what I liked with it." We think it was competent to prove parol authority in that manner, which was obviously the purpose for which the evidence was received.

6. We see no error in limiting the inquiry to the witness George King as to the conversation he had had with the plaintiff on an occasion in a settlement of "his own matters." Apparently nothing was excluded which bore upon the issue between the parties to this action.

7. After the trial judge had, in a very elaborate and careful charge, commented upon the questions of fact for the consideration of the jury upon the evidence, several requests were made to him by the counsel for the respective parties. Among them, at the instance of the defendant, he charged as follows: "If the jury find from the evidence that the property in question was in the actual possession of one of the defendants in the execution when levied upon and sold by the constable, the sale to the plaintiff is presumptively fraudulent, under the statute, as against the creditors of the vendor, and it requires satisfactory proof of good faith to overcome that presumption." He also charged: "If the jury find from the evidence that the plaintiff had knowledge of the indebtedness of James Wallace and Hazard to the King brothers, and took this bill of sale to enable James Wallace and Hazard to cheat, hinder, and delay their creditors, and such sale was merely a wash between the parties to it to accomplish that purpose, such a sale is void under the statute." He also charged: "The burden would be upon them if there was no delivery, or actual and continued change of possession." And he also charged: "Where the seller retains possession of the property after the sale, the rights of the buyer as against creditors depend on the honesty and fairness of the transaction." And he also charged: "That the statute of frauds is imperative; that a sale of chattels must be accompanied by a continued change of possession to avoid the presumption of fraud." And he also charged: "That the fact that an adequate consideration was paid by the vendee upon a sale of goods, accompanied by immediate delivery and actual and continued change of possession, is not conclusive evidence that the sale was made in good faith and without intent to defraud the creditors of the vendor." And he also charged: "That, where a sale of goods and chattels is not accompanied by immediate delivery, or followed by an actual and continued change of possession, the presumption of fraud raised by the statute in such case makes that question one of fact for the jury, although the evidence of good faith and absence of intent to defraud is uncontradicted." In yielding to the last request the judge observed: "I charge that. Uncontradicted by direct evidence, I suppose you mean." To which the counsel for the defendant responded: "Yes, sir." Thereupon the court observed: "I charge that." Then the plaintiff's counsel propounded to the court a request in the following language, viz.: "That, even though the jury should find that there was no change of possession, if the plaintiff and the plaintiff's assignor paid an adequate consideration for the property, the burden is upon the defendant to show that there was fraudulent intent." The court responded: "Yes, I charge that." Exception was taken by the defendant. In considering the question made upon

the charge as given by the trial judge, it must be borne in mind that an appellate court will not seize hold of isolated portions of a charge, or general expressions therein, "for the purpose of discovering error, if the charge, as a whole, conveys to the jury the correct rule of law upon a given question." *Caldwell v. Steamboat Co.*, 47 N. Y. 282; *People v. Dimick*, 107 N. Y. 26, 14 N. E. Rep. 178.

Section 5, tit. 2, p. 2328, 3 Rev. St., (7th Ed.), which provides: "Every sale made by a vendor of goods and chattels in his possession, * * * and every assignment of goods and chattels by way of mortgage or security, * * * unless the same be accompanied by immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or the creditors of the person making such assignment, * * * and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers,"—was referred to by the learned trial judge, and the substance thereof stated with clearness and accuracy to the jury. When he yielded to the request made by the plaintiff, he doubtless did so in deference to section 5, tit. 3, p. 2330, Id., which provides as follows: "The provisions of this chapter shall not be construed in any manner to affect or impair the title of the purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." By section 4, tit. 3, it is provided, viz.: "The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact, and not of law."

In considering the requirements found in section 5, tit. 2, quoted above, in *Stimson v. Wrigley*, 86 N. Y. 336, FINCH, J., says: "To permit a continued possession in the vendor encourages transfers of mere title to defeat creditors, while the debtor's beneficial use of the property leaves him practically the owner, and tends to give him a credit to which he is not entitled. As an honest purchaser buys because he wants the property and its possession, and therefore naturally and usually takes it, the absence of this fact indicates some purpose different from that of an honest purchaser, and requires proof of good faith and honest intention." These remarks furnish a sensible explanation of the provisions found in section 5, where it is declared that a sale, "unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, * * * and shall be conclusive evidence of fraud." By virtue of this statute, every sale of property not followed by a change of possession is to be presumed fraudulent and void. That presumption remains and continues, and the non-change of possession becomes conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers. To avoid the force of the presumption,—to avoid the "conclusive evidence of fraud" found in the omission to change possession,—the burden is cast upon the vendee to make it appear that the purchase by him "was made in good faith, and without any intent to defraud such creditors or purchasers."

BRADISH, P., in *Hanford v. Archer*, 4 Hill, 301, in dealing with the presumption and "the evidence" mentioned in the statute, suggests that it has been claimed "that the vendee or assignee of chattels leaving them in the possession of the vendor or assignor is in itself fraud." He combats that idea, and insists that what the statute does "is to raise a presumption of fraud which becomes conclusive, unless good faith and absence of intent to defraud

be made to appear;" and then he adds: "But if the sale or assignment be shown to have been made in good faith, and without any intent to defraud, the presumption of fraud raised by the statute is fully rebutted. There can be no presumption of fraud in a transaction which has been proved to be without fraud." And at page 319 of the same opinion it is stated in regard to the statute, viz.: "(1) It has abolished the distinction sometimes attempted to be drawn between absolute sales and conditional assignments, and thus avoided the question whether continued possession in the vendor or assignor be consistent or inconsistent with the deed. (2) It declares what shall rebut the evidence of fraud raised by the statute from a want of change of possession, viz., good faith, and absence of intent to defraud. (3) It throws the burden of proof of such good faith and absence of intent to defraud upon the party claiming under the sale or assignment. (4) It declares the question of fraudulent intent to be a question of fact, and not of law. * * * The statute very properly throws the burden of proof on the party claiming under the sale or assignment; and, while it prescribes what shall rebut the evidence of fraud raised by the statute, and submits that as a fact to be determined by the jury, it leaves the court in the unimpaired possession and exercise of all its proper prerogatives of deciding upon the legality, competency, and relevancy of testimony, but not upon its weight and sufficiency on a question declared by the statute to be one of fact. These belong properly to the jury."

In *Griswold v. Sheldon*, 4 N. Y. 592, in referring to a charge delivered upon questions arising under the statute referred to, BRONSON, J., said: "Instead of telling the jury that the mortgage was not void in law, he should have told them that, because the possession was not changed, the mortgage was presumed in law to be fraudulent and void as against creditors and *bona fide* purchasers. Such is the rule of the common law, and such are the words of the statute. 2 Rev. St. p. 136, § 5. And, instead of telling the jury that they must pass upon the question whether the mortgage was made to defraud the creditors of Burdick,—thus, in effect, leaving the *onus* of proving the fraud upon the creditor,—he should have told the jury that the law presumed the fraud, and cast the burden of disproving it upon the person claiming under the mortgage. Such is the plain declaration of the statute. * * * They should not be left to find that there was no fraud because there is no direct evidence of that fact; but they should be told that fraud is presumed from the fact of unchanged possession, and that this evidence of fraud is conclusive,—not such evidence as they may disregard, but, in the words of the statute, 'conclusive evidence,'—unless the person claiming under the conveyance has proved that the same was made in good faith, and without any intent to defraud."

In *Waterbury v. Sturtevant*, 18 Wend. 363, Senator EDWARDS, in dealing with a question of fraud, observed: "I admit that if property is sold for the purpose of preventing or delaying the collection of a debt, and the purchaser, knowing the fact, makes the purchase for the purpose of aiding that intent, the sale is fraudulent, although a fair consideration has been paid. The question of fraud depends upon the motive of the parties. The purchase must be *bona fide*, as well as upon a valuable consideration."

In *Billings v. Russell*, 101 N. Y. 226, 4 N. E. Rep. 531, the case of *Waterbury v. Sturtevant*, *supra*, was referred to with approval in the opinion of RUGER, C. J. It was held in *Billings v. Russell*: "The fact that a mortgage was given, or it seems that property was transferred, by a debtor for valuable consideration, is not, as a proposition of law, inconsistent with the existence of an intent on the part of the debtor to defraud his creditors, or of such knowledge thereof on the part of the mortgagee or purchaser as will avoid the mortgage or conveyance; and in this regard no distinction can be made between the consideration furnished by an existing debt and that aris-

ing in any other manner. When there is an actual intent to defraud, no form in which the transaction is put can shield the property transferred from the claim of the creditors. Proof, therefore, that a mortgage executed by an insolvent debtor was given to secure a debt actually owing by the mortgagor does not, as matter of law, disprove the existence of a fraudulent intent on the part of the debtor." In the course of the opinion in that case the chief judge observed: "We are of the opinion, however, that the fact of the payment of a valuable consideration upon a transfer of property is not, as a proposition of law, inconsistent with the existence of an intent to defraud, and that in the application of this principle no distinction can be made between the consideration furnished by an existing debt or one arising in any other manner. It is undoubtedly evidence, and usually strong evidence, of the intent with which the conveyance is made, but is simply a circumstance to be considered by the court in determining the question of intent. The statute itself declares all conveyances made with a fraudulent intent absolutely void, except in the case of those made upon a good consideration, and in ignorance on the part of the purchaser of the fraudulent design of his grantor. It contains, therefore, the strongest implication that the payment of a valuable consideration is not inconsistent with the existence of an intent to defraud, and of such knowledge on the part of the purchaser of the fraudulent design as will avoid a conveyance made to him, even though accompanied by the payment of an adequate consideration. The vice in the argument of the court below, if any there is, seems to be in its assumption that the mere payment of a good consideration by the vendee upon the transfer of property by an insolvent debtor, as matter of law disproves the existence of a fraudulent intent in such transaction." At the conclusion of the opinion from which the above quotations have been made it is said, viz.: "From this review of the authorities it seems clear that, where there is an actual intent to defraud, no form in which the transaction is put can shield the property so transferred from the claims of creditors, even though a full and adequate consideration be received for the same." Here we have a case of the non-change of possession, and that fact, by virtue of section 5, tit. 2, gives rise to the presumption that the sale was fraudulent and void; and it is also "conclusive evidence of fraud" by the very terms of the statute, unless it was "made to appear" on the part of the plaintiff, who is the person "claiming under such sale or assignment, that the same was made in good faith and without any intent to defraud such creditors or purchasers." The *onus* of making it appear that the purchase was "in good faith and without any intent to defraud" was upon the plaintiff. The burden of giving proof that should answer the requirements of the statute was upon the plaintiff, and continued with him throughout the trial.

In *Tilson v. Tervilliger*, 56 N. Y. 278, which was a case where there was not an immediate and continued change of possession under a bill of sale, it was said by FOLGER, J., on page 276: "The statute is imperative that the sale must be followed by a continued change of possession, or it shall be presumed to be fraudulent. It is, then, upon the vendee to make it appear that the transaction was in good faith, and with no intent to defraud. This is a question for the jury; and, whatever other rules of law there may be, in our judgment it should in this case have been submitted to them. Here was a presumption in favor of the defendants, growing out of the possession found in the vendor. Against this was the testimony of the vendee alone. His credibility in such a position was in issue. We do not think that when there is on one side the presumption against the legality of the transaction which the statute makes, and on the other the vendee seeking by his own oral testimony alone to repel that presumption, that the matter may be taken from the jury and passed upon by the court as a question of law."

In making out the affirmative of the proposition resting upon the plaintiff,

proof of payment of adequate consideration undoubtedly was strong evidence,—persuasive evidence,—for the consideration of the jury; but as the statute in its fourth section has provided that questions of fraudulent intent arising under the statute shall be deemed a question of fact and not of law, it is not within the province of the court to hold as a matter of law that the proof of the consideration, adequate and abundant though it be, was sufficient to establish that the purchase by the plaintiff was “made in good faith, and without any intent to defraud the creditors of the vendor.”

Mr. Stephens, in his Digest of the Law of Evidence, states in article 98, p. 152: “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that these facts do or do not exist.” With that rule before us, it may be observed that the plaintiff sought the verdict of the jury to the effect that his purchase was made in good faith, and without any intent to defraud, which facts he was required to prove to overcome the presumption of fraud and the “evidence of fraud” furnished by the non-change of possession of the property purchased. He was required to prove his good faith, and that his purchase was “without intent to defraud.” Mr. Stephens also says, in article 95, p. 153, that the “burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given if no evidence at all were produced on either side.” Applying the rule to the case in hand, it may be observed that the judgment of the court would be given, if no evidence at all were produced, after the fact appeared that there was not a change of possession of the goods purchased, against the plaintiff. The plaintiff, therefore, took the burden, and must carry “through the case the burden of the facts he is bound to prove.”

In *Stiedenbach v. Riley*, 111 N. Y. 560, 19 N. E. Rep. 275, EARL, J., in dealing with the effect of a non-change of possession, said, viz.: “Here, as we have before stated, the jury were authorized to find that this sale was not accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold. And here the presumption that it was fraudulent and void as against creditors was conclusive, unless the plaintiff made it to appear that the sale was made in good faith, and without any intent to defraud creditors. The burden was upon him to make this appear, and we are of the opinion that there was evidence from which the jury could find that the plaintiff had failed to show that the sale was in good faith, and without any intent to defraud.”

We think the sense of the charge complained of was to the effect that, after the jury had found that there was no change of possession, and after they had found that the plaintiff and his assignor “paid an adequate consideration for the property, the burden is upon the defendant to show that there was fraudulent intent.” Such a charge, in effect, as a ruling, as a matter of law is that proof of an adequate consideration overcomes the presumption that the purchase is fraudulent and void, overcomes the evidence of fraud which arose from the non-delivery of possession of the property, and relieves the plaintiff from the burden cast upon him by section 5, to make it appear on his part that the sale was “made in good faith, and without any intent to defraud the creditors of his vendor.”

Our attention is called to *Leach v. Flack*, 31 Hun, 606, in aid of the contention of the plaintiff. In that case the referee in the court below had refused to sustain the ownership of the plaintiff in certain property purchased by her of her son under a bill of sale, by reason of the non-change of possession, “although he also found the fact to be established by the evidence that the plaintiff was no party to the fraud, but received the bill of sale without notice of her son’s embarrassment in business, and without any intention to hinder, delay, or defraud any of the existing or subsequent creditors of the vendor.” He also found that she “had no knowledge of any

intention on his part to deceive or defraud any of his creditors." And, after such findings of fact were made, it was held by the court that to deny her the right of recovery was erroneous; following the law as laid down in *Dudley v. Danforth*, 61 N. Y. 626. In the latter case the referee had found "that the purchase and sale was made in good faith, for the purpose of paying the plaintiffs an honest debt owed by Edget to them;" and it was held that, after such a finding of fact made, it would be unavailing to find that the "transfer was made without intent on the part of Edget to hinder and delay his creditors; and that the plaintiffs had previous notice of such intent on the part of Edget" would be unavailing "without a further finding that plaintiffs participated in such intent." We see nothing in the case which reaches the question involved in the case in hand.

In *Starin v. Kelly*, 88 N. Y. 420, it appeared that the plaintiff before levy "purchased the property of Besson, and that at the time of the levy he had the property in his possession," and the questions of fact were found in favor of the plaintiff, and the only questions of law determined in the case related to the findings upon the trial; and under the issue in that case it was said, viz.: "To maintain the issue on the part of the defendant it was sufficient for him in the first instance to show Besson's fraudulent intent in making the sale. Then it was for the plaintiff to show that he purchased the property for a valuable consideration. His title would then be unimpeachable, unless the defendant should make it appear that he had previous notice of Besson's fraudulent intent, and that he participated in the fraud. * * * In *Waterbury v. Sturtevant*, 18 Wend. 355, it was held that the question of fraud in such a case may depend upon the motive of both parties; that the purchase must be *bona fide* as well as upon a valuable consideration; and that the fraudulent intent of the grantees may be inquired into, was also decided in *Newman v. Cordell*, 43 Barb. 448." We think the case does not support the contention of the plaintiff.

Our attention is called to *Mitchell v. West*, 55 N. Y. 107. There it was held that a purchaser under a bill of sale "unaccompanied by delivery and change of possession is not required by the statute of frauds (2 Rev. St. 186, § 5) to show, as against the creditors of the vendor, in addition to the proof of, or in order to establish the *bona fides* of, the sale, that there was a valid excuse for leaving the property in the vendor's possession." In that case it was claimed "that, in addition to proof that the sale of the chattels was *bona fide*, and that there was no intent to defraud the creditors of the vendor, it was necessary to show some valid excuse or reason for leaving the property in his possession." The court held that such excuse or reason need not be shown; following the memorable decision in the court of errors, in *Hanford v. Archer*, 4 Hill, 271.

It is said by the learned counsel for the appellant that, "if the intent of the plaintiff and his assignor was honest in purchasing the property, it makes no difference whether there was any change of possession whatever;" but, as we have already seen, the question of the intent of the plaintiff is one of fact, which must be left for the jury to determine; and, when the want of change of possession appears in a case, then the statutory presumption is against the plaintiff, and the burden is upon him to relieve himself from the presumption arising by force of the statute, from the non-change of possession. Possibly the trial judge may have been of the opinion that there had been a change of possession, but, upon the evidence given upon that subject, it was his duty, in obedience to the requirements of the provisions of the statute, that questions arising thereunder should be regarded as questions of fact, and not of law, to submit that question to the jury; and the same duty remains with this court to regard the question as a question of fact, and not a question of law, and therefore it is not appropriate for this court to assume that an erroneous instruction to the jury on the subject of the

burden of proof may not have influenced the jury in reaching a verdict adverse to the defendant. We think the instruction was erroneous, and by reason thereof the verdict should not be allowed to stand. Judgment and order reversed on the exceptions, and a new trial ordered, with costs to abide the event.

MARTIN, J., concurs. MERWIN, J., dissents.

JOHNSON v. NETHERLANDS AMER. STEAM NAV. CO.

(Supreme Court, General Term, Second Department. July 18, 1890.)

MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANTS.

Plaintiff was employed by a stevedore hired by defendant to unload its vessel. Defendant furnished the power and the men to apply the power. While the cargo was being hoisted the rope slipped out of the drum of the winch, and plaintiff endeavored to disentangle it, and at the proper time gave the word to the men at the winch to "come back," but instead of that the winch went forward, and plaintiff's fingers were caught between the rope and the drum, and he was injured. *Held*, that defendant was liable.

Appeal from circuit court, Kings county.

Action by Frank Johnson against the Netherlands American Steam Navigation Company, to recover for personal injuries alleged to have been sustained through the negligence of defendant while plaintiff was assisting to unload its vessel. Plaintiff was a longshore-man, and was employed by one Lithman, a stevedore, who had a contract with defendant for the discharge of the cargo. The court charged that the winch-man was the servant of defendant, and that the defendant was responsible for his negligence. Also that plaintiff did not take the risk of the negligence of the winch-man. The court refused defendant's request for a charge that, if the work of discharging was being done by Lithman as an independent contractor, he having charge of all the men engaged in it, defendant was not liable. There was a verdict for plaintiff for \$700. From the judgment entered thereon defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Wing, Shoudy & Putnam, for appellant. *Charles J. Patterson*, for respondent.

BARNARD, P. J. The facts of this case are very simple. The company hired a stevedore to unload its vessel. The company was to furnish the power and the men to apply the power. The vessel was unloaded by a rope which passed around a steam-winch, and thereby the burden was lifted from the hold of the vessel and deposited on the dock. On the occasion of the accident the rope slipped out of the drum of the winch, and became useless to couple the elevator of the particular burden upon the rope or fall. The plaintiff, who was an employe of the stevedore, endeavored to disentangle the rope when it became slackened by reason of a reversal of the winch. The plaintiff held the rope on the axle of the winch so as to get it on the winch when the tangle was removed. At the proper time the plaintiff gave word to the men at the winch to come back. The process would have remedied the difficulty, but the order was not heeded, and the winch went forward, the effect of which was to wind more rope on the drum instead of freeing it from the disarranged coils. The motion forward caused more rope to suddenly wind on the drum, and the plaintiff's fingers were caught and drawn between the rope and drum, and he was injured. The man at the winch was the servant of the defendant. *Sanford v. Standard Oil Co.*, 118 N. Y. 571, 24 N. E. Rep. 313; *Kilroy v. Canal Co.*, (court of appeals, April, 1890,) 24 N. E. Rep. 192. The question of fact having been settled by the jury, the case must be decided upon the evidence of the witnesses, who support the verdict. The judgment should be affirmed, with costs. All concur.

In re OCKERSHAUSEN'S ESTATE.

(Supreme Court, General Term, Second Department. July 18, 1890.)

EXECUTORS AND ADMINISTRATORS—ORDER OF DISTRIBUTION.

An order for a partial distribution and the conveyance of land to the heirs will not be disturbed because made during the pendency of the executor's accounting and an action against him for the same object when sufficient funds are left in his hands to pay all liabilities.

Appeal from surrogate's court. Richmond county.

An appeal by George P. Ockershausen, executor of the late Adolphus F. Ockershausen, from an order, made on the petition of Henry A. Ockershausen, directing him to make partial distribution, and to convey land to the heirs of his testator.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Woodward & Buckley, for appellant. Wm. M. Mullen, for respondent.

BARNARD, P. J. George P. Ockershausen was appointed executor of deceased on the 12th of May, 1877. In August, 1879, one of the children of testator petitioned for an accounting before the surrogate of Richmond county, where testator resided before and at the time of his death. The executor thereupon asked for a final accounting. On the 18th of October, 1879, at the return of the executor's citation, he filed his accounts with the surrogate. Henry A. Ockershausen, who had originally asked for an accounting, filed objection, and the issue was sent to an auditor, and is still pending. Two supplemental accounts have been since filed by the executor, and the same heir has made objections to them, and they are still pending before a referee. On the 19th of September, 1889, Henry A. Ockershausen brought an action in the supreme court against the executor for an accounting, and also against him as surviving partner of Ockershausen Bros. This action is at issue and undetermined. In August, 1889, the contestant applied upon motion before the surrogate of Richmond county to obtain an order of distribution of the estate, and this order was granted so far as to order the distribution of \$6,000 and the conveyance of a piece of land to and among the heirs of deceased. This application was based in part upon a record and proceedings in the matter of the same estate mentioned in March, 1889, which is not returned with the papers. A partial distribution was then made, and the allegation that the executor showed by his accounts that he had from \$12,000 to \$15,000, without a claim upon it beyond a couple of thousand dollars, must be referred to this account, and must be deemed to be supported by it. Sections 2717, 2718. Code, give power to the surrogate to make the order. The remedy which a distributee has under these sections is not within the principle that two proceedings are pending for the same thing, and that the first in time is first in right. The partial distribution can be made while the contest over items which affect the general settlements is going on. The surrogate will not order a distribution so as to make the executor liable for the same money upon final accounting. If the facts are stated correctly in the papers, the surrogate left more than enough in the executor's hands to cover all liabilities. The order should be affirmed, with costs and disbursements. All concur.

LINTON v. UNEXCELLED FIRE-WORKS CO.

(Supreme Court, General Term, Second Department. July 18, 1890.)

1. MASTER AND SERVANT—WRONGFUL DISCHARGE.

In an action for the wrongful discharge of plaintiff as superintendent of defendant's fire-works factories, where it was claimed the plaintiff was unfaithful, and had appropriated and given away defendant's property, it was shown that plaintiff gave some fire-works to the fireman of an engine company. Held, that proof of a custom to do this was properly admitted.

2. SAME.

It was also proper to prove by plaintiff that the defendant's manager had never objected to his fidelity.

Appeal from circuit court, Kings county.

Action by Charles B. Linton against the Unexcelled Fire-Works Company. There was a verdict for plaintiff for \$8,867, and from the judgment entered thereon defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Hatch & Warren, for appellant. *William J. Gaynor*, for respondent.

BARNARD, P. J. The defendant agreed in writing to have the plaintiff as superintendent of its factories, from July 18, 1887, to the first day of January, 1890, at the yearly compensation of \$4,000 a year. On the 6th of February, 1889, the defendant discharged the plaintiff, and this action was brought to recover for a breach of this contract. The defendant in its answer gave many reasons for the discharge: The plaintiff was unfaithful. He appropriated to his own use the defendant's property. He gave away the defendant's manufactured articles. He used the defendant's employees to do work for himself. He disobeyed orders. He engaged in other business. These questions of fact were sharply contested on the trial, and the finding of the jury cannot be set aside if no error was committed upon the trial. It was proven on the trial that the plaintiff gave some fire-works to the fireman of a fire-engine company. The proof of a custom to do so was objected to, and its admission is urged as error. Similar proof as to an adjoining foreman had been received without objection, and this evidence as to the gift to the fireman was under the direction, or at least with the assent, of the manager of the works. It was not a question of any importance whether one Gillitard removed property to fix his piazza, and the evidence was properly rejected. It was proper to prove by the plaintiff that the manager had never objected to the plaintiff's fidelity. Proof was given that certain of plaintiff's acts were wrong. The plaintiff and the manager seem to be at variance in their testimony. It was, under these circumstances, proper to show that no communication was ever made to plaintiff as bearing upon the existence of the facts out of which the charge of infidelity to the engagement upon plaintiff's part is based. While the rule is strictly adhered to that the verdict of a jury is final as to disputed questions of fact, there is no reason in the case to show that the finding is not right. The discharge was sudden, and was made without any substantial reason, so far as the defendant then knew. The conflict has been made upon alleged discoveries since the discharge. Many of these are trifling. A gift to a fireman and a fire-company, for the benefit of the company, of a few fire-works. A taking of property without value. An effort to show that the plaintiff's son's business was his own. An employee is permitted to stay the day out on which she was discharged. These are the principal questions given to the jury. If the formula belonged to the plaintiff it was a secret of his own; otherwise it was public to all, and the plaintiff should have given it up. The question went to the jury on this theory without objection, and there is no reason to question the finding. Some were denied. Some were done with defendant's assent. Some fell from their unimportance, where there was no intention to do wrong. The judgment should therefore be affirmed, with costs. All concur.

WILLIAMS v. BROOKLYN EL. R. CO.

(Supreme Court, General Term, Second Department. July 18, 1890.)

1. ELEVATED RAILROADS—INJURIES TO ABUTTERS—DAMAGES.

In an action for damages to abutting property, caused by the construction and operation of an elevated railroad, the obstruction of the street, while the road was being built, is a proper item of damage.

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2. SAME—EVIDENCE.

In such case it was not error to prove the effects of the railroad on the street as manifested by a storm which happened after the commencement of the action, the fact proven not being a basis of recovery, but merely evidence in support of the injury done to the street by defendant's structure.

3. SAME—OPINION OF COURT OF APPEALS.

In such action the reading by plaintiff's counsel of an opinion of the court of appeals in a similar case as to what was to be included within the right to recover, was not erroneous.

4. SAME—NEWSPAPER ARTICLES.

A verdict for plaintiff in such case will not be disturbed because counsel read to the jury an article from a newspaper in respect to the violation by corporations of the rights of persons, where the article in question was not in respect to defendant, did not refer to elevated railroad companies, and was not offered in evidence, and where the substance of the article could properly have been stated by counsel in summing up.

Appeal from circuit court, Kings county.

Action commenced by Margaret Williams to recover for loss of rent of her houses in Grand avenue, Brooklyn, caused by the erection and operation of the Brooklyn Elevated Railroad. Plaintiff having died, her executor, Patrick Williams, was substituted as plaintiff. There was a verdict for \$6,875, and from the judgment entered thereon defendant appeals.

Argued before BARNARD, P. J., and DYKMAN, J.

Hoadly, Lauterbach & Johnson, (W. N. Cohen, of counsel,) for appellant. B. F. Tracy, for respondent.

BARNARD, P. J. The plaintiff's testator, at the time of the construction of the defendant's elevated railroad, on Grand avenue, was the owner of 16 houses fronting on the avenue. She brought an action for injury alleged to have been done to her property, and recovered a judgment by the verdict of a jury. The company appealed. The right of action to an abutting owner for damages sustained by reason of the diversion of a street from the use for which it was originally taken, was established by the court of appeals in the case of *Lahr v. Railway Co.*, 104 N. Y. 268, 10 N. E. Rep. 528. The plaintiff fully proved her case. Several witnesses testified to a large loss in rental value by reason of the construction of the railroad. The reason for the diminution in rental value was proven. The light was obstructed as to some of the houses, including the plaintiff's houses, and there was a great annoyance from gas, noise, and smoke. The defendant produced evidence in contradiction of the allegation of the plaintiff and her witnesses. Upon this testimony the jury found a verdict in favor of the plaintiff for \$6,875. The verdict was moderate under the evidence, and the verdict should stand unless some legal right of the defendant was violated upon the trial. The plaintiff's counsel read an article from a newspaper in respect to the violation of the rights of persons by corporations. The article in question was not in respect to the defendant's railroad. It did not refer to elevated railroads in any particular. It was neither offered in evidence nor rejected. The substance of the article could without any offense have been stated by the advocate in summing up the case. The case does not show as to what the article was pertinent by way of answer to the summing up of defendant's counsel. It is seldom, if ever, on an important, severely contested trial, that the speech of either counsel will bear a close scrutiny, upon the theory that every word or part of it should be addressed to the case, and be based upon the evidence. Freedom of advocacy means something beyond this, and it will be a severe rule which reverses a judgment for every idle word of counsel spoken to the jury on the trial. The reading of the opinion of the court of appeals¹ by plaintiff's counsel was not erroneous. The opinion was the expression of the decision of the court of last resort as to the rights of plaintiff to recover, and

¹ *Lahr v. Railway Co.*, 10 N. E. Rep. 528.

as to what was to be included within the rights. If an expression addressed to the facts of that case was included, no harm was done thereby to this case, which had no such fact. The particular clause of the opinion had sole reference to a system which took the property of another owner without compensation. There is nothing in the charge of the judge which will bear the construction that the jury could give damages for a road to be constructed in the future. They were limited to the actual damages sustained as proven on the trial. The obstruction of the street while building the road was stated by the judge to be an item of damage. The cars did not begin to pass over the road until 1885. The defendant began a construction of the road in 1879. The charge had reference only to the damages caused while building, and after the road was completed. The cause of action did not depend upon a completed road. All which was caused by constructing it was as well within the principle of compensation as that which followed the full construction and operation of the road. Proof was given on the trial tending to show that the plaintiff's property could not be rented by reason of the defendant's railroad. The trial judge charged that an absolute loss of rent was to be allowed to her, if proven, as well as a mere diminution. The request to add to and modify this statement was properly denied. It was plainly made, and was complete in itself. If the railroad occasioned a total loss of rent, it was to be allowed. The jury were to pass upon the evidence in support of the claim in this respect. The jury had no duty in reference to the question whether the railroad was a diversion of the street. That question has been settled as matter of law in the case above cited, which gave the plaintiff therein a right of recovery. The jury could say that it was of no damage to a particular owner, if such was the fact. It was not erroneous to prove the effects of the railroad upon the street as manifested by a storm which happened subsequent to the commencement of the action. The fact proven was not a basis for recovery in itself, but was merely evidence in support of the injury done to the street by the defendant's structure. If the evidence was proper, the admission of the photograph was proper. It was the best evidence of the fact sought to be proven. It was not necessary to have also a photograph of the road as it was before the storm. There appearing no exception sufficient to reverse the judgment, it should therefore be affirmed, with costs.

NOSTRAND v. DITMIS *et al.*

(*Supreme Court, General Term, Second Department. July 18, 1890.*)

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE.

Where a husband assumes the possession and control of his wife's separate estate, and collects the rents and income thereof, his estate will be held liable for moneys so collected and improperly expended by him for his own benefit.

Appeal from special term, Queens county.

A proceeding to determine the validity of a claim made by Margaret T. Johnson against the estate of her husband, Martin G. Johnson, and referred under the statute, tried before a referee, who reported in favor of the claim. The executors appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

William J. Sayres, (D. W. Northrup, of counsel,) for appellant. *Michael Furst,* for respondent.

DYKMAN, J. Margaret T. Johnson was the wife of Martin G. Johnson, and after his death she presented a claim to his executors against his estate, which was disputed and referred to a referee under the statute, and the referee made a report in favor of the claimant, upon which a judgment has been entered, and from which the defendants have appealed to this court. The claim

was for money collected from time to time, during many years, by the husband, and improperly expended by him for his own benefit. Mrs. Johnson at the time of her marriage had a separate estate consisting of both real and personal property, which she retained during all the period of her married life. Immediately after her marriage her husband assumed the possession and control of her property, and collected the rents and income thereof down to the time of his death. He kept accounts in which he charged himself with the money he received from time to time, and credited himself with such disbursements as he claimed should be paid out of the money of his wife. Most of the charges for money so paid out were improper, and for disbursements made by Johnson for himself, and which he could not legally charge against his wife, and the referee found that of the money so received by Johnson he retained and never paid over to the claimant the sum of \$7,814.83, the amount of the items which were so improperly charged. The referee further found that Johnson was a trustee of the property of his wife, and liable as such for the income therefrom which came into his hands, and that the sum above named which he did not pay over to her was improperly retained. The referee also found that the statute of limitations had not run against any part of the account from September, 1869, to January, 1887, except two items, which he deducted. The findings and conclusion of the referee are fully sustained by the evidence, and we concur in both. We have examined all the exceptions in the record, and they present no error. The judgment should therefore be affirmed, with costs. All concur.

BECK *et al.* v. PINKNEY.

(Supreme Court, General Term, First Department. July 18, 1890.)

SPECIFIC PERFORMANCE—CONDITION OF CONTRACT.

A land-owner, whom one B. had sued for specific performance of a contract to sell the land, agreed that when that suit should be determined in her favor, she would sell the land to plaintiffs. Pending an appeal in his action, B. agreed with plaintiffs that in the event of a decision in his favor, he would proceed for damages only, and would relinquish all claim to the land itself. *Held*, that the owner was not bound to accept this as equivalent to a final decision in her favor, and plaintiffs are not entitled to specific performance of their contract.

Appeal from special term, New York county.

Action by Frederick Beck and Charles E. Runk against Mary G. Pinkney for specific performance. There was judgment for the defendant, and the plaintiffs appeal. The opinion of Mr. Justice INGRAHAM, filed at special term, was as follows:

"This action is brought for the specific performance of a contract for the sale of a block of land in the city of New York. The contract was dated October 20, 1886, and was to be performed on the 20th of November, 1886. Prior to that time, one Baumann had commenced an action against the defendant for the specific performance of a contract made by the defendant to sell to him the same premises, and had filed a notice of the pendency of that action. The plaintiffs therefore refused to accept title on the ground of the existence of that action, and the time for the defendant to perform her agreement with the plaintiffs was extended from time to time, until the 26th of March, 1887. And prior to this time the action of Bauman against Pinkney had been tried, and judgment entered in favor of the defendant. An appeal from that judgment had been taken by Bauman, and an order had been obtained staying all proceedings for the canceling or discharging the *lis pendens* of record pending the appeal, and the right of the defendant to sell or dispose of the real estate mentioned in the complaint in that action was suspended. On the 26th of March, 1887, the parties to this action made a new agreement, whereby the defendant agreed to convey to the plaintiffs an adjoining block of land, which agreement was subsequently carried

out. As part of that contract it was agreed to extend from time to time the closing of the title under the contract of the 20th of October, 1886, until the final termination of the controversy between the defendant and Baumann, and in the event the said litigation should be terminated in favor of the said Mary G. Pinkney, so that she can convey the said block of land free and clear from said claim, and the lien of said *lis pendens*, then the parties would close said title as provided in said contract of October 20, 1886, except that the said parties of the second part were to take said property subject to all taxes and assessments levied or imposed on said property thereafter. The judgment in the Baumann action was on the 8th of June, 1887, affirmed by the general term, and from the judgment of affirmance the said Baumann appealed to the court of appeals, and such appeal is still pending in said court, undetermined. That subsequent thereto an order was granted upon application of Baumann, that upon filing a bond in the sum of \$40,000, all proceedings on the part of the defendant to sell or dispose of the said property were stayed until the determination of the appeal to the court of appeals, and the entry of the order of judgment thereon, and provided that the right of the defendant under section 1323 of the Code, to sell or dispose of the real estate mentioned in the complaint, be suspended. The time for the completion of the contract of October 20, 1886, was from time to time extended until the 28th of December, when the plaintiffs offered to deliver to the defendant a consent signed by Baumann and his attorney that the *lis pendens* filed in the action of Baumann against Pinkney be canceled and discharged of record; and also an agreement made between Baumann and the plaintiffs in this action, reciting the action brought by Baumann against the defendant and the judgment therein, and the appeal to the court of appeals; and that it was Baumann's intention, in case the judgment should be reversed, to limit his remedy to a claim for damages against the defendant, and not to make or assert any claim against the above-described property, but to relieve the said property from such claim, and to consent to a conveyance of the said property by the said Mary G. Pinkney to the plaintiffs, and providing that in consideration of \$5,000 to him paid by the plaintiffs, that said Baumann did acquiesce in the delivery of a deed of the premises of the plaintiffs with the understanding and acquiescence that if the said judgment should be reversed, his remedy would be limited to a claim for damages against the said Mary G. Pinkney, and contained a covenant that the said Baumann would forever warrant and defend the title of the plaintiffs against any claim or demand to the said land, by any person claiming through him.

"The main question in this case is whether the litigation between Baumann and the defendant has been determined in her favor, so that she can convey the said block of land free and clear from Baumann's claim, and from the lien of the *lis pendens*. Until that event happened, the defendant was under no obligation to carry out the contract of October 20, 1886. It is clear that the letter of the agreement has not been complied with, the litigation is not determined, the *lis pendens* is not canceled. No agreement has been made as between the defendant and Baumann withdrawing his claim upon the property. The agreement between Baumann and the plaintiff was not made for the benefit of the defendant, nor on her behalf. The defendant was not bound by her contract with the plaintiffs to carry into effect an agreement between plaintiffs and Baumann to which she was not a party, and made without her consent. Her agreement was that upon the official determination of the litigation between herself and Baumann in her favor, so that she could convey the property free and clear from Baumann's claim, she would then convey, and before plaintiffs are entitled to a conveyance, they must establish that such litigation is terminated in her favor. The defendant is undoubtedly bound in good faith to prosecute that litigation in the regular and orderly course, but that obligation does not require her to adopt a course

which, while the defendant might be successful, might expose her to risk. In the Baumann suit she has two bonds to indemnify her for any damage which she may sustain by reason of her being unable to convey the property. The sureties on those bonds have not consented to this arrangement, and she is under no obligation to adopt a course that might have the effect of discharging these sureties. If the plaintiffs desired a conveyance of the property before the litigation was finally determined by the decision of the court of appeals, they were bound to procure in some way a determination of the appeal, so that the defendant could be protected. That, they have failed to do. Nor do I think that the defendant could convey the property until the order of the court of common pleas is vacated. That order expressly provides that all proceedings on the part of the defendant to sell or dispose of the property are hereby stayed until the determination of the said appeal by the court of appeals, and the entry of the order and judgment thereon. No order or judgment of the court of appeals on the appeal has been entered. On a consideration of the whole agreement between the parties, I do not think the plaintiffs have shown themselves entitled to a conveyance of the property. The evidence would not justify a judgment that the contract is at an end. The agreement itself provided that the time for the completion of the contract of October 20, 1886, should be extended from time to time until the determination of the controversy between the defendant and Baumann, and a mere refusal to consent to such an extension was not of itself such a breach of the contract as would relieve the defendant from its obligations. On the whole case, I think the defendant is entitled to judgment dismissing the complaint, with costs."

Argued before VAN BRUNT, P. J., and BARRETT and BARTLETT, JJ.
Samuel Untermyer, for appellants. *John C. Shaw*, for respondent.

BARTLETT, J. The reasons given by INGRAHAM, J., at special term, for refusing to enforce a specific performance of the defendant's contract until the final determination of the litigation between the defendant and Oscar Baumann, are so fully stated and so satisfactory that it is necessary to add very little, if anything, to what was said by the court below in disposing of this action. We may suggest, however, that to allow the plaintiffs to prevail, while the litigation with Baumann is still pending, would be not to enforce the contract which was actually entered into between the parties to this suit but to make a new contract for them. According to the express terms of their agreement, the time for closing the title is to be adjourned until the final determination of the controversy between the defendant and Baumann; and that the controversy thus referred to means the suit of Baumann against this defendant is apparent from the further provision in the contract, that she was only to convey to the plaintiffs in the event that "the said litigation" should be determined in her favor. The said litigation being undetermined, and there being no suggestion that the defendant has done anything to prevent a timely decision thereof, there is no basis for the claim that she has violated either the letter or the spirit of her contract. The fact that the plaintiffs think that the arrangement they have made with Baumann leaves the defendant in just as good a position as she would occupy if the litigation had been determined, is not conclusive in any manner upon her. I cannot see why, under any rule of law or equity, she should be compelled to convey the property, which is the subject-matter of this suit, until the contingency occurs upon which she undertook to convey it. The judgment should be affirmed.

All concur.

SCHUCK v. SHOOK.

*(Supreme Court, Special Term, Niagara County. April 12, 1890.)***WILLS—CONSTRUCTION—AFTER-ACQUIRED PROPERTY.**

Testator devised a tract of land to his widow, "being all the real estate I am now seised and possessed of; also all my personal property, horses, cattle, wagons, harness, farm tools, grain, hay, and oats, mortgages and money—about \$2,100—I am now possessed of, or may die possessed of; also household furniture, bed, bedding, etc., etc., whatsoever I may die possessed of; to have and to hold, first erecting me a monument to cost not less than \$50." After making the will, testator purchased land with part of the personalty which he had bequeathed to his widow. He left no children. The income of his estate was barely sufficient to support his widow. *Held*, that the widow took the land acquired by testator after he had made his will.

Ejectment by Etta Schuck against Dora P. Shook. Plaintiff demurs to the answer on the ground that it does not state facts sufficient to constitute a defense.

M. L. Burrell, for plaintiff. *Hickey & Hopkins*, for defendant.

LEWIS, J. Jonathan Shook, who was the defendant's husband, and the paternal uncle of the plaintiff, in the year 1882 made his will. He died in 1883, leaving him surviving the defendant, his widow, no children or descendants of children, nor father nor mother, but left him surviving seven brothers and sisters, or the descendants of brothers or sisters. That portion of the will material to the questions involved in this demurrer is as follows: "I, Jonathan Shook, * * * being desirous of making an equitable and proper disposition of my property at my decease, do make, ordain, and publish, etc.: *First*. After all my legal debts are paid and settled satisfactory to my executors, I give and by these presents do bequeath to my beloved wife, Dora Palmer Shook, four acres of land situated on the home farm, east of the barn, where I now live, on the Mountain road, so-called, between Lockport and Pekin; said land being all the real estate I now am seised and possessed of; also all my personal property, horses, cattle, wagons, harness, farm tools, grain, hay, and oats, mortgages and money—about \$2,100—I am now possessed of, or may die possessed of; also household furniture, bed, bedding, etc., etc., whatsoever I may die possessed of; to have and to hold, first erecting me a monument to not cost less than fifty dollars, to be erected under the direction of my executors. In the event of my wife dying before me, my property and estate will be used in accordance with the provisions of my last will and testament, or by the statute of this state." After the execution of his will the testator purchased 30 acres of land in the county of Niagara, paying therefor with the personal property, stated in his will as being of the value of \$2,100. It is claimed by the plaintiff that, as to the 30 acres, the testator died intestate; that plaintiff's father, John Shook, who was a brother and heir at law of the testator, inherited an interest in the 30 acres, and the plaintiff, by virtue of the will of John Shook, became the owner of the undivided one forty-second part of the 30 acres; and she brings ejectment to obtain possession thereof from the defendant. The defendant claims title to the 30 acres under the will of her husband, the testator. The plaintiff demurs to the answer on the ground that it is insufficient in law to make out a defense. The question, therefore, presented is, did this after-acquired land pass to the defendant under the will of her husband? If so, the demurrer should be overruled.

The testator left an estate of small value. The income of it would be barely sufficient to support his widow by the strictest and most careful economy on her part. He saw fit, after making his will, to convert the personal property which he had devoted to the support of his wife into this land; and, if he intended thereby that she should have simply the widow's dower in the land, he made a serious inroad upon her means of support. It is clear that

at the time of making his will he intended that his widow should have all there should be left of his estate after paying his debts, the expenses of administering his estate, and the cost of a monument. Nothing thereafter occurred showing his intention to change this purpose, unless it be the converting of the personal property into real estate. It being apparent that it was the testator's purpose at the time of making his will to dispose of his entire estate, the will should be construed, if possible, so as to prevent intestacy as to any part of his property. *Lent v. Lent*, 24 Hun, 436; *Jackson v. Merrill*, 6 Johns. 185. From the phraseology of the will it is quite apparent it was drawn by some person unaccustomed to preparing such instruments. It is bunglingly and inartistically drawn, and still the desire of the testator that his widow should enjoy his entire estate after paying debts, etc., is quite clear. In *Thurber v. Chambers*, 66 N. Y. 42, Chief Justice CHURCH said that "it is a general rule that provisions in a will, intended for the support of the wife, will receive the most favorable construction to accomplish the purpose intended." The doctrine at one time prevailed that, as between the wife and heir, the will should be construed favorably to the latter, upon the theory that the ordinary testator would be likely to prefer the heir. But the reason for such a rule does not now obtain. The position of the wife in the family and in society has materially improved. She is now esteemed as the equal of the husband, and as competent to manage and control property. She no longer occupies the inferior position that she did in former years; and the rule, as suggested by Judge CHURCH, is in keeping with the present relations of families, and, as between the heir and the widow, the will should be construed favorably to the widow. "Where, upon examination of a will taken as a whole, the intention of the testator appears clear, but its plain and definite purposes are endangered by inapt or inaccurate modes of expression, the court may, and it is its duty to, subordinate the language to the intention. It may reject words and limitations, supply or transpose them, to get at the correct meaning." *Phillips v. Davies*, 92 N. Y. 199. We have seen that the testator, in the introductory clause of his will, states that he is "desirous of making an equitable and proper disposition" of his property at his decease; showing clearly an intention to dispose, by his will, of all of his property. This may be considered in arriving at the intention of the testator. *Charter v. Otis*, 41 Barb. 525. He further says: "After all my legal debts are paid and settled satisfactory to my executors, I give, and by these presents do bequeath, to my beloved wife," etc.; showing that he contemplated disposing of the estate that he should own at the time of his death. He then enumerates all of the property which he then possessed, consisting of the four acres of land, which he describes as all the land he then owns, personal property of the value of \$2,100, and his household furniture, and then uses the comprehensive phrase: "Whatsoever I may die possessed of; to have and to hold, first erecting me a monument," etc. This sentence, if a grammatical construction is to be given to the will, would probably be held to refer to the sentence immediately preceding it, "also household furniture," etc. But grammatical rules, while important in arriving at the meaning of written instruments, must not be allowed to interfere with the evident intention of the writer. The word "whatsoever" has a very broad and comprehensive meaning. Among other definitions given to the word by Webster are "one thing or another," and "anything that may be," etc., sufficiently broad to cover both real and personal property; anything, in fact, in the way of property; and must be held in this case, I think, to include lands. The will contemplates the contingency of the wife dying before the testator. In that event, he says, "my property and estate will be used in accordance with the provisions of my last will and testament, or by the statute of this state." While it is somewhat difficult to see what the testator meant by the expression "will be used in accordance with the provisions of my last will and testament," I think he

intended to secure the erection of a monument, and that then his property should pass as provided by the statutes of the state. His not providing for any residuary legatees would lead to the inference that he intended, if his wife survived him, that she should take the entire estate as it existed at the time of his death. I cannot bring my mind to believe that the testator intended that his wife should have simply a dower interest in the 80 acres of land, and that it should be divided among his heirs, none of whom would receive a sufficient amount in value to be of any especial use to them. The will clearly states that it is his intention to devise his entire real estate. It is provided by section 5, art. 1, tit. 1, c. 6, 2 Rev. St., relating to wills of real estate, that "every will that shall be made by a testator in express terms of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death." A careful reading of the whole will leads my mind to the conclusion that he intended that the entire estate at the time of his death should pass to his widow for her support, and the demurrer must therefore be overruled, with costs against the plaintiff. So ordered.

CORNING v. ROOSEVELT.

(*Supreme Court, Special Term, New York County. March 31, 1890.*)

PRACTICE IN CIVIL CASES—EXTENSION OF TIME TO ANSWER.

Gen. Rule Prac. N. Y. No. 24, provides that an extension of time to answer shall not be granted unless the party shall present to the judge an affidavit of merits. Code Civil Proc. N. Y. § 783, provides that the affidavit on which an extension of time to answer is granted, or a copy thereof, must be served with a copy of the order. Defendant made an affidavit of merits, and his attorney made an affidavit, which was served on plaintiff's attorney, stating the facts, and asking an extension, which was granted. The affidavit of merits was not served with the order granting the extension and the other affidavit. *Held*, that plaintiff properly disregarded the order granting the extension, and entered judgment by default.

At chambers. Action by Frederick G. Corning against Samuel L. Roosevelt. Defendant's time to answer was twice extended by consent after service of the summons and complaint. At the expiration of the second extension defendant made an affidavit of merits and filed it in the clerk's office, but failed to serve a copy on plaintiff. Defendant's attorney made an affidavit, which was served on plaintiff's attorney, stating the facts, and asking an order for a further extension of time, which was granted. Plaintiff afterwards disregarded this order, and entered judgment as by default. Defendant now moves to vacate the judgment and the execution thereon.

Code Civil Proc. N. Y. §§ 780-782, are as follows: "Sec. 780. Where special provision is not otherwise made by law or by the general rules of practice, if notice of a motion or of any other proceeding in an action before a court or a judge is necessary, it must, if personally served, be served at least eight days before the time appointed for the hearing unless the court, or a judge thereof, upon an affidavit showing grounds therefor, makes an order to show cause why the application should not be granted, and in the order directs that service thereof less than eight days before it is returnable be sufficient. Sec. 781. Where the time within which a proceeding in an action after its commencement must be taken has begun to run, and has not expired, it may be enlarged, upon an affidavit showing grounds therefor, by the court, or by a judge authorized to make an order in the action. Sec. 782. In a case specified in the last two sections, the affidavit upon which the order was granted, or a copy thereof, must be served with a copy of the order; otherwise, the order may be disregarded." Gen. Rule Prac. N. Y. No. 24, is as follows: "No order extending defendant's time to answer or demur shall be granted, unless the party applying for such order shall present to the justice or judge to whom the application shall be made an affidavit of merits, or

proof that it has been filed, or an affidavit of the attorney or counsel retained to defend the action, that, from the statement of the case in the action made to him by the defendant, he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof. And the affidavit shall state whether any and what extension or extensions of time to answer or demur have been granted by stipulation or order, and where any extension has been had the date of issue shall be twenty days after the service of the complaint."

D. J. M. O'Callaghan, for plaintiff. *Davison & Chapman*, for defendant.

ANDREWS, J. As no copy of the affidavit of merits was served, plaintiff has the right to disregard it. Code Civil Proc. § 782; Rule 24. The judgment was heretofore regularly entered, and the defendant is in default. Such default will be opened so far as to permit a defense of the action upon payment of plaintiff's costs and disbursements; the answer to be served within 10 days, and the judgment to stand as security. The order will be settled on notice.

PENDERGAST v. DEMPSEY.

(Supreme Court, Special Term, New York County. April 10, 1890.)

EXECUTION—SUPPLEMENTARY PROCEEDINGS—CORPORATIONS.

A corporation which has been summoned in supplementary proceedings to disclose any indebtedness from it to the judgment debtor may be required by *subpoena duces tecum* served on the proper officer to produce its books and papers to be used on the examination.

At chambers. Action by Charles H. Pendergast against John Dempsey. Plaintiff having obtained a judgment, and execution having been returned unsatisfied, supplementary proceedings were instituted, a *subpoena duces tecum* addressed to Dempsey & Carroll, a corporation, with which defendant appeared to have had dealings, and a subpoena, were served on Charles A. Richardson, the secretary of the company, in order to obtain certain disclosures. Dempsey & Carroll now moves to vacate the *subpoena duces tecum*, which motion plaintiff resists by an affidavit that he believes that the books and papers of the company contain information which is necessary for the prosecution of plaintiff's proceeding. Code Civil Proc. §§ 2441, 2442, referred to in the opinion, are as follows: "Sec. 2441. Upon proof by affidavit or other competent written evidence, to the satisfaction of the judge, that an execution against property has been issued, as prescribed in section 2458 of this act, and either that it has been returned wholly or partly unsatisfied, or that it has not been returned; and also that any person or corporation has personal property of the judgment debtor exceeding ten dollars in value, or is indebted to him in a sum exceeding ten dollars,—the judgment creditor is entitled to an order requiring that person or corporation to attend and be examined concerning the debt or other property, at a time and place specified in the order. The judge may, in his discretion, require notice of the subsequent proceedings to be given to the judgment debtor in such a manner as he deems just; but a receiver shall not be appointed without such a notice, except as otherwise prescribed in article second of this title. Sec. 2442. An order requiring a person to attend and be examined, made pursuant to any provision of this article, must require him so to attend and be examined either before the judge to whom the order is returnable or before a referee designated therein. Where the examination is taken before a referee, he must certify, to the judge to whom the order is returnable, all the evidence and the other proceedings taken before him."

The cases of *Semmes v. Noel* and *Pendergast v. Dempsey*, cited in the opinion, are as follows:

Semmes v. Noel. In this case the judgment creditor in supplementary proceedings procured the issuance of a *subpoena duces tecum* to the officer of a corporation, in order that he might be examined as a witness, and produce the books and papers of the company. This was objected to by the judgment debtor. The matter was heard at chambers, (supreme court, New York county,) and the following decision was filed on March 29, 1886: "LAWRENCE, J. The learned counsel for the plaintiff is, I think, entirely right in his contention that section 2444 of the Code of Civil Procedure removes any doubt as to the power of the judge to direct the production of the books and papers called for by the subpoena. The section provided that either party may be examined as a witness in his own behalf, and may produce and examine other witnesses, as upon the trial of an action. By section 868 of the Code the production upon a trial of a book or paper belonging to or under the control of a corporation may be compelled in like manner as if it was in the hands of or under the control of a natural person, etc. Section 2463 of the Code does not apply, for the reason that these proceedings are instituted against an individual. The objections must therefore be overruled, and the examination proceed."

Pendergast v. Dempsey. This was a decision at chambers of the supreme court, New York county, filed April 5, 1886, on a motion to vacate an order in supplementary proceedings directing the production of the books and papers of a corporation. The following memorandum was filed: "LAWRENCE, J. The motion to vacate the order heretofore granted herein must be denied, with costs. See my memorandum in the case of *Semmes v. Noel*, Daily Reg. March 30, 1886."

John McCrone, for plaintiff. *Abram Kling*, for Dempsey & Carroll.

ANDREWS, J. The question whether a corporation examined through one of its officers, pursuant to sections 2441 and 2442 of the Code, can be compelled to produce its books and papers upon such examination, does not appear to have been passed upon by the appellate courts. There are several special term decisions, however, holding that such production can be compelled. *Holmes v. Stiets*, 6 Civil Proc. R. 362; *Semmes v. Noel*, Daily Reg. March 30, 1886; *Pendergast v. Dempsey*, April 6, 1886. Upon the authority of these cases, the motion to vacate the order will be denied.

PERINE v. WIGGINS *et al.*

(Supreme Court, Special Term, New York County. March 24, 1890.)

COSTS—TRIAL FEE—OFFER OF JUDGMENT.

Code Civil Proc. N. Y. § 783, provides that defendant may before trial serve a written offer of judgment on plaintiff's attorney, which plaintiff may accept, and enter judgment within 10 days thereafter. Section 740 provides that, unless the offer of judgment is signed by the party making it, his attorney must annex his affidavit that he is duly authorized to make it in behalf of the party. After a cause had been noticed for trial, and less than 10 days before it was reached, defendant's attorney served a notice that he withdrew the answer, but the affidavit required by section 740 was not annexed thereto. *Held*, that such notice was not sufficient as an offer of judgment, and plaintiff, having taken an inquest on defendant's failure to appear, was entitled to tax a trial fee in his bill of costs.

At chambers. Action by Mary E. Perine against Charles B. Hall as drawer, and Edwin R. Wiggins as indorser, of a draft. Defendant Wiggins alone answered, and issue was joined thereon. After the cause had been noticed for trial, the attorney for the answering defendant served a notice on plaintiff that he withdrew his answer. Afterwards, on the day on which the cause was noticed for trial, defendants failed to appear, and an inquest was had against them. The clerk struck out of plaintiff's bill of costs the items of \$30 for the trial fee on an issue of fact, and \$1 for the clerk's trial fee. Plaintiff now moves for a relaxation. The sections of the Code of Civil Procedure cited in the opinion are as follows:

"Sec. 738. The defendant may, before the trial, serve upon the plaintiff's attorney a written offer to allow judgment to be taken against him for a sum or property, or to the effect, therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken. If the plaintiff, within ten days thereafter, serves upon the defendant's attorney a written notice that he accepts the offer, he may file the summons, complaint, and offer, with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If notice of acceptance is not thus given, the offer cannot be given in evidence upon the trial; but, if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time." "Sec. 740. Unless an offer or an acceptance, made as prescribed in either of the last four sections, is subscribed by the party making it, his attorney must subscribe it, and annex thereto his affidavit to the effect that he is duly authorized to make it in behalf of the party."

Wilder, Wilder & Lynch, (William J. Lynch, of counsel,) for plaintiff. Stanley, Clarke & Smith, for defendant Wiggins.

ANDREWS, J. The notice cannot be regarded as sufficient offer of judgment under section 738 of the Code, for the reason that no affidavit was annexed, as required by section 740. *Riggs v. Waydell*, 78 N. Y. 586. Besides, it was of no avail as such an offer, because not made more than 10 days before the trial. *Herman v. Lyons*, 10 Hun, 111. There does not appear to be any provision of the Code authorizing the withdrawal of an answer except in connection with an offer of judgment. Under section 740 I think the trial fee of \$30 and the clerk's trial fee of \$1 should have been allowed by the clerk. Motion granted, without costs.

PEOPLE *ex rel.* WESTERN UNION TEL. CO. v. TERNEY *et al.*, Assessors.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

1. CONSTITUTIONAL LAW—TAXATION OF TELEGRAPH LINES.

Laws N. Y. 1886, c. 659, authorizing the taxation in the various towns and wards of the state of the portions of telegraph lines located in such towns and wards, including the interest in the land on which the poles stand, and all poles, insulators, wires, apparatus, etc., is not an interference with the right of the federal government to "regulate commerce among the several states," within Const. U. S. art. 1, § 8, subd. 3, though such lines extend into other states.

2. EVIDENCE—JUDICIAL NOTICE.

Judicial notice will not be taken, on appeal, of the existence or operation of telegraph lines of the relator outside of the state, nor that, under authority of an act of congress, such relator, a private corporation, has entered into certain business relations with the United States.

3. TAXATION—OBJECTIONS TO ASSESSMENT—WAIVER.

Under Laws N. Y. 1880, c. 269, § 1, requiring relator on *certiorari* to a tax assessment to specify in the petition the grounds of the illegality of the tax, the question of whether the assessors swore to the assessment rolls before the right person is waived by failure to make it a ground of the *certiorari*.

Appeal from special term, Rensselaer county.

Certiorari on the relation of the Western Union Telegraph Company against Michael A. Terney and others, assessors of the city of Troy, to review an assessment. From a judgment for defendants, relator appeals.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

King & King, (Wager Swayne and Brown & Wells, of counsel,) for relators and appellants. R. A. Parmenter, for respondents.

MAYHAM, J. We have examined the questions of fact relied upon by the relator to establish the overvaluation or inequality in the assessment com-

plained of on *certiorari* from assessments in Troy for the year 1885, which is substantially like the evidence in this case, and reached the conclusion that the evidence did not justify a reversal of the judgment upon the facts; and we discover no reason for reaching a different conclusion in this case upon the facts on this appeal. *People v. Keator*, 36 Hun, 592. The question raised by the appeal in this case differs from those arising on the *certiorari* for 1885 in two particulars, which require consideration: (1) In this case the relator appeared before the assessors on "grievance day," and objected to the assessment, which was not done, as we hold, in that case; and (2) chapter 659 of the Laws of 1886 modified or changed in some degree the law relating to the assessment of telegraph lines as it had theretofore existed. On the day fixed by the public notice for hearing complaints by persons and corporations claiming to be aggrieved by the assessment of 1886, the relator appeared before them and presented an affidavit in substance that relator's real property in Troy was worth not to exceed \$4,000, and by its attorney requested the assessors to modify such assessment so as to conform to that amount, which they declined to do, and also called attention to the judgment setting aside the assessment of 1883, and ordering a reassessment; but it does not appear that any additional facts were submitted to such assessors. On the trial of this case at special term the same facts were relied upon as in the trial of the *certiorari* of 1885, upon the question of value, and all the other questions except the additional fact of appearance on "grievance day."

It appears that the assessment for 1886 was at \$12,000, or for \$300 more than for the year 1885; but, as we have held in that case, we see no sufficient reason for reversal for overvaluation. It is true that the assessment was slightly increased, but by section 2, c. 659, Laws 1886, in force at the time of the completion of the assessment for that year, "the apparatus, instruments, or other things connected with or used as part of the line in such town or ward," were made liable to assessment as lands; and the proof shows that the relator had in Troy, as apparatus, instruments consisting of relays, sounders, switch-boards, keys, batteries, electric-light protectors, and other apparatus connected with their lines, not estimated in the estimate of value of material and cost of construction, which the evidence shows were in use, and which the trial court might well have regarded as sufficient to justify the small increase in value over the previous year.

Nor were the respondents bound to adopt the statement filed by Brewer with the county treasurer. It was substantially in the same form as the one filed by Peck in 1883, which was held by PROCKHAM, J., not to be in conformity with chapter 597 of the Laws of 1881, under which they purport to have been filed, and that they are therefore null and void, and of no effect in law. That certificate, therefore, furnished no evidence upon which the assessors could legally act.

But it is insisted by the relator that section 2, c. 659, Laws 1886, so far as the assessors acted under or by authority of the same, is in violation of article 1, § 8, of the constitution of the United States, and therefore illegal and void, as it affects interstate commerce, and is therefore subject to the federal jurisdiction. It is conceded that relator is a corporation created under the laws of New York, and there is no proof in this case that its lines extend beyond the limits of the state of New York; but it is insisted that this court should take judicial notice of the fact that the relator conducts an interstate business, and is the agent of the federal government for certain purposes under the act of July 24, 1866, (Rev. St. U. S. §§ 5263-5269.) We have not been cited to any authority holding that the court, on appeal, can take judicial notice of the existence or operation of telegraph lines of the relator, outside of its territorial jurisdiction, without proof of their existence. While there are certain facts of a public nature of which the court may take judicial notice, still we understand the rule to be that they must be of a public

nature, such as the political divisions of the country, public statutes, the *de facto* existence of independent nations, and the existence of a state of war between such nations; but the fact that an act of congress has made it possible for a telegraph company, which is purely a private corporation, created under general laws, by which certain restrictions and limitations are imposed, to, under certain restrictions, establish business relations with the federal government, does not, we think, without proof that such relations have been formed, justify the court in assuming that it extends beyond the limits of the state, and has assumed such relations with the United States as to deprive the state, by which it was created, and within which it is proved to have property liable to taxation, from exercising its taxing powers. It cannot, therefore, be claimed under the evidence in this case that the exercise of the taxing power upon the relator's property in the city of Troy is an interference with the constitutional rights of the federal government to "regulate commerce among the several states," within article 1, § 8, subd. 3, of the federal constitution, especially as there was no finding by the court, or request by the relator of the court to find, that the telegraph extended into other states, and no evidence to establish that proposition. The case of *Loloup v. Port of Mobile*, 127 U. S. 645, 8 Sup. Ct. Rep. 1880, does not seem to be in point on this question. In that case the proof showed that a large part of the relator's business was interstate and international, and the tax imposed seemed to be a license tax, and the question propounded by the court was, "can a state prohibit such company from doing such business unless it will pay a tax and procure a license for such privilege?" And the court answers: "If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that can be done." That is not this case. No license tax is sought to be imposed. The tax purports to be a tax upon the relator's property, and not upon its right to do business; and to hold that a tax upon the property of a corporation within the state, even if we assume that it is connected with lines in other states, was a tax upon interstate commerce, and prohibited by the federal constitution, would, it seems to us, exempt from state taxation many of the great railroads and other corporations within this state, and thus practically exonerate and relieve them from all taxation. It was entirely competent for the legislature to authorize the taxation of lines including the interest in lands on which the poles stand, and all poles, arms, insulators, wires, and apparatus, instruments, or other things connected with or used as a part of such line in the town or ward. Chapter 659, Laws 1886.

Nor do we think this assessment should be set aside or this judgment be reversed because of the official character of the officers before whom the assessors swore to the assessment rolls either in 1885 or 1886 or 1887. It is objected that the commissioner of deeds of the city of Troy, and the justice of the justice's court of Troy, are not officers of the county of Rensselaer, authorized by law to administer oaths. These were officers in the county of Rensselaer, authorized by law to administer oaths. If this was not a technical compliance with the statute, we think the defect was cured in both instances by the relator failing to make the same one of the grounds of the *certiorari*, as section 1, c. 269, Laws 1880, requires the relator in his petition to specify the grounds of the illegality. No such ground having been specified in the petition, we think the point cannot be made on this appeal. On the whole case, we see no error for which the judgment should be reversed.

Judgment affirmed, with costs.

PEOPLE v. MEADE.

(Court of General Sessions, New York County. February, 1890.)

INFANCY—EMPLOYMENT OF CHILDREN—CRIMINAL PROSECUTION.

On an indictment under Pen. Code N. Y. § 292, as amended by Laws 1886, c. 81, which forbids the employment in a theatrical exhibition of children under the age of 16 years, it is sufficient to prove that there was a theatrical exhibition, that defendant employed children under the age of 16 years to perform in it, and that they did perform in such exhibition.

James H. Meade was indicted and convicted for violating Pen. Code N. Y. § 292, as amended by Laws N. Y. 1886, c. 81, which is as follows: "A person who employs or causes to be employed, or who exhibits, uses, or has in custody, or trains for the purpose of the exhibition, use, or employment of, any child apparently or actually under the age of sixteen years, * * * in peddling, singing, or playing upon a musical instrument, or in a theatrical exhibition, or in any wandering occupation, * * * is guilty of a misdemeanor."

FITZGERALD, J., (*charging jury.*) The issues upon which you are to pass as jurors are very narrow, and ought not to occasion much difficulty in determining. It is the duty of the jury to decide all questions of fact. In matters of fact you are supreme. The court has nothing to do with questions of fact. But in questions of law the duty of the court arises, and the court is just as supreme in regard to questions of law as the jurors are in reference to questions of fact; so that, when the court instructs a jury as to the law, it is the duty of the jury to accept the court's instructions as to the law, and then to examine into the facts, and determine from the facts whether the law, as laid down by the court, has or has not been violated. You will readily perceive, gentlemen of the jury, that in any permanent system of government observance of such a rule is vital. Otherwise, one jury might find the law to be one way, and another jury might find it to be the other way, and there would be nothing reliable or permanent about the administration of justice. If the court errs in declaring the law to the jury, the rights of the defendant are amply preserved and protected upon appeal; but, in so far as the jurors are concerned, they would violate their oaths if they should undertake to question in any way the rules of law as laid down by the court for their guidance.

There has been some discussion between counsel as to the policy of this act, and as to the wisdom or power of the legislature in enacting it. Those are matters for certain tribunals. They are not matters for a jury to pass upon. The issue in this case is an exceedingly simple one. I will not cloud your minds by reading the entire act that relates to the misdemeanor with which this defendant at the bar is charged; but I will read to you such portion of the statute as I think it is necessary for you to know, in order that you may determine the issues of fact in this case. The statute under which this indictment is drawn reads as follows: "A person who employs, or causes to be employed, or who exhibits, uses, or trains for the purpose of exhibition, any child, apparently or actually under the age of 16 years, in peddling, singing, or playing upon a musical instrument, or in a theatrical exhibition, or in any wandering occupation, is guilty of a misdemeanor." This is the statute as far as it applies to the case at bar, and the issues involved are very simple, and very easily to be determined. I regard them to be merely three questions of fact, and, as you find these three questions of fact, your final conclusion will be easily reached. The first question, in my judgment, for you to determine, is, was it a theatrical performance? Upon that question you have the testimony of the officers for the Society for the Prevention of Cruelty to Children, who informed you that on February 8th they went to Niblo's Garden,

and paid an admission fee of one dollar, and that they entered the place. They described what they saw there,—an auditorium and foot-lights, and the costumes of the various persons who appeared upon the stage,—and it is for you to determine from that description whether that was a theatrical performance. That is the evidence that addresses itself to your minds upon that subject. The people claim that it was a theatrical performance; that it was a theater, with an admission price, and all the surroundings and appurtenances belonging to a place of that character; and that there can be no question in dispute as to the nature of the performance, and as to its being a theatrical performance. That is the contention of the people, and that is the evidence that they submit to you. Now, the next question, after you have disposed of that one, is: Did the defendant employ these children for the purpose of such theatrical performance or exhibition? Did he employ them for that purpose? In relation to that, you have the admission upon the record that the defendant is the manager of the "Blue Beard, Jr.," company, and that he employed the persons who were engaged in acting in that performance. Then you have the evidence of the officers that they saw these children among the actors in that performance, of which it is admitted that he was the manager. Then the third question is: Are they under the age of 16 years? In relation to that, gentlemen of the jury, the people called in this case the children who, it is charged, were employed. They were brought into court, and were identified before you. And, under a provision of our law, it is provided: "Whenever, in any legal proceeding, it becomes necessary to determine the age of a child, the child may be produced for personal inspection, to enable the magistrate, court, or jury to determine the age thereby." Now, they have been produced here, and you saw them; and it is for you, as a question of fact, to determine whether they were under the age of 16 years. There has been some evidence adduced here in relation to other performances in this city in which children are employed. With that you, as jurors, have nothing to do. It is not a matter to influence or determine the decision at which you are to arrive upon the evidence here. We are trying simply one issue here, and of course it is our duty to confine ourselves to that issue. We are not trying the policy of laws here. We are not trying, under this indictment, the methods or practices by which associations or organizations or officials of any character perform or neglect to perform their duty. We are simply trying this issue, as to whether or not the defendant at the bar, Mr. Meade, violated the provisions of the act to which I have directed your attention. If he did, he is guilty, and should be convicted; if he did not, he ought to be acquitted. I have now, gentlemen of the jury, endeavored to place as clearly as I could before you the rules of law that in my judgment should govern you in considering this evidence. It is for you now to determine the facts. It is the duty of the people to prove their case beyond a reasonable doubt, and, if they have accomplished that, if they have proved to your satisfaction, beyond a reasonable doubt, that this defendant employed children under the age of 16 years for the purposes of a theatrical exhibition, and that they did perform, as charged in this indictment,—if that is proved, beyond a reasonable doubt, to your satisfaction, your duty is to find a verdict of guilty. If not, your verdict should be not guilty.

In re BOOTH'S WILL.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

Motion for new trial on exceptions. For former report, see 6 N. Y. Supp. 41. Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
J. S. Ross, for proponent. B. F. Watson, for contestant.

PER CURIAM. Under the law as laid down by this court upon the previous appeals in this case, the proponent's motions for a new trial and for judgment must be denied, and the motion of the contestant for judgment granted, with costs.

CARR, Respondent, v. TRACY, Appellant.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

Appeal from special term, New York county.

Action by George W. Carr against Harriet R. Tracy. Defendant appeals from an order denying motion to set aside the alleged service of the summons. The affidavits for and against the motion were numerous and conflicting.

Argued before VAN BRUNT, P. J., and BRADY and DALY, JJ.

Lyon & Smith, for appellant. *George W. Carr, pro se.*

BRADY, J. The examination of the proofs spread upon the record, and due consideration of them, has led to the conclusion that the service of the summons herein was not made as alleged. It is not intended to asperse the person who thinks he served the process, but to declare he was mistaken. The order appealed from should be reversed, and the motion made in the court below granted, with \$10 costs and disbursements. All concur.

COSTER et al. v. FISKE.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

Action by Charles Coster and another against Oliver Fiske. The receiver appointed in supplementary proceedings appeals from an order denying his motion to compel the transfer of two policies of life insurance.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

J. Rustice for appellant. *G. Bliss*, for respondent.

PER CURIAM. The order appealed from should be affirmed, with \$10 costs and disbursements.

MCDONALD et al., Appellants, v. HEINEMAN et al., Respondents.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

Appeal from circuit court, New York county.

Action by Robert McDonald and others against Simon D. Heineman and others. Plaintiffs moved to vacate a default entered on their failure to prosecute when the case was called. The motion was denied, and plaintiffs appeal.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Blumenstiel & Hirsch, for appellants. *Benno Loewy*, for respondents.

BRADY, J. The plaintiffs, having answered "Ready" on the call of this action for trial several times, when it was finally reached, moved for leave to discontinue without costs, but did not present any affidavits bearing upon that motion before the case was again called and judgment entered by default. The plaintiffs, with an apparent design of procuring a vacation of the default, procured a stay, which the respondents' counsel says was obtained to enable the appellants' counsel to go on a fishing excursion, a source of pleasure which, while it is an innocent and exciting pastime, and should be encouraged for its gratifying results, though not always truthfully told, should not be made to depend upon the exercise of judicial power. Some more serious objection, though not of greater depth, should have been presented. It was apparent,

however, that the attempt to open the default was fanciful, not real. The proposition to try a cause to save the payment of costs, except in cases of the absolute insolvency of the adverse party, is too novel to be impressive, and the learned justice presiding at the trial term no doubt so regarded it, and perhaps, as well, that there was an under-current of professional pique prompting the effort, and which, no doubt, resulted in this appeal. There is really nothing to sustain it, and therefore nothing to consider here now. The default was regular, and the subsequent proceedings by the plaintiffs destitute of merit, in any sense. The cause of action was a failure from the time of the demurrer; so felt by the plaintiffs' counsel, and, substantially, so conceded on this appeal. The learned counsel for the appellants know this thoroughly. The appeal must therefore fail, and the order and judgment appealed from be affirmed; but as the appeal was presented as one from a motion, and is so treated, costs of such a proceeding only will be allowed, namely, \$10 costs and the disbursements of the appeal. Ordered accordingly. All concur.

PEOPLE *ex rel.* BARNSTOFF v. McLEAN *et al.*, Police Commissioners.

(*Supreme Court, General Term, First Department. June 6, 1890.*)

Certiorari by George Barnstoff to review the action of the police commissioners in dismissing him from the police force of New York city.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

L. J. Grant, for relator. J. J. Delaney, for respondents.

VAN BRUNT, P. J. The proceedings in this case should be affirmed, and the writ dismissed, with costs. No opinion is written, because of the character of the points submitted upon the part of the relator. All concur.

BABCOCK v. SCHUYLKILL & L. V. R. Co.

(*Supreme Court, General Term, First Department. July 12, 1890.*)

No opinion. Application denied. See 9 N. Y. Supp. 845.

COLLINS, Respondent, v. LONG ISLAND CITY, Appellant.

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

No opinion. Judgment in this action by stipulation is to abide result in *Collins v. Long Island City*, 9 N. Y. Supp. 866, *ante*, 167.

GOUVERNEUR *et al.*, Appellants, v. NATIONAL ICE CO. OF NEW YORK, Respondent.

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

No opinion. Reargument ordered.

PEOPLE v. FLYNN.

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

No opinion. Conviction and judgment affirmed, for non-submission of papers by stipulation.

PEOPLE *ex rel.* WATERMAN v. SCHELLENGER *et al.*, Highway Commissioners.

(*Supreme Court, General Term, Second Department. May 12, 1890.*)

The writ of *certiorari* in this case was issued, upon the relation of Henry Waterman against N. B. Schellenger and others, highway commissioners of the town of Southold, in the county of Suffolk, to review their determination in laying out a highway through the inclosed lands of relator.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Payne & Benjamin, for relator. *Albertson Case*, (*J. H. Tuthill*, of counsel,) for respondents.

BARNARD, P. J. It is not the object of a writ of *certiorari*, to reverse proceedings to open highways, that the return should state facts outside of those which show jurisdiction. The return must give the record only. In this case the record "properly included the application, the certificate of the freeholders, and the order of the commissioners, or, at most, a history and recital of all the official acts of the commissioners in the course of the proceedings." *People v. Wheeler*, 21 N. Y. 82. The return shows no error in the proceedings. The jury was drawn in the manner required by law. The names of all persons on the jury-lists of the town were put in a box, and a jury of twelve drawn therefrom. One person declined to serve and was not sworn, and no objection was made to any other person. Ten of the jurors signed the certificate. The commissioners therefore made the order laying out the road. The return does not show an orchard, if it is proper that the commissioners should determine that question. There are a few wild apple and cherry trees along the fence, and 10 prickly pear trees. The apples are wild natural growth trees, and the return states that the trees do not constitute, in whole or in part, an orchard. The finding of the jury, and the decision of the commissioners upon the question, should be upheld. *People v. Commissioners*, 57 N. Y. 549. The judgment should therefore be affirmed, with costs. All concur.

SHIELDS *et al.*, Appellants, v. WORTMANN *et al.*, Respondents.

(*Supreme Court, General Term, Second Department. July 12, 1890.*)

Appeal from special term, Kings county.

Action by Andrew J. Shields and others against Sigismund B. Wortmann and Margaret Smith. An extra allowance was granted to defendants in pursuance of a former decision of the general term, and plaintiffs appeal from such order, and move for a rehearing of the former appeal. For former report, see 8 N. Y. Supp. 799.

Argued before BARNARD, P. J., and DYKMAN, J.

William J. Gaynor, for appellants. *Johnston & Johnston*, for respondents.

DYKMAN, J. This is an appeal from an order for additional allowance made to the defendants. The plaintiffs submitted to a nonsuit at the circuit, and the trial judge refused to make any allowance to the defendants. Upon appeal to the general term that order was reversed, and subsequently an order for an additional allowance of \$500 was made in pursuance of the decision of the general term, and now the plaintiffs have appealed from the last order. The plaintiffs have also made a motion for a reargument of the first appeal. There seems to have been some misapprehension respecting the first appeal, and we think it will be safest to grant a reargument. We will therefore reverse the order for an allowance, and grant a reargument. In that case, if first order for an allowance be affirmed, that will dispose of the controversy; and if it be reversed, as it was before, then the defendants can make a new application for an additional allowance. No costs to either party on this appeal.

GREEN et al., Respondents, v. WESTON et al., Appellants.

(*Supreme Court, General Term, Third Department. May 26, 1890.*)

Appeal from special term, Fulton county.

Action by James W. Green and George R. Hannon against Abijah Weston and Charles Weston.

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

Elias Root, for appellants. *William Green*, for respondents.

LEARNED, P. J. Appeal from an order denying motion to change place of trial for convenience of witnesses from Fulton county to Niagara county. Action to recover \$105.60 damages for defect in lath sold by defendants to plaintiffs' assignors. Order affirmed, with \$10 costs. All concur.

DIEFENDORF v. DIEFENDORF et al.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

No opinion. Judgment corrected as on file. See 8 N. Y. Supp. 617.

EISENLORD, Appellant, v. EISENLORD et al., Respondents.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

No opinion. Judgment affirmed, with costs. See 2 N. Y. Supp. 123.

HAYES et al., Appellants, v. ALSDORF, Respondent.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

No opinion. Order affirmed, with \$10 costs and printing disbursements.

MORREY v. WALKER. SAME v. WHITE.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

No opinion. Order affirmed, with \$10 costs and printing disbursements.

PEOPLE ex rel. VAN HISE, Appellant, v. BOARD OF POLICE COMMISSIONERS, Respondents.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

No opinion. Proceedings reversed, with \$50 costs and disbursements.

PEOPLE ex rel. WESTERN UNION TEL. CO. v. TERNEY, et al., Assessors.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

Argued before LEARNED, P. J., and LANDON and MAYHAM, JJ.

King & King, (*Wager Swayne and Brown & Wells*, of counsel,) for relator. *R. A. Parmenter*, for respondents.

MAYHAM, J. All the questions raised on this appeal have been considered by this court, at this term, in appeals from judgments on *certiorari* between the relator and the assessors of the city of Troy, (*ante*, 940.) and disposed of adverse to the appellant on this appeal, for the reasons stated in the opinion of this court in those appeals, and those contained in the very able opinion of the trial judge on all these *certioraris*. We think this case clearly

distinguishable from *Paddock v. Lewis*, 9 N. Y. Supp. 333. In that case the question of non-residence had been previously determined by the assessors, and nothing had occurred to change the condition after that determination. That fact does not appear in this case. The judgment of special term affirmed, with costs.

REYNOLDS *et al.*, Appellants, *v.* LITTLE *et al.*, Respondents.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

No opinion. Order affirmed, with \$10 costs and printing disbursements.

ROBBINS, Appellant, *v.* LAFOUNTAIN, Respondent.

(*Supreme Court, General Term, Third Department. July 7, 1890.*)

No opinion. Judgment affirmed, with costs.

STERN *et al.*, Respondents, *v.* MEIKLEHAN, Appellant.

(*Supreme Court, General Term, Third Department. May Term, 1890.*)

No opinion. Case dismissed on the ground that there is no valid appeal.

ACKERMAN *et al.*, Appellants, *v.* BURDICK, Respondent.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Order affirmed, with \$10 costs and disbursements.

ARNOT *et al.*, Respondents, *v.* BINGHAM *et al.*, Appellants.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Motion for leave to appeal to the court of appeals denied. See 9 N. Y. Supp. 68.

BARDEEN, Respondent, *v.* MCINTYRE, Appellant.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Order reversed, with \$10 costs and disbursements, and motion granted.

BULL, Respondent, *v.* ROME, W. & O. R. Co., Appellant.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Judgment affirmed, with costs.

CALVARY CEMETERY Ass'N OF WATERTOWN, Appellant, *v.* GLENN *et al.*, Respondents.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Judgment affirmed, with costs.

CHAPMAN, Appellant, *v.* FORBES, Respondent.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Order affirmed, with \$10 costs and disbursements.

CLARK *et al.*, Appellants, v. MIKELS, Respondent, *et al.*
(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)
No opinion. Judgment affirmed, with costs.

CLARK, Respondent, v. GLENN FALLS INS. CO., Appellant.
(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)
No opinion. Judgment and order affirmed, with costs. Followed former decision of this court, reported in 21 Wkly. Dig. 197.

COR *et al.*, Appellants, v. COR, Respondent.
(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)
No opinion. Order affirmed, with \$10 costs and disbursements.

COMSTOCK *et al.*, Appellants, v. BUDLONG *et al.*, Respondents.
(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)
No opinion. Judgment of the county court of Oneida county, reversing the judgment of the city court of Utica, reversed, with costs, and the judgment of the city court of Utica affirmed, with costs.

COURNEY *et al.*, Appellants, v. MORTON *et al.*, Respondents.
(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)
No opinion. Judgment affirmed, with costs to the respondent Sidney Smith, assignee, only.

In re DEMELT.
(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)
No opinion. Decree of surrogate affirmed, with costs to the respondent, payable out of the estate.

DISBROW, Appellant, v. DISBROW, Respondent.
(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)
No opinion. Order affirmed, with \$10 costs and disbursements.

DOBBINS, Respondent, v. FISHER, Appellant.
FISHER MANUF'G CO., Limited, v. SAME.
(*Supreme Court, General Term, Fourth Department. April Term, 1890.*)
No opinion. Order reversed, without costs, and without prejudice to an application or motion, under section 2463 of the Code of Civil Procedure.

DWIGHT, Respondent, v. ELMIRA, C. & N. R. Co., Appellant.
(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)
No opinion. Judgment affirmed, with costs. See 8 N. Y. Supp. 789.

FINNEGAN, Respondent, v. FINNEGAN, Appellant.*(Supreme Court, General Term, Fourth Department. May 2, 1890.)*

No opinion. Judgment and order reversed on the exceptions, and a new trial ordered, with costs to abide the event.

GIBSON et al., Respondents, v. McLAURY et al., Appellants.*(Supreme Court, General Term, Fourth Department. May 2, 1890.)*

No opinion. Judgment affirmed, with costs.

HARRINGTON et al., Appellants, v. BROWN et al., Respondents.*(Supreme Court, General Term, Fourth Department. May 2, 1890.)*

No opinion. Decree of the surrogate's court of Chenango county affirmed, with costs.

HAYNES et al., Appellants, v. WEST et al., Respondents.*(Supreme Court, General Term, Fourth Department. May 2, 1890.)*

No opinion. Judgment and order affirmed, with costs.

HILL v. EGGELESTONE.*(Supreme Court, General Term, Fourth Department. May 2, 1890.)*

No opinion. Order affirmed, with \$10 costs and disbursements.

INGLEZ, Appellant, v. EDDY et al., Respondents.*(Supreme Court, General Term, Fourth Department. May 2, 1890.)*

No opinion. Decree of the surrogate of Madison county reversed upon the exceptions, and the proceedings remanded to the surrogate's court for further action. The question of costs reserved for the determination of the court below upon the final disposition of the case.

KENT, Respondent, v. CROUSE, Appellant.*(Supreme Court, General Term, Fourth Department. May 2, 1890.)*

No opinion. Judgment and orders affirmed, with costs; MERWIN, J., not acting.

KENYON, Appellant, v. LUTHER et al., Respondents.*(Supreme Court, General Term, Fourth Department. May 2, 1890.)*

No opinion. Judgment and order affirmed, with costs. See 4 N. Y. Supp. 498.

KETCHAM, Respondent, v. DICKERSON, Appellant.*(Supreme Court, General Term, Fourth Department. May 2, 1890.)*

No opinion. Order affirmed, with \$10 costs and disbursements.

LEWIS et al., Respondents, v. DOUGLASS, Sheriff, Appellant.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Order affirmed, with \$10 costs and disbursements. See 6 N. Y. Supp. 888.

McGRAW, Appellant, v. DELAWARE, L. & W. R. Co., Respondent.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Judgment affirmed, with costs.

McMULLIN, Respondent, v. CROUSE, Appellant.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Judgment affirmed, with costs.

MELHINCH, Respondent, v. ROME, W. & O. R. Co., Appellant.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Judgment affirmed, with costs.

MERTENS, Appellant, v. WRIGHT, Respondent. CROUSE, Appellant, v. SAME. DUNN, Appellant, v. SAME.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Order reversed, with \$10 costs and disbursements. See opinion of MARTIN, J., in *McCarthy v. Wright, ante*, 824, (decided at this term.)

MINER, Appellant, v. STEBBINS, Respondent.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Judgment affirmed, with costs.

O'GORMAN et al., Respondents, v. NATIONAL FIRE INS. CO., Appellant.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Judgment and orders affirmed, with costs.

PALLAS, Appellant, v. CITY OF SYRACUSE, Respondent.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Judgment affirmed, with costs.

PECK, Respondent, v. BALDWIN, Appellant.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Appeal dismissed, with \$10 costs and disbursements. See *Billington v. Billington*, 4 N. Y. Supp. 504; *Finck v. Mannering*, 46 Hun, 328; Code Civil Proc. § 2433.

PEOPLE, Respondent, v. KEYSER et al., Appellants.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Order affirmed, with \$10 costs and disbursements.

PEOPLE, Respondent, v. RICHARDSON, Appellant.

(Supreme Court, General Term, Fourth Department. May 2, 1890.)

No opinion. Conviction, order, and judgment reversed, and a new trial ordered in the court of sessions, Schuylcr county, to which court the case is remitted, the evidence being insufficient to sustain the verdict.

PEOPLE, Respondent, v. WARNER, Appellant.

(Supreme Court, General Term, Fourth Department. May 2, 1890.)

No opinion. Conviction, order, and judgment affirmed, and proceedings remitted to the court of sessions of Tioga county, with instructions to proceed.

PEOPLE *ex rel.* PADDOCK, Appellant, v. LEWIS *et al.*, Respondents.

(Supreme Court, General Term, Fourth Department. May 2, 1890.)

No opinion. Motion denied.

PEOPLE *ex rel.* STREETER, Appellant, v. FITZGERALD, Respondent.

(Supreme Court, General Term, Fourth Department. May 2, 1890.)

No opinion. Order affirmed, with \$10 costs and disbursements.

PETERSON, Appellant, v. WILLIAMS *et al.*, Respondents.

(Supreme Court, General Term, Fourth Department. May 2, 1890.)

No opinion. Judgment affirmed, without costs of the appeal, and with leave to amend the complaint, upon the terms given in the interlocutory judgment, within 20 days.

PITCHER, Appellant, v. NEW YORK CENT. & H. R. R. Co., Respondent.

(Supreme Court, General Term, Fourth Department. April Term, 1890.)

No opinion. Order affirmed, with costs.

PLETT, Respondent, v. WILLSON *et al.*, Appellants.

(Supreme Court, General Term, Fourth Department. May 2, 1890.)

No opinion. Judgment affirmed, with costs. See 4 N. Y. Supp. 507.

SHEAD, Respondent, v. ROME, W. & O. R. Co., Appellant.

(Supreme Court, General Term, Fourth Department. May 2, 1890.)

No opinion. Judgment and order affirmed, with costs.

STOUT *et al.*, Appellants, v. SHERMAN, Respondent.

(Supreme Court, General Term, Fourth Department. May 2, 1890.)

No opinion. Order affirmed, with \$10 costs and disbursements.

VILLAGE OF CANASTOTA, Appellant, v. WOODFORD, Respondent.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Judgment reversed on the exceptions, and a new trial ordered, with costs to abide the event.

WALTERS, Respondent, v. MAYHEW, Appellant.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Motion denied. See 8 N. Y. Supp. 771.

WRIGHT, Respondent, v. PETERSON, Appellant.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Order modified to be settled by HARDIN, J., on five days' notice.

In re YEOMANS.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Motion of defendant denied. Motion of petitioner for leave to add supplemental charges to those now pending before the referee denied. See 6 N. Y. Supp. 946, 8 N. Y. Supp. 944.

ZIMMERMAN, Appellant, v. SANDERSON BROS. STEEL CO., Respondent.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

No opinion. Judgment affirmed, with costs.

BARNARD MANUF'G CO., Appellants, v. QUACKENBUSH, Respondent.

(*Supreme Court, General Term, Fourth Department. July 1, 1890.*)

No opinion. Judgment of Herkimer county court, so far as it modifies the verdict and judgment of justice's court, reversed, and the judgment of justice's court affirmed, with costs to the plaintiff in the county court, and the appeal of the plaintiff to the county court dismissed, with \$10 costs to the defendant (respondent) in the county court; the costs to be offset. The order for retaxation reversed, and the taxation vacated, neither party to have costs in this court on this appeal.

GARDNER, Respondent, v. DE LONG, Appellant.

(*Supreme Court, General Term, Fourth Department. July 1, 1890.*)

No opinion. Judgment and order affirmed, with costs.

HIER, Respondent, v. HEYENGA, Appellant.

(*Supreme Court, General Term, Fourth Department. July 1, 1890.*)

No opinion. Judgment and order reversed on the exceptions, and a new trial ordered, with costs to abide the event.

RAFTER, Respondent, v. FOULTS et al., Appellants.

(Supreme Court, General Term, Fourth Department. July 1, 1890.)

Judgment modified, and, as modified, affirmed, without costs to either party to this appeal.

LESTER v. CITY OF OSWEGO.

(Supreme Court, General Term, Fourth Department. July 1, 1890.)

No opinion. Judgment ordered for defendant, with taxable disbursements.

HUGGER, Respondent, v. NEW YORK CENT. & H. R. R. Co., Appellant.

(Supreme Court, General Term, Fourth Department. July 1, 1890.)

No opinion. Judgment and order affirmed, with costs.

MALLOY, Respondent, v. SCHERMERHORN, Appellant.

(Supreme Court, General Term, Fourth Department. July 1, 1890.)

No opinion. Judgment reversed, and a new trial ordered before another referee, costs to abide event.

SHERFF, Respondent, v. NEW YORK CENT. & H. R. R. Co., Appellant.

(Supreme Court, General Term, Fourth Department. July 1, 1890.)

No opinion. Judgment and order affirmed, with costs.

STILSON v. HAGADORN.

(Supreme Court, General Term, Fourth Department. July 1, 1890.)

No opinion. Judgment affirmed, with costs.

GILLIGAN, Respondent, v. GERRY et al., Appellants.

(Common Pleas of New York City and County, General Term. June 16, 1890.)

Appeal from tenth district court.

Action by John Gilligan against Allston Gerry and another.

Argued before LARREMORE, C. J., and BOOKSTAVEN and BISCHOFF, JJ.

L. L. Kellogg, for appellants.

PER CURIAM. After a careful perusal of the evidence in this case, we are satisfied that justice will be promoted by ordering a new trial. From that evidence it appears that in December, 1889, and for some time prior thereto, Louis Cattabery was engaged as subcontractor in doing work on the line of the New York, New Haven, & Hartford Railroad, in the vicinity of 170th street. While he continued this work he hired all the laborers, and no one else was responsible for their payment. On the 28th of December, 1889, the work was taken away from him by the defendants. Up to that time in December the plaintiff was employed by Cattabery and not by the defendants. McCahill was at that time paymaster for Cattabery and not for the defendants. For the work done after that time, we think it is very clear that the plaintiff was paid by McCahill, as paymaster for the defendants, partly in money and partly in a board bill, which was paid by plaintiff's direction, who was present when the order was given. We also think the testimony of the plaintiff

as to who were defendants' agents in December was improperly admitted; that the testimony does not establish such agency. It seems to us very clear that Toner was not acting for the defendants in December. For these reasons the judgment should be reversed, and a new trial ordered, with costs to abide the event.

BENESCH v. HANCOCK MUT. LIFE INS. CO.

(*Common Pleas of New York City and County, General Term. June 26, 1902.*)

Argued before ALLEN, P. J., and BOOKSTAYER, J.

No opinion. Motion for reargument granted.

BROWN, Appellant, v. LOWE, Respondent.

(*Common Pleas of New York City and County, General Term. June 26, 1902.*)

Appeal from eighth district court.

Argued before ALLEN, P. J., and BOOKSTAYER, J.

S. Oppenheim, for appellant. *S. H. Stuart*, for respondent.

No opinion. Judgment affirmed, with costs.

CHENOWSKY, Respondent, v. VOLPIN, Appellant.

(*Common Pleas of New York City and County, General Term. June 26, 1902.*)

Appeal from fifth district court.

Argued before ALLEN, P. J., and BOOKSTAYER, J.

Uilo & Ruebsamen, for appellant. *J. Mannheim*, for respondent.

No opinion. Judgment affirmed, with costs.

KOHN, Appellant, v. REISS, Respondent.

(*Common Pleas of New York City and County, General Term. June 26, 1902.*)

Appeal from fourth district court.

Argued before ALLEN, P. J., and BOOKSTAYER, J.

A. S. Rosenthal, for appellant. *M. Esberg*, for respondent.

No opinion. Judgment affirmed, with costs.

LEVY, Appellant, v. KOHN, Respondent.

(*Common Pleas of New York City and County, General Term. June 26, 1902.*)

Appeal from seventh district court.

Argued before ALLEN, P. J., and BOOKSTAYER, J.

Fromme Bros., for appellant. *C. Cohen*, for respondent.

No opinion. Judgment reversed, with costs to plaintiff (appellant) to abide the event. Order of interpleader vacated, and proceedings remitted to district court.

MAEHADO, Respondent, v. BRADFORD, Appellant.

(*Common Pleas of New York City and County, General Term. June 26, 1902.*)

Appeal from eleventh district court.

Argued before ALLEN and BOOKSTAYER, JJ.

S. Baker, for appellant. *A. Lamont*, for respondent.

No opinion. Judgment affirmed, with costs.

MAYOR, ETC., OF THE CITY OF NEW YORK, Respondent, v. SMITH, Appellant.*(Common Pleas of New York City and County, General Term. June 26, 1890.)*

Appeal from third district court.

Argued before ALLEN, P. J., and BOOKSTAYER, J.

Kohn & Ruck, for appellant. *L. Steckler*, for respondent.

No opinion. Judgment affirmed, with costs.

NEW YORK JUVENILE ASYLUM, Respondent, v. CANE, Appellant.*(Common Pleas of New York City and County, General Term. June 26, 1890.)*

Appeal from eighth district court.

Argued before ALLEN, P. J., and BOOKSTAYER, J.

L. Mathot, for appellant. *Dixon, Williams & Ashley*, for respondent.

No opinion. Order affirmed, with costs.

O'HAIR, Respondent, v. WILSON, Appellant.*(Common Pleas of New York City and County, General Term. June 26, 1890.)*

Appeal from tenth district court.

Argued before ALLEN, P. J., and BOOKSTAYER, J.

W. H. Sage, for appellant. *C. A. Burgess*, for respondent.

No opinion. Judgment reversed, with costs.

PEOPLE v. OTT et al.*(Common Pleas of New York City and County, General Term. June 26, 1890.)*

Argued before ALLEN and BOOKSTAYER, JJ.

L. Steckler, for the people.

No opinion. Motion to vacate judgment entered on forfeited recognizance granted.

MACFARLANE, Respondent, v. WALTER, Appellant.*(Superior Court of New York City, General Term. May 24, 1890.)*

Appeal from order directing judgment for plaintiff on demurrer as frivolous.

Argued before SEDGWICK, C. J., and FREEDMAN, J.

W. T. Birdsall, for appellant. *F. E. Anderson*, for respondent.

PER CURIAM. Order affirmed, with \$10 costs.

MACFARLANE, Respondent, v. WALTER, Appellant.*(Superior Court of New York City, General Term. May 24, 1890.)*

Appeal from order denying motion to vacate attachment.

Argued before SEDGWICK, C. J., and O'GORMAN, J.

W. T. Birdsall, for appellant. *F. E. Anderson*, for respondent.

PER CURIAM. Order affirmed, with \$10 costs.

BARNES, Respondent, v. KEENE, Appellant.*(Superior Court of New York City, General Term. June 27, 1890.)*

Appeal from jury term.

Action by Lucien Barnes against James B. Keene.

Argued before FREEDMAN and TRUAX, JJ.
Shipman, Barlow, Larocque & Choate, for appellant. *S. H. Randall*, for respondent.

PER CURIAM. Upon the whole case no error appears which constitutes ground for reversal; nor can it be held that the verdict is excessive. The judgment and order should be affirmed, with costs.

HUXFORD, Respondent, v. STODDART, Appellant.

(Superior Court of New York City, General Term. June 27, 1890.)

Appeal from jury term.

Action by Samuel H. Huxford against Matilda S. Stoddart.

Argued before FREEDMAN and O'GORMAN, JJ.

Alex. Thain and George William Hart, Jr., for appellant. *Truax & Orendall*, for respondent.

FREEDMAN, J. This is an action to recover for services as a real-estate broker in procuring for the defendant a purchaser of her farm and of certain personal property. Plaintiff's claim that he was procuring cause of the sale, under an employment as broker for that purpose, appears to have been sharply contested at the trial, and it was submitted to the jury under a charge which carefully guarded all the rights of the defendant. The record discloses no error constituting, under the circumstances of the case, ground for reversal. The judgment and order should be affirmed, with costs.

IRWIN, Appellant, v. Brown *et al.*, Respondents.

(Superior Court of New York City, General Term. June 27, 1890.)

Appeal from special term.

Action by Robert J. Irwin against Edward M. Brown and another.

Argued before FREEDMAN and TRUAX, JJ.

Martin & Smith, for appellant. *Hoffman Miller*, for respondents.

PER CURIAM. The order should be affirmed, with \$10 costs and disbursements.

NOLTE, Respondent, v. MANHATTAN RY. Co., Appellant.

(Superior Court of New York City, General Term. June 27, 1890.)

Appeal from jury term.

Action by Albert Nolte against the Manhattan Railway Company.

Argued before FREEDMAN and TRUAX, JJ.

Davies & Rapallo, for appellant. *Charles Steckler*, for respondent.

FREEDMAN, J. The record discloses no error which under all the circumstances constitutes ground for reversal, nor can it be held that the verdict is excessive. The judgment and order should be affirmed, with costs.

PETERSON, Appellant, v. SWAN, Respondent.

(Superior Court of New York City, General Term. June 27, 1890.)

Appeal from jury term.

Action by John Peterson against John Swan.

Argued before FREEDMAN and INGRAHAM, JJ.

Hart & Price, for appellant. *Hill, Wing & Shoudy*, for respondent.

PER CURIAM. The judgment should be affirmed, with costs. See 53 N. Y. Super. Ct. Rep. 151.

WHITE, Respondent, v. REED *et al.*, Appellants.

(*Superior Court of New York City, General Term. June 27, 1890.*)

Motion to resettle order dated first Monday of December, 1887.

Action by George W. White against Mary Reed, as executor, etc., and another.

Argued before FREEDMAN and INGRAHAM, JJ.

PER CURIAM. The order should be resettled so as to read as follows: "With costs to the appellants to abide the event, and, in case the plaintiff should finally succeed in the action, such costs are to be set off against any judgment which may be recovered against the defendants or either of them by the plaintiff in this action."

WILLS, Appellant, v. UNION BOTTLING CO., Respondent.

(*Superior Court of New York City, General Term. June 27, 1890.*)

Appeal from jury term.

Action by William Wills against the Union Bottling Company.

Argued before TRUAX and O'GORMAN, JJ.

Hatch & Warren, for appellant. *Morgan & Warren*, for respondent.

TRUAX, J. The action was brought by the plaintiff to recover a certain sum of money for a balance alleged to be due to the plaintiff from the defendant for unpaid salary as treasurer of the defendant. It was alleged in the answer, among other things, that the plaintiff had resigned his position as treasurer and abandoned the defendant's business, and had not offered or tendered his services as treasurer to the defendant since the day of his resignation. The trial judge correctly stated the only question in the case when he left it to the jury to determine whether the plaintiff, in June, 1888, resigned his office of treasurer. That question the jury determined against plaintiff, and, as there was evidence to warrant such determination, the judgment and order must be affirmed, with costs. Judgment and order affirmed, with costs.

PFEIFFER, Respondent, v. AMERICAN SURETY CO., Appellant.

(*Superior Court of New York City, General Term. June 28, 1890.*)

Appeal by defendant from judgment entered on verdict of jury.

Argued before SEDGWICK, C. J., and FREEDMAN, J.

Stickney & Shepard, for appellant. *F. F. Nugent and Wm. H. Arnoux*, for respondent.

PER CURIAM. Judgment affirmed, with costs.

AUSTIN, Appellant, v. VROMAN, Respondent.

(*Supreme Court, General Term, Fourth Department. May 2, 1890.*)

Judgment reversed, and new trial ordered, with costs to abide event. Leave given to appeal to the court of appeals.

POWELL, Appellant, v. RUSSELL, Respondent.

(Supreme Court, General Term, Fourth Department. May 2, 1899.)

No opinion. Order affirmed, with \$10 costs and disbursements.

MILLER, Respondent, v. NEW JERSEY STEAM-BOAT CO., Appellant.

(Supreme Court, General Term, First Department. June 6, 1899.)

No opinion. Motion denied, with \$10 costs to respondent, to abide event of appeal.

END OF VOLUME 10.

INDEX.

NOTE. A star (*) indicates that the case referred to is annotated.

Abandonment.

Of wife by husband, see *Husband and Wife*, 9.

ABATEMENT AND REVIVAL.

Death of party.

1. An action for an injunction, in which incidentally damages for the maintenance of a railroad are demanded, is not an action for trespass, and on the death of plaintiff may be revived in the name of his devisee and executor. Affirming 7 N. Y. S. 641.—*Sanders v. New York El. R. Co.*, 10 N. Y. S. 112.

2. The rule that, where one of several joint debtors dies, the personal representative cannot be joined in an action with the survivors except on the allegation of the insolvency of the survivors, applies to the case of the death of a joint debtor pending the action, and is not changed by Code Civil Proc. N. Y. § 758, which provides that "the estate of a person or party jointly liable upon contract with others shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent when it is necessary so to do for the proper disposition of the matter."—*First Nat. Bank v. Lenk*, 10 N. Y. S. 261.

Revival on appeal.

3. Code Civil Proc. N. Y. §§ 755-765, provide for the revival of an action on the death of a "plaintiff" or "defendant." Section 1297 provides that, on the death of the adverse party after judgment, an appeal may be taken as if he were living, "but it cannot be heard until the heir, devisee, executor, or administrator * * * has been substituted as the respondent." Section 1298 provides that, when either party dies pending an appeal, "if an order substituting another person in his place is not made within three months after his death, * * * the court in which the appeal is pending may * * * make an order requiring all persons interested in the decedent's estate to show cause before it why

the judgment * * * should not be reversed or affirmed, or the appeal dismissed." Section 1786 provides that, on the death of either party to an action to recover a chattel, the cause of action survives to or against his executor or administrator. Held that, on the death of appellant in an action to recover chattels before argument of the appeal, the court of appeals may revive the action in the name of appellant's assignee for benefit of creditors.—*Riley v. Gitterman*, 10 N. Y. S. 88.

4. An improper order of revival made by the court of appeals cannot be collaterally attacked, but can be remedied only by an application to vacate the order.—*Riley v. Gitterman*, 10 N. Y. S. 88.

Accommodation Paper.

Rights of sureties, see *Negotiable Instruments*, 3.

Accomplice.

Testimony of, see *Criminal Law*, 2.

ACCORD AND SATISFACTION.

See, also, *Compromise; Payment; Release and Discharge*.

What constitutes.

1. Acceptance of a check for part of a claim against a county, where there is no dispute as to the facts, and no agreement that it shall be in full, will not preclude a recovery for the residue. Distinguishing *People v. Supervisors*, 33 Hun, 305.—*People v. Board of Sup'rs*, 10 N. Y. S. 88.

2. The fact that, on leaving his master's employ, a servant consented to receive the amount appearing by the master's books to be due him, does not show an accord and satisfaction, where the servant refused to sign a receipt in full, and gave no receipt at all.—*Rosenfeld v. New*, 10 N. Y. S. 282.

3. A payment of money by a bank on a claim to buy its peace, by reason of which the suit was discontinued, was a settlement,

within the meaning of an assignment of any money recovered on payment or settlement of the claim.—*Beran v. Tradesmen's Nat. Bank*, 10 N. Y. S. 877.

Evidence—Burden of proof.

4. Where defendant alleges an accord and satisfaction, he has the burden of proving it.—*Rosenfeld v. New*, 10 N. Y. S. 232.

Accounting.

Between partners, see *Partnership*, 4-8.

By executors, etc., see *Executors and Administrators*, 7-10.

guardian, see *Guardian and Ward*, 2, 8.

ACCOUNT STATED.

What constitutes.

1. In 1871 plaintiff and S., members of a firm conducting an hotel, made an agreement by which plaintiff was to purchase part of S.'s interest, and for a continuance of the business from February 1, 1872, until February 1, 1875, when plaintiff was to purchase the remaining interest of S.; the sale to be made at the cost valuation on that date, to be ascertained according to the inventory of the property, in the manner adopted by the firm. It was further provided that the annual expenses for repairs during the four years succeeding February 1, 1871, should not exceed the average of the same expense for the years prior thereto. The parties knew, from the monthly and annual statements which had been regularly made, precisely what the amount of those repairs were. About February 1, 1875, the executors of S. completed the transfer of his interest to plaintiff, and notes were given for the price upon the basis of a settlement then had. *Held*, that the accounts rendered between plaintiffs and S. prior to 1871, upon which they settled their rights and interests in the business conducted during that period, were stated accounts, the accuracy of which, in the absence of fraud, could not be attacked by plaintiff in a suit brought by him 10 years after they had been rendered, to open the settlement of 1875.—*Kingsley v. Melcher*, 10 N. Y. S. 68.

2. An account presented by plaintiff against the estate of a decedent showed that the principal item in it originated in a transaction between plaintiff and one P. There was evidence that, when the account was presented to decedent, he expressed surprise at the amount of it, said that P. ought to have paid it, and suggested a counter-claim. Afterwards he said that he would pay the account, and have no trouble about it. *Held* insufficient to show an account stated between plaintiff and decedent.—*Stevens v. Ayers*, 10 N. Y. S. 502.

ACTION.

See, also, *Limitation of Actions; Parties; Pleading; Practice in Civil Cases; Venue in Civil Cases.*

Against administrator, see *Executors and Administrators*, 18, 19.

—corporation, see *Corporations*, 12.

—officers of corporation, see *Corporations*, 11.

—wife, see *Husband and Wife*, 5.

By and against receivers, see *Receivers*, 1-4.

tenant, see *Landlord and Tenant*, 8.

receiver of national bank, see *Bank and Banking*, 3.

wife, see *Husband and Wife*, 7, 8.

For dispossession, see *Landlord and Tenant*, 11-18.

libel, etc., see *Libel and Slander*, 2-6.

obstruction of highway, see *Highways*, 5-8.

price, see *Sale*, 17, 18.

On bond of receiver, see *Receivers*, 5.

contracts, see *Contracts*, 15-18.

insurance policy, see *Insurance*, 6, 7.

notes, see *Negotiable Instruments*, 5, 6.

Particular forms, see *Assumpsit; Ejectment; Partition; Trespass; Trover and Conversion.*

To set aside agreement for consolidation of religious societies, see *Religious Societies*, 2.

Form.

1. Where a complaint states facts which constitute a cause of action *ex contractu*, an averment of negligence on the part of defendant will not make the action one *ex delicto*.—*Rothchild v. Grand Trunk Ry. Co.*, 10 N. Y. S. 96.

Consolidation.

2. Plaintiffs sued for the contract price of goods delivered to defendant. The answer averred a failure by plaintiffs to perform their part of the contract, whereby defendant was sued by other parties, and notice was given to plaintiff to assume the defense of such action, which had been referred. *Held*, that a motion by plaintiffs to have the two actions consolidated so that the rights of the respective parties might be adjusted so as to conform to the facts alleged in the moving affidavits, which facts were disputed, was properly denied.—*Gloucester Iron-Works v. Board of Water Com'rs*, 10 N. Y. S. 168.

Administration.

See *Executors and Administrators*.

ADVERSE POSSESSION.

Uninclosed lands.

The fact that a vendee, under a written contract, occasionally cut timber on an ad-

ditional six acres, which were uninclosed and unimproved, does not give him title by adverse possession, under Code Civil Proc. N. Y. § 870, which provides that the use of uninclosed land for the supply of fuel or of fencing timber is sufficient to constitute adverse possession by one claiming title "founded on a written instrument;" the vendee's written contract not covering the six acres.—*Weeks v. Martin*, 10 N. Y. S. 656.

Affidavit.

In attachment, see *Attachment*, 4-6.

Agency.

See *Principal and Agent*.

Aliens.

Right to inherit realty, see *Descent and Distribution*, 8, 4.

Alimony.

See *Divorce*, 4, 5.

Amendment.

Of indictment, see *Indictment and Information*, 2.

pleading, see *Pleading*, 2; *Pleading*, 17-21.

process, see *Writs*, 2.

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Animals.

Vicious horse, liability of livery-man, see *Livery Stable Keepers*.

Answer.

See *Pleading*, 2-6.

APPEAL.

See, also, *Certiorari*; *New Trial*.

From justice of the peace, costs, see *Costs*, 16.

In criminal cases, see *Criminal Law*, 7, 8.

When appeal lies.

1. An order refusing to dissolve an attachment which shows that both parties were heard on the motion is appealable whether formal notice of the motion was given or not.—*Thompson v. Dater*, 10 N. Y. S. 618.

2. An order of the general term of the city court of New York affirming a judgment of that court is not an "actual determination" in the action, within the meaning of Code Civil Proc. N. Y. § 8191,

providing that an appeal may be taken to the court of common pleas for the city and county of New York, from an "actual determination" made by the marine court (now city court) of New York, at a general term thereof, where a final judgment has been rendered upon an appeal taken to the general term. In such a case the appeal lies from the judgment entered in accordance with the directions of the order, and not from the order itself.—*Whitfield v. Broadway & S. A. R. Co.*, 10 N. Y. S. 106.

Final judgments.

8. After entry of judgment, an order was entered to the effect that the judgment was not to be deemed to determine whether a clause in the agreement between the parties involved in the action had been abrogated. The parties agreed to a reference to determine the question. The referee found that the clause was abrogated, and an order was entered to that effect. *Held*, that such order was in terms a final judgment, and appealable.—*Buhler v. Hubbell*, 10 N. Y. S. 264.

Order granting temporary injunction.

4. An appeal cannot be taken from an order granting a temporary injunction, when no motion to vacate has been made as prescribed by Code Civil Proc. § 626.—*Aldinger v. Pugh*, 10 N. Y. S. 684; *People v. Same*, *Id.*

Time of taking.

5. Code Civil Proc. N. Y. § 8140, provides that the justice of the peace must keep a docket-book in which he must enter the judgment, and section 8046 provides that an appeal must be taken within 20 days after the entry of judgment in the justice's docket. *Held*, that the time for taking an appeal from the judgment of a justice is to be reckoned from the entry of the judgment in his docket-book, and not from the entry in his minutes.—*Beuerlein v. Hodges*, 10 N. Y. S. 505.

Rehearing.

6. A rehearing will not be granted on the ground that counsel overlooked a case alleged to be in point, but which, on examination, does not affect the question in issue.—*Ross v. Simon*, 10 N. Y. S. 742.

7. In an action for an injunction against the operation of an elevated railroad on the street in front of plaintiff's premises, and for damages caused thereby, a judgment for plaintiff was reversed because of incompetent testimony concerning the value of such premises. *Held*, that a rehearing would be granted; it not appearing that the admission of such testimony affected plaintiff's right to an injunction.—*Lawrence v. Metropolitan El. Ry. Co.*, 10 N. Y. S. 748.

Surrogate's decision—Notice of entry.

8. Code Civil Proc. N. Y. § 2572, relating to appeals from surrogates' decrees, provides that an appeal by a party must be taken within 30 days after the service upon him or his attorney of a copy of the decree from which the appeal is taken, and a written notice of the entry thereof. *Held*, that affidavits as to the service of a surrogate's decree adjudging certain legacies void, which failed to show that written notice of the entry of the decree had also been served, were insufficient. Reversing 9 N. Y. S. 448. — *In re Kavanagh's Estate*, 10 N. Y. S. 899.

From justice of the peace—Jurisdiction.

9. On appeal from the judgment of a justice in a case in which he had no jurisdiction on account of the residence of the defendant, affidavits of defendant, showing the residence of the parties, are competent, under Code Civil Proc. § 8057, providing that, upon appeal, errors in fact not affecting the merits of the action, and not within the knowledge of the justice, may be determined upon affidavits. — *Larocque v. Harvey*, 10 N. Y. S. 576.

Presumption.

10. Where, after reply to an answer setting up a counter-claim, defendant files an amended answer, also pleading a counter-claim, and a motion for judgment on the counter-claim is denied on the ground that "the reply served" was a sufficient reply thereto, it will be presumed on appeal, in the absence of the original answer from the case, that the counter-claim set up in the amended answer was the same as that set up in the original answer. — *Lamberty v. Roberts*, 10 N. Y. S. 190.

Review—Findings by court.

11. Where only two witnesses testify, the determination of the trial judge on a question of fact will not be reviewed by the general term. — *New York, L. E. & W. R. Co. v. Beirne*, 10 N. Y. S. 191.

Findings of referee.

12. Where the only testimony for defendant is that of her husband, who is contradicted, a judgment for plaintiff will not be disturbed on appeal, as it was for the referee to judge of the credibility of the witness. — *Farmer v. Emigrant Industrial Sav. Bank*, 10 N. Y. S. 425.

13. On an issue whether authority to settle an action had been revoked by plaintiff before a settlement was actually made, the finding of the referee, to whom the matter was referred, is not conclusive upon the general term, but it is the duty of that court to consider the evidence, and, if upon the whole case it thinks a different re-

sult should have been arrived at, to decide accordingly. — *Sperb v. Metropolitan E. Ry. Co.*, 10 N. Y. S. 885.

Weight and sufficiency of evidence.

14. A judgment will not be disturbed on appeal when the verdict on which it is based is justified by the evidence. — *Kelly v. Weiss*, 10 N. Y. S. 589.

15. A verdict for plaintiff for personal injuries, rendered on the testimony of herself and one other witness, as against that of seven opposing witnesses, will not be disturbed as against the weight of evidence, when the testimony for defendant is contradictory, and shows circumstances tending to support plaintiff's theory of the accident. — *Schick v. Brooklyn City R. Co.*, 10 N. Y. S. 528.

16. In an action by a vendor against the vendee for refusal to take goods in accordance with the contract of sale, a finding by the referee that, by reason of the failure of defendant to take certain goods, plaintiff was damaged in a certain sum, cannot be objected to on appeal on the ground that it fails to state the facts, where no case is made, and the evidence is not brought up. — *Dunn v. Hunt*, 10 N. Y. S. 412.

17. The fact that plaintiff's testimony is in contradiction to her testimony given on a former trial is not sufficient to overthrow a verdict in her favor. — *Murphy v. Rome W. & O. R. Co.*, 10 N. Y. S. 854.

18. In an action by a conductor to recover for services rendered in September and part of October, defendant set up that in August plaintiff had collected fares for which he had failed to account, and that by the terms of his contract his salary was not to be paid, in such case, till the fares were accounted for. Several private detectives testified that plaintiff had collected the fares unaccounted for. Plaintiff denied the misappropriation, and the jury found for him. *Held*, that the verdict would not be disturbed. — *Rand v. Rome W. & O. R. Co.*, 10 N. Y. S. 800.

19. A brakeman who had struck his head against something while riding on top of a box-car, going through a tunnel, sued the railroad company for the injury on the ground that it was negligent in not giving him notice of a brick arch in the tunnel which reduced its height to 4 feet 7 inches above the top of the car. At the first trial plaintiff testified that he was in a sitting posture when the car entered the tunnel, and the court of appeals reversed a judgment in his favor on the ground that it was physically impossible for him to have come in contact with the arch while in that position. At the second trial plaintiff testified that he rose up as he entered the tunnel.

nel to go on the top of the car to another brake; that he was not asked on the first trial whether he stood up; and that he then testified that the tunnel looked as though he could stand up and go through without any trouble. *Held*, that a verdict in his favor would not be disturbed.—*Hunter v. New York, O. & W. R. Co.*, 10 N. Y. S. 795.

— Conflicting evidence.

20. Where the evidence is conflicting, the findings of the trial judge will not be disturbed on appeal.—*Gilmore v. Ham*, 10 N. Y. S. 48; *Boyle v. Van Tassel*, *Id.* 321.

21. Where, in an action for rent reserved on a written lease, the evidence is conflicting as to whether the landlord assented to the surrender of the premises, and the jury find for plaintiff, the verdict will not be disturbed.—*Underhill v. Collins*, 10 N. Y. S. 680.

22. Where plaintiff's contention in an action for personal injuries is supported by three witnesses, whose testimony is denied by seven witnesses for defendant, a verdict for plaintiff will not be disturbed on appeal.—*Volk v. Livingston*, 10 N. Y. S. 211.

23. In an action for the diversion of surface water, a verdict for plaintiff on conflicting evidence will not be disturbed, though the evidence of plaintiff himself was not as full and conclusive as it might have been, it appearing that on previous trials, when the jury agreed, the verdict was for plaintiff, and that the last trial occurred 15 years since.—*Seely v. Shaffer*, 10 N. Y. S. 288.

24. In an action based on false representations by defendants, a verdict for plaintiffs was set aside on the ground that it was not sustained by the evidence, and the order was affirmed on appeal. On the second trial a verdict was directed for defendants. The evidence was as consistent with the innocence of defendants as with their guilt. *Held*, that the direction of a verdict would not be disturbed by the general term.—*Fenno v. Hannan*, 10 N. Y. S. 408.

Matters not apparent of record.

25. Questions of fact will not be reviewed by the general term where the appeal-book fails to show that it contains all the evidence.—*Davis v. Willis*, 10 N. Y. S. 883.

26. Where the record does not show that it contains all the evidence, the findings of the lower court on questions of fact will not be reviewed on appeal.—*First Nat. Bank v. Bard*, 10 N. Y. S. 684.

27. Where the case on appeal contains no order denying a motion for a new trial, the general term cannot review the questions whether the verdict was against the weight of evidence, and whether it was excessive.—*Blohm v. Bamber*, 10 N. Y. S. 98.

28. Code Civil Proc. N. Y. § 2545, provides that, on the trial of an issue of fact,

"the surrogate must file in his office his decision in writing, which must state separately the facts found and the conclusions of law. Either party may, upon the settlement of a case, request a finding upon any question of fact, or a ruling upon any question of law; and an exception may be taken to such a finding or ruling, or to a refusal to find or rule accordingly. An appeal from a decree or an order of the surrogate's court brings up for review * * * each decision to which an exception is duly taken by the appellant, as prescribed in this section." *Held*, that a case on appeal from a decree of the surrogate which does not contain a decision in writing stating "separately the facts found and conclusions of law," as required by section 2545, presents no question for review, and will be remanded for proper proceedings.—*In re Falls' Estate*, 10 N. Y. S. 41.

Harmless error.

29. Error in excluding testimony on direct examination of a witness is cured where he states the facts called for on his cross-examination.—*Arthur v. Wright*, 10 N. Y. S. 868.

30. Where certain facts are admitted by the answer, the admission of incompetent evidence to establish them is not prejudicial.—*Coffey v. Lyons*, 10 N. Y. S. 817.

31. Error in refusing to strike out plaintiff's testimony as to a conversation with the doctor at the hospital, in which the latter told him he had a lot of ribs broken, was harmless, in view of competent evidence, wholly uncontradicted, that plaintiff had sustained a fracture of the ribs.—*Atkinson v. Oelsner*, 10 N. Y. S. 832.

32. Error cannot be predicated on the admission of improper testimony where it is afterwards stricken out, and the jury instructed to disregard it, unless it appears that the party objecting was prejudiced by the admission of such testimony.—*Newman v. Ernst*, 10 N. Y. S. 810.

33. The admission in evidence of a deposition in violation of Code Civil Proc. N. Y. § 882, which provides that the deposition of a person not a party shall not be read in evidence until it is proved that the witness is dead, or is absent from the state, so that his attendance cannot be compelled with reasonable diligence by subpoena, is harmless error when the witness subsequently testifies orally to the same facts as were returned in the commission.—*Slocum v. Slocum*, 10 N. Y. S. 878.

34. The evidence consisted of a stipulated statement of facts, and it was stipulated that plaintiff gave *prima facie* evidence of these facts, and that defendant objected to parts thereof as incompetent and irrelevant, and that in case

of defendant's taking an appeal the record should be so framed as to preserve all its rights of objection and exception. No objections were brought to the court's attention on the trial. Moreover, proof of defendant's liability was not dependent on the objectionable evidence. *Held*, that the judgment would not be reversed by reason of the admission of this evidence.—*City of New York v. National Broadway Bank*, 10 N. Y. S. 555.

85. The payments indorsed on the contract showed that a large balance of the purchase money was still unpaid. In addition to the erroneously admitted evidence of the vendee's administrator, the only evidence of payment consisted of alleged admissions to that effect by the vendor, to overcome which plaintiffs introduced admissions by the vendee that a large amount due on the contract had never been paid. *Held* that, though Code Civil Proc. N. Y. § 1008, permits an appellate court to disregard an error in the admission of evidence where substantial justice has been done, the general term could not fairly say that the evidence, without the objectionable part, was sufficient to sustain a finding that the contract had been paid in full, and hence a new trial would be granted.—*Parks v. Andrews*, 10 N. Y. S. 844.

Waiver of objections.

86. Where defendant demurs to a complaint on four different grounds, and the issues raised are separately determined, the demurrer being sustained as to some of the grounds and overruled as to others, the failure of the defendant to take an appeal from that part of the judgment adverse to him precludes him from objecting thereto on appeal from the final judgment.—*Lawrence v. Church*, 10 N. Y. S. 566.

Liabilities on appeal-bond.

87. Code Civil Proc. N. Y. c. 18, tit. 2, art. 4, §§ 2568-2589, provide that an appeal from a surrogate's court may be taken to the general term of the supreme court, and prescribe the procedure. Section 2581 provides that the surrogate may at any time authorize any person aggrieved to sue on an undertaking given on appeal from an order or decree in his court. *Held*, that section 1809, contained in chapter 12, tit. 1, relating to "appeals generally," which declares that no action shall be maintained on an undertaking given on an appeal to the supreme court, "as prescribed in * * * this chapter," until after 10 days from the service of notice of the entry of a judgment, or order affirming the judgment or order appealed from, or dismissing the appeal, does not apply to appeals from surrogates' courts.—*Hildreth v. Lerche*, 10 N. Y. S. 288.

Application.

Of payment, see *Payment*, 8.
town taxes, see *Towns*, 6, 7.

Aqueduct Commission.

Powers and duties, see *Eminent Domain*, 2-5.

Argument of Counsel.

See *Trial*, 8, 4.

ARREST.

Of debtor of insolvent corporation, see *Corporations*, 15, 16.

In civil actions—Complaint.

1. Where the complaint in an action for goods sold alleges, in the language of Code Civil Proc. N. Y. § 549, subd. 4, providing for arrest in civil cases, that defendants were "guilty of a fraud in contracting or incurring the liability," it may be amended so as to state the facts constituting the fraud.—*McBride v. Langan*, 10 N. Y. S. 554.

2. A complaint in an action for the price of goods sold, which alleges that defendants were guilty of fraud in contracting the debt, and that they have disposed of their property with intent to defraud their creditors, is sufficient, when supported by proper proof, to support a warrant of arrest.—*McBride v. Langan*, 10 N. Y. S. 552.

3. A complaint which alleges that defendant, as plaintiffs' agent, sold merchandise and received the proceeds, and refuses to pay over the sum so received as plaintiffs' agent, will not support an order of arrest, under Code Civil Proc. N. Y. § 549, providing that a defendant may be arrested, in an action to recover money or property, "where it is alleged in the complaint that the money was received, or the property was embezzled or fraudulently misapplied, by * * * a factor, agent, broker, or other person in a fiduciary capacity."—*Harland v. Howard*, 10 N. Y. S. 449.

—Affidavits.

4. Under Code Civil Proc. N. Y. § 537, which prescribes that in cases in which arrests are authorized in civil actions the cause of action must be made to appear by affidavit, it is not sufficient that the acts are charged upon information and belief; and where the cause alleged is conspiracy to defraud the state the affidavits must state facts which show that the conspiracy is provable.—*People v. Snaith*, 10 N. Y. S. 589.

5. Where the cause of action alleged is conspiracy, it is not sufficient to justify an arrest that it appears from affidavits that

one or more of the defendants did defraud the state, when it is not shown to be probable that they did so in pursuance of a conspiracy.—*People v. Snaith*, 10 N. Y. S. 589.

6. Affidavits averring that defendant had admitted that he had obtained the delivery to him by plaintiff of a bill of lading by expressly promising to collect as the agent of plaintiff the money due for the goods represented by the bill, and pay it to plaintiff at once, and that he had collected the money, and personally appropriated it, are sufficient to justify an order of arrest.—*Hirsh v. Van der Perren*, 10 N. Y. S. 449.

— Abuse of process.

7. A private detective, without a warrant, forcibly seized defendant for the purpose of detaining him until the order of arrest could be served on him by the proper officer. *Held* that, though the order of arrest was subsequently served, while defendant was detained on a charge of assault committed in breaking away from the detective, there was an abuse of process, for which the order should be set aside.—*Harland v. Howard*, 10 N. Y. S. 449.

Assessment.

See *Taxation*, 2-8.

For public improvements, see *Municipal Corporations*, 40-43.

ASSIGNMENT.

See, also, *Assignment for Benefit of Creditors*.

Of charter of corporation, see *Corporations*, 8.

insurance policy, see *Insurance*, 1.
judgment, see *Judgment*, 20.
mortgages, see *Mortgages*, 8.

Rights of assignee.

1. The administrators agreed with a mortgage creditor of decedent not to bid against him at the foreclosure sale of decedent's land, provided the mortgagee would discharge certain judgments which he held against the estate. This agreement was executed by the administrators, and the mortgagee bought in the land for less than his debt, though it was easily worth that and the judgments. Prior to this agreement the mortgagee had assigned without consideration the judgments to his wife. *Held*, that she could not enforce them against the estate, as she occupied no better position than her assignor.—*French v. Stevenson*, 10 N. Y. S. 886.

2. An assignment by D. of a portion of a claim against a bank, after stating that a suit was pending against the bank for the entire claim, provided that the suit was to

proceed to final judgment in the name and at the expense of D., and that the sum assigned should be paid to the assignee immediately upon the payment or settlement of the claim by the bank. The instrument then conferred authority upon the attorney of D. conducting the suit, or whoever should act for D. in the settlement, to pay to the assignee, immediately upon the receipt of the money, the amount assigned. *Held* that, notice of the assignment having been given, the assignee could maintain an action directly against the bank for his part of moneys paid by it to D. in settlement of the claim, the assignee not having consented that such portion should first go into the hands of D.—*Beran v. Tradesmen's Nat. Bank*, 10 N. Y. S. 677.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Liability of assignee for costs, see *Costs*, 5.

Schedule and inventory.

1. Laws N. Y. 1888, c. 294, amending the general assignment act, (Laws 1877, c. 466,) so as to provide that, in an assignment for benefit of creditors, the residence, kind of business carried on by the debtor at the time, the place where conducted, and, if in a city, the street and number, should be specifically stated, is merely directory; and the failure of the assignor to fully comply therewith will not render the assignment void. Following *Taggart v. Sisson*, 9 N. Y. S. 758.—*Mullin v. Sisson*, 10 N. Y. S. 801; *Boak v. Blair*, *Id.* 896.

Delivery of deed to assignee.

2. A debtor prepared and placed in the hands of his attorney, who was defending a suit against him, an assignment for the benefit of creditors. On the day of the trial the debtor instructed the attorney that he should not deliver the instrument that morning. No subsequent directions were given, and there was no evidence of any directions having been given to deliver the instrument at any particular time. After judgment was entered in the suit against the debtor, the attorney, without consultation with the client, delivered the assignment to the assignee. *Held*, that the assignment never became effective as against creditors.—*Kingston v. Koch*, 10 N. Y. S. 868.

Confession of judgment.

3. The single circumstance that a judgment is confessed at or about the time of the execution of a general assignment does not alone warrant the conclusion that the confessed judgment is a part of the assignment.—*First Nat. Bank v. Bard*, 10 N. Y. S. 684.

Preferences.

4. A husband who makes an assignment for the benefit of creditors may prefer a debt legally due to his wife. — *Kitteredge v. Van Tassell*, 10 N. Y. S. 92.

5. An assignment for benefit of creditors is not rendered invalid by preferring the wife and sister-in-law of the assignor for *bona fide* debts, for money loaned by them to him. — *Lyon v. Davis*, 10 N. Y. S. 182.

ASSOCIATIONS.

See, also, *Benevolent Societies; Corporations; Insurance; Religious Societies.*

Evidence of membership.

1. Where a defendant who is sued as president of an unincorporated association consisting of seven or more members (Code Civil Proc. N. Y. § 1919,) fails to produce the constitution and by-laws of the association after being notified to do so, evidence that, in addition to the original members, tickets were issued to a large number of other persons who contributed to the support of the association, and were entitled to all the privileges of the original members, is sufficient proof that the association consisted of more than seven persons. — *Haden v. Clarke*, 10 N. Y. S. 291.

Actions by trustees—Pleading.

2. Plaintiffs, as trustees of a voluntary association, sued for semi-annual payments on an agreement by which certain property was leased to defendant. The agreement under which the association was formed, and to which defendant was a party, provided that the trustees to be appointed should be authorized to lease the property, as was done in the agreement with defendant, and that the money to be paid by defendant should be paid to or recovered by them. *Held* that, though they were trustees of an express trust, capable of enforcing the agreement, within Code Civil Proc. N. Y. § 449, the court properly refused to strike from the complaint an allegation that plaintiffs, as trustees, had in a preceding suit recovered other and prior installments on the lease, as this was a material averment showing plaintiffs' right to maintain the action as trustees. — *Humphreys v. New York, L. E. & W. R. Co.*, 10 N. Y. S. 461.

ASSUMPSIT.**When lies.**

1. The fact that a contract is void under the statute of frauds will not preclude a recovery for services actually rendered in pursuance thereof. — *Springer v. Bien*, 10 N. Y. S. 580.

2. In an action to recover back money overpaid in the settlement of an account, it appeared that, there being a dispute as to the amount of the account, defendant agreed that if plaintiff would pay the amount of his demand, which included an indebtedness from plaintiff to a third person, who had assigned it to defendant, he would repay whatever sum it should be ascertained on a settlement of the account between plaintiff and the third person had been overpaid by plaintiff. Plaintiff effected a settlement with his debtor, and got a receipt showing the exact amount of his indebtedness. *Held*, that he could recover back the difference between the amount of the receipt and the sum paid defendant. — *Keenholts v. Church*, 10 N. Y. S. 615.

Pleading.

8. Complainant alleged that plaintiff shipped goods to defendant, his agent, to sell, and that defendant collected the proceeds, and converted same to his own use. An order of arrest founded on such complaint was vacated upon appeal because the complaint did not allege, as required by Code Civil Proc. N. Y. § 549, that defendant converted money received "in a fiduciary capacity." 9 N. Y. S. 2. *Held*, that the complaint stated a good cause of action, though not for money received in a fiduciary capacity, and that the trial court erred in dismissing the complaint. — *Bartlett v. Sutorius*, 10 N. Y. S. 800.

ATTACHMENT.

See, also, *Execution.*

Grounds.

1. The fact that defendants' stock has decreased from \$6,000 to \$2,000 during a period of eight months of unsuccessful business will not sustain an attachment on the ground that they have fraudulently disposed of their property. — *Thompson v. Dater*, 10 N. Y. S. 618.

2. That defendants were negotiating for the sale of their business at its value, but declined to pay plaintiffs, or to promise to pay them out of the avails of the sale, if it should be made, and also refused to make a *pro rata* general assignment, is no evidence of an intention to fraudulently dispose of their property. — *Thompson v. Dater*, 10 N. Y. S. 618.

Property subject to—Equitable interest in land.

3. The owner of land, in consideration of and for the purpose of securing a loan, agreed to execute to defendants H., S., and T., a warranty deed, and said defendants, in consideration of the deed, agreed to advance the money. It was further agreed

that the deeds should be security for the loan for a term not exceeding a year, and on repayment of the loan within a year the premises should be reconveyed; but, in case the loan should not be repaid within a year, then the deed was to become a deed absolute, and said defendants were to be owners in fee-simple absolute. Pursuant thereto a deed with the usual covenants of warranty was executed and recorded. The agreement was not recorded. The loan was not repaid within the year, and the owner of the real estate surrendered possession to said defendants, who afterwards sold and conveyed it to a fourth defendant. Thereafter plaintiff commenced an action by publication against said owner as a non-resident, and at the same time levied an attachment on said real estate. Judgment was entered by default. Code Civil Proc. N. Y. § 707, provides that, where a non-resident defendant has not been served within the state with the summons, a judgment by default can be enforced only against property on which an attachment has been levied at the time when the judgment is entered. *Held*, in an action to have the deeds declared mortgages, and the real estate adjudged subject to the judgment, that after the expiration of the year the original owner had at most an equitable interest, which was not subject to attachment.—*Macauley v. Smith*, 10 N. Y. S. 578.

Affidavit.

4. An affidavit for an attachment which states that plaintiffs sold goods to defendants; that affiant, who was in charge of plaintiffs' office in New York, made the sale, and had been informed by plaintiffs that they dealt with defendants only through affiant as agent; and that plaintiffs are entitled to recover the sum sued for, over and above all counter-claims known to plaintiffs or affiant,—is not objectionable as being one on information and belief. Affirming 5 N. Y. S. 881.—*Hamilton v. Steck*, 10 N. Y. S. 177.

5. Under Code Civil Proc. N. Y. § 1780, providing that "an action against a foreign corporation may be maintained by a resident of the state * * * for any cause of action," but that such action "may be maintained * * * by a non-resident in one of the cases following only: * * * (3) Where the cause of action arose within the state,"—an attachment against a foreign corporation for a cause of action which does not appear to have arisen in the state will be vacated where the affidavit therefor fails to show that plaintiff is a resident of the state.—*Oliver v. Walter Heywood Chair Manufg Co.*, 10 N. Y. S. 771.

6. Defendants, three brothers constituting a firm of retail dealers, on the same day made a chattel mortgage to a bank,

confessed judgment in its favor upon a debt not due, and rode 20 miles to confess judgment in favor of a fourth brother for a large amount, and under these judgments their goods were immediately seized on execution. Afterwards an attachment was issued in favor of plaintiffs, for goods sold on credit, upon four affidavits showing that defendants had obtained credit with them by representing that the fourth brother, worth a large sum of money, was a member of the firm, but that after the confessions of judgment they asserted that he had withdrawn before the purchase; that when the credit was given defendants knew themselves to be insolvent, and failed to so inform plaintiffs; that just before the judgments defendants bought large quantities of goods on credit, and at the same time shipped over 4,000 pounds of merchandise to various relatives and friends. *Held* sufficient evidence to sustain an attachment, under Code Civil Proc. N. Y. § 636, subd. 2, which authorizes an attachment when the debtor, with intent to defraud his creditors, has assigned, disposed of, or secreted his property, or is about to do so.—*Jaffray v. Nast*, 10 N. Y. S. 230.

Deposit in lieu of bond.

7. Code Civil Proc. N. Y. § 677, which provides that plaintiff in attachment may, by leave of court, bring any action in the name of himself and the sheriff that the sheriff might bring to recover property attached or its value or on an undertaking, does not authorize plaintiff to bring such action against the clerk to recover money deposited by defendant in lieu of bail.—*Anderson v. Tomkins*, 10 N. Y. S. 89.

Levy.

8. Code Civil Proc. N. Y. § 649, subd. 2, directing that a copy of a warrant of attachment, and the affidavit upon which it was granted, shall be delivered without delay to the person from whose possession the property is taken, is directory merely; and a failure to comply therewith is a mere irregularity, which will not of itself invalidate a levy. Following *Adams v. Speelman*, 39 Hun, 85.—*Adams v. Speelman*, 10 N. Y. S. 364.

Judgment.

9. In an action aided by attachment, a judgment for plaintiff for the amount of the debt sued for, with interest and ordinary costs, not including marshal's fees, will not be reversed because the attachment was erroneously issued.—*Schnauffer v. Catterbury*, 10 N. Y. S. 543.

Dissolution.

10. An affidavit for attachment, after averring the indebtedness of defendant to plaintiff, stated that affiant had learned from a neighbor of defendant that the

latter had taken a considerable portion of the goods from his store, and packed them for shipment, and that they were not shipped in defendant's name; that on the same day several judgments were entered against defendant, some of them being in favor of relatives; that the sheriff had informed affiant that defendant requested him to sell his property under such judgments without delay; and that defendant had refused to give affiant any information as to his affairs. The affidavit further alleged, upon information and belief, that the said judgments were not based upon any indebtedness, but were procured to be rendered for the purpose of defrauding creditors. *Held*, that an attachment granted on such affidavit would not be vacated, in the absence of counter-affidavits of defendant.—*Loeser v. Rosman*, 10 N. Y. S. 415.

ATTORNEY AND CLIENT.

Arguments of counsel, see *Trial*, 3, 4.
Privileged communications, see *Witness*, 4.

Compensation.

1. In an action to recover \$50 for legal services rendered "in case of Baldwin v. Robinson," plaintiff testified: "I defended a suit brought by Robinson against Baldwin. After the conclusion of that suit, I brought an action in the supreme court for Baldwin against Robinson. I know the value of such services rendered. The value of said services is \$50." *Held*, that plaintiff's estimate of value would be regarded, on appeal from a judgment in his favor, as referring to the services in Baldwin v. Robinson, and not to all the services testified to.—*Wood v. Baldwin*, 10 N. Y. S. 195.

2. After an attempted organization in New York in 1886, under a paper purporting to be an assignment of a charter of incorporation granted in 1882 by the legislature of Virginia, under the laws of which state a corporation must be organized within two years after the charter is granted, else the grant will be absolutely void, plaintiff was employed as counsel by persons who desired to put the company into operation, if the charter were valid, to give his opinion "upon the validity of the first charter of our company, and every act or event that has happened, or that may hereafter occur, by legislation which has or may affect it." Plaintiff, after having discovered that the original incorporators had organized in Virginia under the charter in 1883, and had changed its name in 1884, since when it had continuously prosecuted its business, went to Virginia, and procured an act of legislature changing the name of the company given by the act of 1884. *Held*, that plaintiff could not recover

for service in procuring such change of name.—*Welch v. Old Dominion Min. & Ry. Co.*, 10 N. Y. S. 174.

Lien.

3. An attorney may have the satisfaction vacated and execution issued to collect the amount of a judgment paid to his client after notice to defendants to pay the same to him, as he had a lien thereon for professional services.—*Commercial Telegram Co. v. Smith*, 10 N. Y. S. 433.

4. When a judgment is against several defendants, an appeal taken by one of them operates in his favor alone, and as to the defendants who have not appealed an attorney's lien may be enforced by issuing execution against them.—*Commercial Telegram Co. v. Smith*, 10 N. Y. S. 433.

5. That an attorney has sued his client by attachment for professional services does not defeat his right to enforce his lien on a judgment obtained for his client, if the claims giving rise to such lien were not included in that action.—*Commercial Telegram Co. v. Smith*, 10 N. Y. S. 433.

6. That there is a dispute between the attorney and his client as to the amount of his compensation or his right to remuneration does not defeat his right to enforce his lien on a judgment by a summary proceeding against defendants after notice to them that he claimed it.—*Commercial Telegram Co. v. Smith*, 10 N. Y. S. 433.

7. The attorney for plaintiff in an action for a limited divorce has no lien for his services on the alimony awarded, which he can enforce by proceeding against defendant for contempt in failing to pay the alimony.—*Weill v. Weill*, 10 N. Y. S. 627.

8. Where a wife, in an action for separation, procures a decree for alimony, costs, and attorneys' fees, and defendant, though verbally advised of a lien of plaintiff's attorneys on the judgment, secretly procures plaintiff to execute a satisfaction of the decree, the satisfaction will be set aside for the protection of plaintiff's attorneys, even after the death of plaintiff.—*Branth v. Branth*, 10 N. Y. S. 638.

9. But in such case plaintiff's attorneys must rely for their compensation upon the costs and counsel fees awarded, and are not entitled to any part of the alimony.—*Branth v. Branth*, 10 N. Y. S. 638.

BAILMENT.

See, also, *Carriers; Pledge*.

Injury to property—Rights of bailee.

In an action for damages to property caused by negligent blasting, plaintiff cannot recover for injuries to chattels which had been left with him by the owner to be repaired.—*Buddia v. Fortunato*, 10 N. Y. S. 115.

BANKS AND BANKING.

Check paid after drawer's death, action, see *Executors and Administrators*, 19.

Deposit—Delivery to officer.

1. Where plaintiff delivered moneys to the president of a bank to be deposited therein, and the latter, without plaintiff's knowledge or consent, deposited them in his own name as her attorney, and afterwards unlawfully appropriated a large part thereof to his own use, the bank is liable, since it is chargeable with the knowledge possessed by its president.—*Smith v. Anderson*, 10 N. Y. S. 278.

Dissolution—State bank.

2. Laws N. Y. 1865, c. 97, § 2, provides that any state bank becoming a national bank shall be deemed to have surrendered its charter on compliance "with the requirements of this act," but that it shall continue a body corporate for three years afterwards for the purpose of closing its concerns, but not for the purpose of the business for which it was established. Section 6 provides that, when authorized to commence business as a national bank, all assets of the old bank shall vest, without any conveyance, in the national bank, which, on returning the bills of the state bank to the banking department of the state, may receive the stock pledged to secure the redemption of the same, and that it shall be subjected to the same rules as the state banks with regard to the final redemption of the circulating notes of "such state banks so converted into national associations." Section 8 provides that the act shall not be construed so as to release the national bank from any obligation incurred before becoming such association. *Held*, that the conversion of a state bank into a national bank did not constitute such a "closing of the business" of the state bank that it could limit its liability to redeem its circulating notes by proceedings under Laws 1859, c. 236, authorizing state banks intending to close business to publish notice that any persons having any of the circulating notes of the bank should present them for redemption within six years, and, failing to do so, the bank would no longer be liable on such notes. Affirming 4 N. Y. S. 115.—*Claggett v. Metropolitan Nat. Bank*, 10 N. Y. S. 165.

National bank—Action by receiver.

3. Under Code Civil Proc. N. Y. § 449, excepting from the provision that an action must be prosecuted in the name of the real party in interest a person expressly authorized by statute to sue, the receiver of a national bank may sue for assessments levied on the stockholders, being so authorized by the act of congress relating

to national banks.—*Peters v. Foster*, 10 N. Y. S. 889.

BENEVOLENT SOCIETIES.

Mutual benefit insurance, see *Insurance*—8-12.

Fines of members—Remedies.

1. The Bricklayers' Benevolent & Protective Union, an incorporated association, designed to secure fair wages for its members, prescribes certain fines for violations of its laws, and provides for an appeal from the imposition of fines. *Held*, that a member could not sue to annul fines imposed on him until he had appealed as prescribed by the laws of the association.—*Burns v. Bricklayers' B. & P. Union*, 10 N. Y. S. 916.

Expulsion of members.

2. A rule of a benevolent society that any member feigning sickness to obtain benefits shall be expelled, does not authorize an expulsion without notice of the charges preferred or opportunity to defend.—*Simmons v. Syracuse, B. & N. Y. and Oswego & S. R. Benev. Soc.*, 10 N. Y. S. 298.

Bill of Particulars.

See *Pleading*, 22, 23.

Bills and Notes.

See *Negotiable Instruments*.

Bona Fide Purchaser.

Of draft, see *Negotiable Instruments*, 2.

Bonds.

For costs, see *Costs*, 6-8.

In attachment, see *Attachment*, 7.

Of receiver, action on, see *Receivers*, 5.

On appeal, see *Appeal*, 37.

BREACH OF MARRIAGE PROMISE.

Evidence.

In an action for breach of marriage promise, declarations by defendant that he was the only heir of his uncle, who would leave a large estate to him, and testimony by plaintiff that she had "heard" defendant was a very rich man, are inadmissible to prove defendant's financial circumstances.—*Totten v. Read*, 10 N. Y. S. 818.

BRIDGES.

Bonds of towns for construction, see *Towns*, 1-3.

Construction—Authority of county board.

1. Under Laws N. Y. 1875, c. 482, as amended by Laws 1876, c. 257, and Laws 1885, c. 451, which provides that county boards may authorize towns to build bridges and issue their bonds in payment therefor, the county board may, in its resolution authorizing the building of a bridge, appoint commissioners to supervise its construction, though such power of appointment is not expressly conferred by the act.—*Barker v. Town of Oswegatchie*, 10 N. Y. S. 884.

— Duty of highway commissioners.

2. 1 Rev. St. N. Y. p. 501, § 1, invests the commissioner of highways with the care, superintendence, repair, and improvement of highways and bridges within his town; and Laws N. Y. 1878, c. 877, as amended by Laws 1879, c. 67, charges him with the custody and disbursement of whatever money is raised by the town for those purposes. *Held* that, where a town-meeting votes to raise and appropriate a sum of money for the erection of a bridge across a river, the commissioner of highways is charged with the duty to erect it, and to make appropriate contracts therefor, in the absence of any action placing the work in the hands of other agents.—*Berlin Iron Bridge Co. v. Wagner*, 10 N. Y. S. 840.

Defects—Contributory negligence.

8. In an action against a town for injuries caused by the falling of a bridge by reason of a defective stringer, it appeared that plaintiff had been employed by the bridge commissioner, about a month before the accident, to assist in repairing the bridge, at which time they examined it together. Afterwards, and about three weeks before the accident, a brace was replaced, whereupon the commissioner pronounced it safe, though it was then decided to replace another brace on a certain day in the following week, and the commissioner directed plaintiff, in case of his absence, to replace the brace himself; but, owing to a storm on the day set, the work was prevented, and nothing more was done up to the time of the accident. Before making the repairs, plaintiff had said that the bridge was rotten, and in danger of falling, but there was no evidence that he knew of the defective condition of the stringer. Just before the accident, many persons had crossed with loads heavier than that hauled by plaintiff when the bridge fell. *Held*, that the question of contributory negligence should have been submitted to the jury.—*Taylor v. Town of Constable*, 10 N. Y. S. 807.

Brokers.

See *Factors and Brokers*.

Cancellation.

Of contracts, see *Equity*, 1.

CARRIERS.

See, also, *Horse and Street Railroads; Railroad Companies*.

Of passengers—Care required.

1. A railroad company is bound to give passengers a reasonable opportunity to leave trains at stations where they stop.—*Murphy v. Rome, W. & O. R. Co.*, 10 N. Y. S. 854.

Injuries to passengers.

2. A request to charge, in an action against an elevated railroad company for injuries to a passenger who, while leaving the car, was thrown down by other passengers entering, that, if defendant opened the gate to the platform of the car without giving any warning to let plaintiff alight first, it was an invitation to passengers on the station platform to enter the car, and to plaintiff to leave, and that if the platform was so narrow that two persons could not pass abreast, and that the passengers entering the car collided with plaintiff while leaving it in consequence of an invitation given by opening the gate, then defendant is liable for any injury to plaintiff caused by the collision without his fault, is objectionable as involving the conclusion that opening the gate of the car platform was an invitation to passengers to enter the car, rather than to plaintiff to alight, and also as making defendant liable for the negligence of one passenger to another, without negligence on its part.—*Buck v. Manhattan Ry. Co.*, 10 N. Y. S. 107.

8. In an action against an elevated railroad company for injuries to a passenger, who, while leaving the car, was thrown down by other passengers entering, where the evidence showed that only plaintiff and one other passenger alighted at the station where the accident occurred, and that only three passengers attempted to get aboard, evidence that on other occasions, on different trains, at other stations, plaintiff had heard the guards warn persons not to enter the train until the outgoing passengers had alighted, was properly excluded, in the absence of proof that the situation was identical with the circumstances in the case at bar.—*Buck v. Manhattan Ry. Co.*, 10 N. Y. S. 107.

4. A charge that "the mere fact that the plaintiff sustained an injury while a passenger on defendant's road does not entitle

him to a verdict. He must show that the accident was caused by a lack of due care on the part of the defendant,"—is proper, as merely stating the rule that the burden of proving negligence is on plaintiff.—*Buck v. Manhattan Ry. Co.*, 10 N. Y. S. 107.

5. In an action against an elevated railroad company for injuries to plaintiff, who, while trying to leave a car platform, was forced between the car and the station platform by persons endeavoring to board the train, it is not error to refuse plaintiff's request for a charge that it was defendant's duty, as a common carrier, to use the utmost care which a very cautious person would exercise to prevent injury to its passengers while on its vehicles, and to grant his other request for a charge that defendant was bound to use reasonable care to prevent injuries from the careless or wrongful act of any person whom it permits to come on its premises. Explaining 6 N. Y. S. 524.—*Buck v. Manhattan Ry. Co.*, 10 N. Y. S. 107.

6. In an action for injuries sustained while attempting to enter a street-car, after having signaled the driver to stop, plaintiff and some of his witnesses testified that the car had stopped, but started suddenly, as he was mounting the platform, and threw him down. Other witnesses for plaintiff testified that the car had not stopped, but had slackened its speed so that a person could enter it without risk. Defendant's witnesses testified that the car was moving at its usual speed when plaintiff attempted to enter it. The court charged that, if the car had not stopped when the plaintiff attempted to enter it, the verdict must be for defendant. *Held*, that a verdict for plaintiff would not be disturbed on appeal.—*Seltz v. Dry Dock, E. B. & B. R. Co.*, 10 N. Y. S. 1.

7. Plaintiff, a passenger on defendant's elevated train, arose as the train approached the station at which she wished to stop, and passed to the door of the car, which the brakeman held open. The jar of the train impelled her to place her hand on the door-casing, when, as the train stopped, the brakeman let go of the door, which slammed together, and injured her hand. *Held*, that the brakeman, who had been so seated as that he must have seen that plaintiff wished to get off at the station, was negligent in letting go of the door, in the absence of suitable appliances to hold it from shutting when the train stopped.—*Colwell v. Manhattan Ry. Co.*, 10 N. Y. S. 686.

8. It is not negligent for a passenger in an elevated railway car to leave his seat, and go towards the door, which at the time is held open by one of the trainmen, as the train approaches the station.—*Colwell v. Manhattan Ry. Co.*, 10 N. Y. S. 686.

9. While riding in defendant's horse-car, plaintiff was injured by the shaft of a wagon which collided with the car. In an action to recover for the injuries, the evidence tended to show that the two vehicles had stopped in plain view of each other in a very narrow street, and that the collision would not have occurred had the car stood still for a very short time, and permitted the wagon, which was first in motion, to get by. *Held*, that it was error to order a nonsuit.—*Devlin v. Atlantic Ave. R. Co.*, 10 N. Y. S. 848.

Injuries to passengers — Torts of servants.

10. A street railway company is liable for the acts of one of its drivers in wrongfully throwing a passenger off a car; the rule relieving a master from liability for a malicious injury inflicted by his servant not applying as between a common carrier and a passenger, where the servant is performing duties which the carrier owes to its passenger.—*Lyons v. Broadway & S. A. R. Co.*, 10 N. Y. S. 237.

CERTIORARI.

Against erroneous taxation, see *Taxation*, 15.

Review of proceedings for establishment of highway, see *Highways*, 4.

Procedure—Review.

On *certiorari* to review the action of police commissioners in removing a policeman, matters presented by the return to the writ, as to which relator was not tried, will be disregarded.—*People v. Hannan*, 10 N. Y. S. 71.

CHATTEL MORTGAGES.

Discharge of lien.

The fact that a landlord, who holds a chattel mortgage on household furniture belonging to his tenant as security for rent, takes possession of the furniture on its abandonment by the tenant, and cares for it, does not amount to an appropriation of the property in satisfaction of the mortgage debt.—*Lathers v. Hunt*, 10 N. Y. S. 529.

Collateral Attack.

On judgment, see *Judgment*, 13-15.

COMPROMISE.

See, also, *Accord and Satisfaction; Payment; Release and Discharge.*

By joint wrong-doer—Effect.

1. Where two persons were jointly liable for an injury caused by the negligence

of one in carrying out a joint enterprise. an agreement entered into with one of them whereby his note was accepted, together with a promise to deliver certain property, as full settlement of the claim, operated to discharge the other.—*Newman v. Stuckey*, 10 N. Y. S. 760.

Rescission.

2. Where an agreement of settlement of the claim sued on had been made, and in pursuance thereof, among other things, defendant had given his note to plaintiff, it was error, on a question whether the agreement was rescinded at a certain time, to refuse a charge that the fact that plaintiff did not then return the note was to be taken into consideration in determining the question.—*Newman v. Stuckey*, 10 N. Y. S. 760.

8. Where plaintiff unadvisedly enters into an agreement for the settlement of the matters in controversy for the sole purpose of escaping the injurious effects to his health caused by protracted litigation, and it immediately thereafter appears that such settlement will result in a series of future onerous litigations, it is within the discretion of the court, if not too late to place the parties *in statu quo*, to set aside the agreement and subsequent stipulations made in pursuance thereof.—*Van Nuys v. Fittsworth*, 10 N. Y. S. 507.

Confession.

Judgment by, see *Judgment*, 1, 2.

CONFLICT OF LAWS.

Wills—Trusts of personalty.

Where a testatrix dying in Rhode Island creates in a New York corporation certain trusts relating to personalty, which are valid under the laws of testatrix's domicile, but void under the laws of New York, though not on account of the incapacity of the beneficiaries to take, the courts of the latter state will not assume jurisdiction in the premises, but the trusts must be administered and their validity determined under the laws of Rhode Island.—*Cross v. United States Trust Co.*, 10 N. Y. S. 781.

Consideration.

Of contract, see *Contracts*, 2, 3.

CONSTITUTIONAL LAW.

Erroneous assessments, relevy by legislature, see *Taxation*, 7.

Interstate commerce—Taxation of telegraph lines.

1. Laws N. Y. 1886, c. 659, authorizing the taxation in the various towns and

wards of the state of the portions of telegraph lines located in such towns and wards, including the interest in the land on which the poles stand, and all poles, insulators, wires, apparatus, etc., is not an interference with the right of the federal government to "regulate commerce among the several states," within Const. U. S. art. 1, § 8, subd. 3, though such lines extend into other states.—*People v. Terney*, 10 N. Y. S. 940; Id. 948.

Reading deposition in criminal case.

2. Depositions in a criminal case, taken *de bene esse*, under a stipulation by counsel that they shall be read on the trial with the same force and effect as if the witnesses had testified, are not open to the objection that defendant is deprived of his constitutional right to be confronted by his accusers.—*People v. Molins*, 10 N. Y. S. 180.

CONTEMPT.

Collection of costs, see *Costs*, 19.

In violating injunction, see *Injunction*, 4, 5.

What constitutes.

1. An application for a commitment of defendant by an attorney to obtain his fees, it not appearing that the commitment, under Code Civil Proc. N. Y. § 779, for refusal to satisfy the decree for all money, costs, and attorney's fees, related exclusively to costs and counsel fees, will be refused.—*Branth v. Branth*, 10 N. Y. S. 638.

2. The refusal of defendant, executor of an estate, to obey an order of the surrogate to appear and show cause why he should not pay a collateral inheritance tax, constitutes a contempt.—*In re Pelton's Estate*, 10 N. Y. S. 642.

3. An assignee for the benefit of creditors cannot be attached for contempt in not complying with an order directing him, in general terms, to distribute the funds remaining in his hands, after deducting fees, costs, and commissions, *pro rata* among a large number of creditors, where the amount to be paid to each creditor is not specified by such order. The acts to be done are not sufficiently specific to be made the basis of an attachment.—*Ross v. Butler*, 10 N. Y. S. 444.

Power to punish.

4. Under Code Civil Proc. N. Y. § 8343, subd. 3, defining a judge as any "judicial officer," a justice of the supreme court is a "judge," within the meaning of Laws N. Y. 1858, c. 190, § 4, which provides, if any person duly subpoenaed by the board of supervisors of a county shall refuse to answer a pertinent question, he shall be deemed in contempt, and the facts shall be reported to "the county judge, or to a judge of the supreme court * * * or

of the court of common pleas, of any of the cities of this state, who shall thereupon issue an attachment."—*People v. Rice*, 10 N. Y. S. 270.

Procedure.

5. Laws N. Y. 1858, c. 190, § 4, provides that, if a person duly subpoenaed by the board of supervisors of a county shall refuse to answer a pertinent question, he shall be deemed guilty of a contempt, and the facts shall be reported to "the county judge, or to a judge of the supreme court * * * or of the court of common pleas," etc., "who shall thereupon issue an attachment, in the form usual in the court of which he shall be judge. * * * to attach such person, and forthwith bring him before the judge by whose order the attachment was issued." Section 5 provides that on the return of the attachment the judge shall have jurisdiction, and the same proceedings shall be had as in case of a witness subpoenaed to testify in a civil case before a circuit court or special term. Section 8 provides that all orders, decisions, and judgments in proceedings under this act by any judge out of court shall be filed in the office of the county clerk, and have the same effect as if made at a regular term or session. *Held*, that such proceeding for contempt must be before a judge, and cannot be had at special term.—*People v. Rice*, 10 N. Y. S. 270.

CONTRACTS.

See, also, *Accord and Satisfaction; Assignment; Assignment for Benefit of Creditors; Carriers; Chattel Mortgages; Compromises; Covenants; Deed; Factors and Brokers; Frauds, Statute of; Fraudulent Conveyances; Guaranty; Insurance; Landlord and Tenant; Marine Insurance; Mortgages; Negotiable Instruments; Orders; Partnership; Pledge; Principal and Agent; Release and Discharge; Sale; Specific Performances; Usury; Vendor and Vendee.*

Of cities, see *Municipal Corporations*, 34-38.
infant, see *Infancy*, 1.

wife, see *Husband and Wife*, 3.

Restraining violation, see *Injunction*, 2.

Validity.

1. An agreement for a builder's loan, which provides that mortgages to be executed as security for the loan may be foreclosed if work on buildings to be erected on the mortgaged premises shall be unreasonably delayed, is valid between the parties and subsequent purchasers and mortgagees with notice of its existence.—*Metropolitan Life Ins. Co. v. Hall*, 10 N. Y. S. 196.

Validity—Consideration.

2. A renewal note, signed by a married woman as surety for her husband, is supported by a sufficient consideration where the payee surrenders the old note of the husband.—*Queens County Bank v. Leavitt*, 10 N. Y. S. 194.

8. An agreement by the husband to give the wife certain furniture if she would continue to live with him is illegal and void, where it appears that at the time they were married the wife knew that the husband had a former wife living, from whom there is no evidence of a divorce, and that they went to another state to have the ceremony performed.—*Tyrrell v. York*, 10 N. Y. S. 611.

—Public policy.

4. The law requires that leases of New York city property shall be made at public auction to the highest bidder, but it is usual before the auction to obtain privately what is considered a reasonable offer, which can be accepted if no higher bid is made. Plaintiff assisted defendant in negotiating with the city comptroller as to such an offer, and alleged that defendant agreed to pay him a commission, in case the bid was accepted. There was no bargaining as to keeping away other bidders. *Held*, the contract was not void as against public policy.—*Myers v. Dean*, 10 N. Y. S. 532.

5. In an action for moneys belonging to plaintiff which came into defendant's hands, defendant pleaded and testified that plaintiff agreed to give him part thereof if he would refuse to pay a certain note which he had given in settlement of certain actions against him wherein plaintiff was attorney for the persons suing, and that plaintiff agreed to furnish evidence to defeat a recovery thereon. *Held*, a charge that, if the money came into defendant's hands in pursuance of such an agreement plaintiff could not recover, because the contract was immoral and against public policy, was as favorable as defendant could ask, and was not erroneous.—*Garfield v. Blair*, 10 N. Y. S. 340.

Interpretation.

6. A contract to make steel-plate bank-drafts, "a satisfactory design" to be furnished the purchaser, involves a matter of taste, and the purchaser may reject the work without assigning any reason for his dissatisfaction.—*Gray v. Alabama Nat. Bank*, 10 N. Y. S. 5.

7. In an action for breach of contract to sell railroad bonds, plaintiff claimed the number sold was 600. Defendant claimed it was 500. The evidence was conflicting, and would have supported a verdict either way. Five days after the making of the

contract, which was oral, defendant gave plaintiff a written order for 60 of the bonds, to be delivered on payment of "85 per cent. flat;" the order continuing: "You may also deliver him any other of said bonds, not exceeding \$600,000 in all, he may take at same time." *Held*, that the court, in speaking of this order, erred in charging that defendant "delivered to the plaintiff what substantially shows the contract and its terms; * * * and, so far as the agreement between the parties is concerned, it fixes plainly the terms, and the number of bonds the plaintiff was to be entitled to thereunder, which was 600."—*Goodwin v. Burke*, 10 N. Y. S. 628.

8. Nor was this error cured by the further charge: "There is a discrepancy between the parties in relation to the number of bonds which were included in this arrangement, and an explanation is offered by both the plaintiff and defendant, to be considered by you."—*Goodwin v. Burke*, 10 N. Y. S. 628.

9. Where defendant agrees with the executors of an estate to pay all debts "allowed or legally established against the estate," he is bound for all claims properly presented and verified, and allowed by the executors in good faith.—*Lawrence v. Church*, 10 N. Y. S. 566.

10. An agreement between plaintiff and defendant for the transportation of Mexican pilgrims from New York to Rome by a steamer owned by plaintiff was made by a correspondence, which commenced with a letter from defendant referring to a preceding conversation respecting the matter, and adding: "Our people in Mexico advise that upon favorable terms they can secure a party of about 175 or 200 people, with a possibility of increasing the number. These people will be divided into classes, about as follows: 75 first-class, 75 second-class, 50 steerage." Plaintiff replied stating the rates, but without mentioning any number, and received an answer expressing dissatisfaction with the rates, and stating: "There is a probability that there will be 250 people, or more." Plaintiff then wrote stating, *inter alia*: "We beg to confirm the understanding arrived at between us, viz., that you will not ship less than 75 first-class, 75 second-class, and 100 third-class passengers for the round trip;" and then again mentioned the rates, which were accepted by a letter on the same day, stating: "There is a probability that the party will exceed 250." Other letters passed without mentioning the number of passengers until plaintiffs wrote expressing surprise at hearing of a falling off in the number of the passengers, and notifying defendant it would be held responsible for the passage money on the numbers originally arranged. The vessel was then

engaged for the trip. *Held*, that the agreement was for the transportation of 250 persons, including the different classes, and that plaintiff could recover of defendant damages resulting from its failure to furnish that number. *Distinguishing Railway Co. v. Dane*, 48 N. Y. 240.—*Barrow v. S. Co. v. Mexican C. R. Co.*, 10 N. Y. S. 804.

Merger.

11. An agreement for a builder's loan, which provides that mortgages to be executed as security for the loan may be foreclosed if work on buildings to be erected on the mortgaged premises shall be unreasonably delayed, does not merge in the mortgages subsequently executed, where the making of those instruments was in execution of a part only of the agreement, and there is no evidence of an intention to extinguish the agreement by the execution and delivery of the mortgages.—*Metropolitan Life Ins. Co. v. Hall*, 10 N. Y. S. 196.

Performance.

12. Plaintiff, as manager of an opera troupe, engaged defendant, a tenor of repute, under an agreement stipulating that defendant should be as well advertised in programmes and newspapers as the other tenor. A performance was to be given at the city where defendant resided, and he was assured by plaintiff that he should take the part of tenor on the opening night, and defendant joined the company, and rendered services under that assurance. Defendant did sing on that occasion, but the other tenor was advertised and received the credit of the performance in the morning papers, the mistake being corrected in the afternoon papers. *Held*, this was such a violation of the agreement as absolved defendant from its further performance.—*Pratt v. Montegriffo*, 10 N. Y. S. 903.

13. Defendant entered into a single contract for the purchase of bonds and warrants from plaintiffs. The bonds only were delivered, though defendant told plaintiffs to send the warrants, and insisted on their delivery, as he had sold them. *Held*, that the fact that defendant paid a portion of the purchase price of the bonds did not amount to a severance of the contract, and plaintiffs could not recover the balance of such purchase money without a delivery of the warrants.—*Ming v. Corbin*, 10 N. Y. S. 641.

14. Plaintiff agreed to give defendant lessons in a certain art every evening, till defendant had fully acquired it, and to receive therefor \$25 on the first day of the lessons, and \$25 each week for two other weeks, if the lessons should be satisfactory, and a final payment of the same amount when defendant was satisfied. Plaintiff gave ten lessons, receiving two payments,

and then, on account of illness, discontinued the instructions, and never offered to resume them. *Held*, that he could not recover the last two payments, if plaintiff had not acquired the art from the instructions already given.—*Johnson v. Bindsell*, 10 N. Y. S. 821.

Actions on—Evidence.

15. In an action on a contract, under which the contractor is entitled to different rates of compensation for different grades of work, where the contractor has testified to the amount and value of the work alleged to have been done by him, it is error to exclude testimony by the chief engineer, whom the contract designates as the arbitrator of all questions arising under it, as to deductions that should be made from the contractor's estimate because of charges for lower grades of work at rates fixed for higher grades.—*Byron v. Bell*, 10 N. Y. S. 698.

16. A provision in a contract for the construction of a piece of railroad that the amount due the contractor shall be determined by the measurements and calculations of the chief engineer of the construction company will not prevent the contractor, who alleges that the chief engineer's estimates are fraudulent and unjust, from proving the nature, extent, and value of his work by other competent witnesses.—*Byron v. Bell*, 10 N. Y. S. 698.

17. In an action for breach of a contract for the building of house, evidence as to the cost of removing defective material, and of replacing the same in accordance with the contract, was admissible.—*Healy v. Bulkley*, 10 N. Y. S. 702.

—Instructions.

18. In an action for breach of contract in building a house, a request to charge as to the rule of damages for defective workmanship or poor material is properly refused as too general, where there is also a claim for material not furnished, and for delay in the performance of the contract.—*Healy v. Bulkley*, 10 N. Y. S. 702.

Contributory Negligence.

See *Negligence*, 11-18.

CONVERSION.

See, also, *Trover and Conversion*.

Testamentary conversion.

A testator devised a farm, with the stock, horses, etc., thereon, to four persons as joint tenants, the income to be divided in a specified manner. In the event that the income should become insufficient to pay expenses and a dividend to the beneficiaries, he empowered the executors to

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sell the property, and to pay the proceeds, one-half to one of the beneficiaries, and the other half to the other three, "the survivor and survivors, share and share alike." *Held* that, after the farm had become unprofitable, and after a sale of part of the stock by the executors, the entire property, by virtue of the power of sale, was converted into personalty, and from a joint tenancy to a tenancy in common, and that the heirs of one of the beneficiaries, who thereafter died, were entitled to her share of the proceeds from the sale of the entire property.—*In re Ransom's Estate*, 10 N. Y. S. 16.

CORPORATIONS.

See, also, *Banks and Banking; Benevolent Societies; Carriers; Horse and Street Railroads; Insurance; Municipal Corporations; Railroad Companies; Religious Societies; Schools and School-Districts.*

Dissolution of "trust," see *Injunction*, 1.

—substitution of receiver in action against, see *Receivers*, 1, 2.

Forfeiture of charter, violation of labor law, see *Horse and Street Railroads*, 8.

Service of process on, see *Writs*, 1, 2.

Corporate name.

1. In an action by the Employers' Liability Assurance Corporation against the Employers' Liability Insurance Company of the United States to restrain defendant from using the words "Employers' Liability" as part of its corporate name, it appeared that there were many corporations carrying on business of the same nature as that in which plaintiff was engaged, and that all used the words "Employers' Liability" in their corporate names. *Held*, that such words designated a kind of insurance business, and did not express proprietorship, and their use by defendant would not be restrained, though plaintiff was the first to use them.—*Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co.*, 10 N. Y. S. 845.

2. It appeared in such case that plaintiff was an English corporation doing business in New York, and that defendant, a New Jersey corporation, had applied to the insurance department for leave to do business in New York. There was no evidence that defendant adopted its name with an intent to imitate that of plaintiff, or in fraud of its rights. *Held*, that the use by defendant of the words "Employers' Liability" in its corporate name would not be enjoined on the ground that confusion would result as to the identity of the two companies, in that it was the custom to refer to insurance companies by abbreviated titles, since defendant would be permitted to do business only in its corporate name,

which is distinguishable from that of plaintiff.—*Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co.*, 10 N. Y. S. 845.

Assignment of charter.

3. A charter of incorporation is not assignable, and an attempted organization of a corporation by persons to whom the charter is attempted to be assigned is void, and a corporation *de facto* cannot be created by user under such organization.—*Welch v. Old Dominion Min. & Ry. Co.*, 10 N. Y. S. 174.

Officers—Election.

4. Laws N. Y. 1875, c. 611, § 6, subd. 2, requires that the by-laws of a corporation shall prescribe the term of office of the directors, which shall not exceed one year. The record of an election of the first directors of a limited corporation organized thereunder, held in October, 1886, shows that they were to hold until their successors were elected. The by-laws adopted at the same meeting prescribed that the annual election of directors should be held on the first Monday of January in each year, and that the term should be "one year, and until such time as their successors are chosen, but in no case to hold longer than three months after the expiration of the year." There was no election in January, 1887. *Held*, that the directors elected in October, 1886, held office until at least one year from their election.—*Post-Express Printing Co. v. Coursey*, 10 N. Y. S. 497.

Restraining transfer of assets by directors.

5. An injunction will not be granted to restrain the directors of a corporation from transferring its property, assets, and business to another corporation, where it appears from affidavits of the directors that they do not contemplate such action, but merely the leasing of important rights and functions to the other corporation.—*Small v. Minneapolis Electro-Matrix Co.*, 10 N. Y. S. 456.

Contracts.

6. The president of a corporation not engaged in banking discounted a note payable to his own order, and paid for it with the check of the corporation, to which he afterwards assigned the note. *Held*, that discounting by the corporation being forbidden by statute, it will be presumed that it was not a corporate act, and that the use of its money was a wrongful appropriation thereof, in satisfaction of which it received the note, and, the president being dead, the court is not bound to credit the testimony of the defendant giving the trans-

action another color in order to defeat a just demand.—*Lawrenceville Cement Co. v. Parker*, 10 N. Y. S. 831.

7. Defendant cannot repudiate the acts of its agent upon the ground that it is a corporation formed to do a lawful business, and therefore the unlawful dealings of its agent were *ultra vires*.—*Peck v. Doran Wright Co.*, 10 N. Y. S. 401.

8. Under Laws N. Y. 1878, c. 163, providing that an association incorporated under Act Feb. 17, 1848, and its amendments, shall, as a condition precedent to the giving of a mortgage to secure a debt contracted by it in the course of its business, have the assent of two-thirds of the owners of the capital stock, persons who have made no payments on their subscriptions, but are officers of the association, and persons who have made substantial payments either in cash or work, are stockholders for the purpose of giving their assent, though no certificates have been issued.—*McComb v. Barcelona Apartment Ass'n*, 10 N. Y. S. 546; *Same v. Cordova Apartment Ass'n*, Id. 552; *Same v. Lisbon Apartment Ass'n*, Id.; *Same v. Madrid Apartment Ass'n*, Id.

9. It was part of the arrangement under which land was conveyed to an incorporated association that it should give two mortgages to secure future advances for improvements thereon, and the mortgages and the deed were executed and delivered contemporaneously. *Held*, that these mortgages were not within Laws N. Y. 1878, c. 163, requiring the assent of stockholders before giving a mortgage.—*McComb v. Barcelona Apartment Ass'n*, 10 N. Y. S. 546; *Same v. Cordova Apartment Ass'n*, Id. 552; *Same v. Lisbon Apartment Ass'n*, Id.; *Same v. Madrid Apartment Ass'n*, Id.

10. In an action to foreclose the mortgages given to secure advances, it is error to include in the judgment a sum sufficient to satisfy advances in excess of the amount of the mortgages.—*McComb v. Barcelona Apartment Ass'n*, 10 N. Y. S. 546; *Same v. Cordova Apartment Ass'n*, Id. 552; *Same v. Lisbon Apartment Ass'n*, Id.; *Same v. Madrid Apartment Ass'n*, Id.

Actions.

11. In an action against a director for the debt of a corporation, upon the ground of failure to file an annual report, it was not prejudicial error to admit the judgment roll of a judgment against the corporation for the same debt, for the purpose only of proving the costs in that action, which plaintiff claimed a right to recover when the finding was against such director.—*Post-Express Printing Co. v. Coursey*, 10 N. Y. S. 497.

12. A complaint which alleges that defendant is a corporation, but which fails

to allege whether it is a foreign or domestic corporation, is not demurrable, as not stating facts sufficient to constitute a cause of action.—*Rothchild v. Grand Trunk Ry. Co.*, 10 N. Y. S. 88.

Transfer of corporate property to stockholders.

13. Defendants, owning patents for carpet looms, formed a corporation under the general manufacturing act, with a capital stock of \$40,000, which was issued to themselves, and transferred the title of the patents to the company at that valuation, which was merely nominal. The only business intended by defendants was the holding of the patents and the collection of royalties. Subsequently, it was determined to manufacture carpets, and, for that purpose, to increase the capital stock. Preliminarily, and so as to retain the ownership of the patents, defendants had them retransferred to themselves individually, for the same nominal price at which they were transferred to the company. They then increased the capital to \$600,000, all of which was issued to themselves; \$250,000, including the \$40,000 already held by them, for cash at par, and the balance for an unlimited license to use the patent at a certain rate of royalty. No debts were then owed by the company. *Held*, that the retransfer of the patents to defendants individually was not a withdrawal of capital, within the prohibition of 8 Rev. St. N. Y. (8th Ed.) p. 1728, § 2, declaring it to be unlawful for the directors of a corporation to withdraw, or in any way pay to the stockholders, any part of the capital stock, without the consent of the legislature.—*Skinner v. Smith*, 10 N. Y. S. 81.

Reorganization—Rights of old stockholders.

14. By an agreement for the reorganization of a corporation, entered into between the stockholders and creditors, it was provided that new stock should be issued in lieu of the old, which should be divided *pro rata* among the holders of the floating debt of the corporation, on certain conditions, and among the old stockholders who should elect to provide their *pro rata* share of the amount requisite to pay the floating debt and other charges, the amount of such *pro rata* share to be fixed and determined by a certain trust company. *Held*, that the old stockholders, on a simple allegation that the assessment made by the trust company was "unnecessarily high," could not have an injunction restraining the distribution of stock until the validity of the claims to be paid by the assessment could be investigated. Reversing 7 N. Y. S. 872.—*Gernsheim v. Olcott*, 10 N. Y. S. 488.

Insolvency—Arrest of debtor of corporation.

15. Rev. St. N. Y. p. 469, § 70, providing for notice of the appointment of a receiver for an insolvent corporation, and section 72, that, after the first publication, every one having any of its property or indebted to it shall account therefor to the receiver, a warrant cannot, until after the first publication, be issued for the arrest and examination of one on whom a personal demand has been made, under 2 Rev. St. p. 48, § 12, and 2 Rev. St. p. 469, § 72, providing that where a receiver of an insolvent corporation shall show that any one has concealed or embezzled any part of the estate, or can testify as to the concealment and embezzlement thereof, a warrant may issue for his arrest and examination.—*In re Stonebridge*, 10 N. Y. S. 727.

16. A warrant, issued at the instance of a receiver of an insolvent corporation for the arrest and examination of its debtor, should be vacated on motion, unless notice was given to the attorney general under Laws N. Y. 1888, c. 878, § 8, requiring service on him of a copy of all motion papers, and of any other application, in any proceeding for the dissolution of a corporation, or the distribution of its assets.—*In re Stonebridge*, 10 N. Y. S. 727.

Dissolution.

17. Code Civil Proc. N. Y. § 1785, provides that an action to dissolve a corporation may be maintained "where it has suspended its ordinary and lawful business for at least one year." Section 1798 provides that the attorney general may sue to vacate the charter of a corporation, on the ground that it has "forfeited its privileges or franchises by a failure to exercise its powers." *Held*, that there is no conflict between the two sections, and an action by the attorney general to dissolve a corporation, on the ground that it has suspended business, can be brought only after the lapse of a year, as prescribed by section 1785.—*People v. Atlantic Ave. R. Co.*, 10 N. Y. S. 907.

18. An order denying an application for leave to bring action in behalf of the state to vacate the charter of a gas company on the ground of non-user and other neglect will be affirmed where it appears that the company assumed a large responsibility and outlay upon the strength of the discontinuance of a former action for the same purpose, and no new facts are alleged why the charter should be annulled which did not exist at the time of such discontinuance.—*In re Equity Gas-Light Co.*, 10 N. Y. S. 801.

Foreign corporations—Service of process.

19. Prior to the service of summons upon one B., as officer or managing agent of

defendant, a foreign corporation, under Code Civil Proc. N. Y. § 482, B. had resigned his position of president of the corporation, and he made affidavit that subsequently he sustained no relation to defendant except as a member of a firm which was under contract to sell defendant's goods and to advance moneys to defendant. On the day of the service of summons B. gave directions as to the disposition of certain property consigned to defendant, but with such directions B. communicated the fact of his resignation. *Held*, that the service could not be sustained.—*Sturgis v. Crescent Jute Manuf'g Co.*, 10 N. Y. S. 470.

COSTS.

Right to costs.

1. Code Civil Proc. N. Y. § 8230, provides that, in cases where costs are not allowable of course, the court, in its discretion, may award them to any party "upon rendering final judgment." *Held* that, in an action to abate a nuisance tried at the circuit, a dismissal of the complaint without directing costs to be awarded to defendant is, in effect, a final judgment without costs; and the special term, presided over by another judge, has no power to allow the costs of the action to defendant, though the omission of the circuit court to allow them grew out of a misapprehension by the counsel and the court as to defendant's right to costs of course.—*Le Roy v. Browne*, 10 N. Y. S. 828.

2. Where, in an action to abate a nuisance, plaintiffs are nonsuited, costs are not allowed as of course, but only on the award of the court.—*Le Roy v. Browne*, 10 N. Y. S. 828.

3. Where the circuit judge, in the exercise of his discretion, has not awarded costs to defendants on deciding the case in their favor, and defendants have entered judgment accordingly, the special term will not assume that the circuit judge was mistaken in the exercise of such discretion, and will not send the case back to him for his determination on the question of costs.—*Le Roy v. Browne*, 10 N. Y. S. 828.

Who liable — Personal representative.

4. In an action against an administratrix to recover for services performed and moneys expended as expenses of administration, costs may be awarded against her, under Code Civil Proc. N. Y. § 8248, providing that, in an action brought against an executor or administrator in his representative capacity, costs must be awarded as in an action against a person defending in his own right, except as otherwise prescribed in sections 1835 and 1836, which ex-

cept generally cases where a judgment for a sum of money only is rendered.—*Boydton v. Laddy*, 10 N. Y. S. 622.

— Assignee for benefit of creditors.

5. Code Civil Proc. N. Y. § 8247, provides that where, after the commencement of an action, the cause of action becomes by transfer the property of a person not a party to the action, the transferee or other person so interested is liable for costs to the same extent as if he was the plaintiff, and where costs are awarded against plaintiff the court may order the person so liable to pay them. Plaintiffs brought replevin for goods sold by them and transferred to defendants on the ground that the sale was induced by fraud, and recovered possession of the same. After the commencement of the action, defendants made a general assignment for the benefit of creditors, but the assignee was never made a party to the action, and refused to have anything to do with it, because of the suspicious circumstances connected with the transfer of the property to defendants. *Held* that, judgments having been rendered for plaintiffs for the retention of the goods, and for costs, the assignee could not be made liable for such costs under the above section.—*McCarthy v. Wright*, 10 N. Y. S. 824.

Security for costs.

6. Where an undertaking to secure costs is regular in all respects except that it was filed without leave of court, and without giving defendants an opportunity to be heard as to the amount thereof, such undertaking will not be approved, but leave will be given to plaintiff to apply for an order to show cause why he should not be permitted to file a sufficient undertaking.—*Rothchild v. Wilson*, 10 N. Y. S. 61.

7. Under Code Civil Proc. N. Y. § 8273 providing that "the undertaking * * * must be executed to the defendant," several defendants cannot appear separately, and require a non-resident plaintiff to give a separate undertaking to secure the costs of each.—*Rothchild v. Wilson*, 10 N. Y. S. 61.

— In forma pauperis.

8. It being in the discretion of the court to allow an action to be prosecuted *in forma pauperis*, (Code Civil Proc. N. Y. §§ 458, 460, 461,) a non-resident plaintiff may be permitted to sue in such form, though section 8268 provides that "defendant in an action brought in a court of record may require security for costs to be given: * * * where the plaintiff was, when the action was commenced, * * * person residing without the state."—*Harris v. Mutual Life Ins. Co.*, 10 N. Y. S. 473.

Taxation.

9. In an action by the indorsee against the maker and indorser of a promissory note the summons and complaint were served on one defendant on January 18th, and on January 24th his separate answer was served. The other defendant was served with the summons and complaint on March 11th, and he served his separate answer on March 18th. Both defendants appeared by the same attorney, but the answers were substantially different, and separate answers were necessary. *Held* that, on discontinuing the action, plaintiff would be required to pay two bills of costs.—*Mazet v. Crow*, 10 N. Y. S. 743.

10. Code Civil Proc. N. Y. § 738, provides that defendant may before trial serve a written offer of judgment on plaintiff's attorney, which plaintiff may accept, and enter judgment within 10 days thereafter. Section 740 provides that, unless the offer of judgment is signed by the party making it, his attorney must annex his affidavit that he is duly authorized to make it in behalf of the party. After a cause had been noticed for trial, and less than 10 days before it was reached, defendant's attorney served a notice that he withdrew the answer, but the affidavit required by section 740 was not annexed thereto. *Held*, that such notice was not sufficient as an offer of judgment, and plaintiff, having taken an inquest on defendant's failure to appear, was entitled to tax a trial fee in his bill of costs.—*Perine v. Wiggins*, 10 N. Y. S. 939.

11. The sum paid to a lawyers' title insurance company by plaintiff, for searches made in action for the foreclosure of a mortgage, is not a legal disbursement, taxable as costs in the suit.—*Equitable Life Assur. Soc. v. Olyphant*, 10 N. Y. S. 659.

12. Under the statute and rules of practice in New York, fees paid by complainant in foreclosure suits for searches of title are only taxable as legal disbursements when the searches are official. Affirming 9 N. Y. S. 836.—*Equitable Life Assur. Soc. v. Hughes*, 10 N. Y. S. 796.

— Extra allowance.

13. An extra allowance of costs under Code Civil Proc. N. Y. § 8253, which authorizes such an allowance in foreclosure proceedings in a sum not exceeding 2½ per cent. of the amount due on the mortgage, nor the aggregate sum of \$100, "in the discretion" of the court, will not be reviewed on appeal unless there has been a clear abuse of discretion.—*Mutual Life Ins. Co. v. Cranwell*, 10 N. Y. S. 404.

14. Where, on demurrer, a court dismisses a complaint for want of jurisdiction, no costs can be allowed defendant under Code Civil Proc. N. Y. § 8253, which provides that in a difficult and extraordi-

nary case the court may award, as additional costs, a sum not exceeding 5 per cent. of the amount involved. Before the court can award such costs, it must determine that the case itself is difficult and extraordinary, and that question cannot be considered where the court has no jurisdiction.—*Genet v. Delaware & H. C. Co.*, 10 N. Y. S. 467.

15. Where defendant becomes entitled to costs under Code Civil Proc. N. Y. § 738, providing that if plaintiff does not accept an offer of judgment made by defendant before the trial, and "fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time," defendant is not limited to the costs expressly provided for in the statute, but may be granted an extra allowance in a proper case. *Overruling Magnin v. Dinsmore*, 47 How Pr. 11.—*Landon v. Van Etten*, 10 N. Y. S. 802.

On appeal from justice of the peace.

16. Under Code Civil Proc. N. Y. § 3072, relating to appeals from justices of the peace, where new trials are demanded in the appellate court, which provides that "either party may, at any time after the action is deemed at issue in the appellate court, and before the trial, serve upon the adverse party a written offer to allow judgment to be taken against him for a sum or property, or to the effect therein specified, with or without costs, * * * and if the party to whom it is made fails to obtain a more favorable judgment he cannot recover costs from the time of the offer, but must pay costs from that time," where the offer is not accepted, and the party obtains a more favorable judgment than the offer, he can recover costs from the time of the offer. *Distinguishing Zoller v. Smith*, 45 Hun, 819.—*Watson v. Benz*, 10 N. Y. S. 799.

Remedies.

17. Code Civil Proc. N. Y. § 779, provides that where costs of a motion, directed by an order to be paid, are not paid within the time fixed, or, if no time is fixed, within 10 days after the service of the order, all proceedings on the part of the party required to pay them, except to vacate the order, are stayed, without further direction of the court, until payment. The section further provides that, when the order directs that the costs of the motion abide the event of the action, they may be taxed as a part of the costs of the action, or set off against costs awarded to the adverse party, as the case may require. On motion of defendant, an order was made granting a new trial, "with \$10 costs, to abide the event," and, on appeal, the order was affirmed. *Held*, that defendant could not have an or-

der staying proceedings by plaintiff because of the non-payment of such costs.—*Van Woert v. Ackley*, 10 N. Y. S. 673.

18. Neither will the non-payment of the costs included in the judgment of affirmance of the order granting a new trial justify such an order staying proceedings.—*Van Woert v. Ackley*, 10 N. Y. S. 673.

19. The costs of an action for divorce cannot be collected by a proceeding to punish for contempt.—*Weill v. Weill*, 10 N. Y. S. 627.

20. Where on appeal the general term allows a certain amount for costs, the remedy of the prevailing party, who claims a greater amount, is by application to that court for a modification of its order, and not by appeal from the taxation of the clerk, in accordance with the order.—*Clark v. Sullivan*, 10 N. Y. S. 897.

Counter-Claim.

See *Set-Off and Counter-Claim*.

Counterfeiting.

Of trade-marks, see *Trade-Marks*, 3-5.

COUNTIES.

See, also, *Bridges; Highways; Schools and School-Districts*.

Authority to towns to issue bridge bonds, see *Bridges*, 1, 2; *Towns*, 1-3.

Power to reduce salary of officer, see *Office and Officer*.

Public printing.

1. Under Laws N. Y. 1886, c. 515, providing that the boards of supervisors in the several counties shall designate newspapers "to publish the laws," a designation of papers "to do the public printing" is sufficient.—*People v. Board of Sup'rs*, 10 N. Y. S. 88.

Allowance of claims by county board.

2. It is the duty of a board of supervisors to allow a claim against the county, where the amount is undisputed, and its refusal to do so is not a mere error of law, but a breach of duty, which the courts will remedy by *mandamus*.—*People v. Board of Sup'rs*, 10 N. Y. S. 88.

Liability of county treasurer.

3. Laws N. Y. 1869, c. 907, § 4, as amended by Laws 1871, cc. 283, 925, provides that all taxes, except road and school taxes, collected and paid over to the county treasurer, on the assessed valuation of any railroad in any town, village, or city, which has issued bonds to aid in the construction of such railroad, shall be used by the treasurer to purchase such bonds, in order that

they may be canceled. Prior to the time of the demand made on the county treasurer to use the moneys in question for the purchase of bonds, the act above cited, on which this proceeding was based, had been declared unconstitutional by the general term, but it was afterwards held constitutional by the court of appeals. *Held*, that the refusal of the treasurer to comply with the demand was not such a willful neglect of a plain duty as would charge him with interest upon such moneys.—*Clarke v. Sheldon*, 10 N. Y. S. 857.

Children committed to charitable institution—Liability for support.

4. The county is liable, on a bill audited by the supervisors, for the maintenance of children committed to a charitable institution under Pen. Code N. Y. §§ 291, 292, providing that children in certain cases may be committed to such institutions.—*People v. Dickson*, 10 N. Y. S. 604.

5. The question of the validity of commitments which are not absolutely void does not arise in a proceeding to collect the audited bill for the maintenance of the children.—*People v. Dickson*, 10 N. Y. S. 604.

Courts.

See *Judge; Justices of the Peace*.

Mandamus to, appointment of crier, see *Mandamus*, 1-3.

COVENANTS.

Against incumbrances.

1. At the time of the execution and delivery of a deed containing a covenant against incumbrances the legislature had passed an act authorizing the improvement of the avenue fronting the property conveyed, and requiring the property along the route to pay \$175,000 of the cost, one-twentieth part of which was to be levied and collected in each year for 20 years. *Held*, that the installments levied after the deed was delivered were not incumbrances within the meaning of the covenant.—*McLoughlin v. Miller*, 10 N. Y. S. 830.

Warranty—Constructive eviction.

2. Defendants purchased certain wild and uninclosed lands under warrant of title. They were sold for taxes levied before the deed in 1871. Deeds to the state were given in 1875, and recorded in 1877. The covenantees never recorded their deed, had nothing to do with the land after 1871, and in 1874 said there was no use in recording the deed, as their title was not good, owing to the sale for taxes. Laws N. Y. 1885, c. 283, creating the forest commission, provided (section 7) that all lands owned by the state in certain counties, including

L., should constitute the "forest preserve," should be kept forever as wild forest lands, and should be cared for by the forest commission. *Held*, that this act, with the report of the forest commission to the legislature, showing that said land was included in the forest preserve, was such an assertion of ownership as constituted a constructive eviction by the state, entitling defendants to a remedy on the covenant.—*Brown v. Allen*, 10 N. Y. S. 714.

CRIMINAL LAW.

See, also, *Indictment and Information; Witnesses*.

Counterfeiting trade-marks, see *Trade-Marks*, 8-6.

Offenses against election law, see *Elections and Voters*.

Particular crimes, see *Intoxicating Liquors; Kidnapping; Rape*.

Prosecution for employing children for theatrical exhibition, see *Infancy*, 2.

Reading deposition, see *Constitutional Law*, 2.

Preliminary hearing—Waiver.

1. By stipulating to appear at a future day for his own convenience, and receiving a parol, the party arrested waives the objection that he was not immediately taken before a magistrate.—*Nowak v. Waller*, 10 N. Y. S. 199.

Evidence—Accomplice testimony.

2. A detective employed to procure testimony on which to predicate a prosecution, who enters into a bargain with defendant with a view to obtaining such evidence against defendant, is not an accomplice.—*People v. Molins*, 10 N. Y. S. 180.

Instructions.

8. In a prosecution for a conspiracy to obtain a divorce by unlawful means, it appeared that a summons and complaint had been served upon the defendant in the divorce proceedings, and M., one of the defendants in the criminal prosecution, was appointed referee; that, the judge objecting to entering a decree on the report of the referee, the latter destroyed the original summons, and substituted a new one, which was signed by one as attorney who had not been authorized to act as such by plaintiff; that a false affidavit of regularity was prepared by M.; that the affidavit of service of the original summons was attached to the new summons, and a new order of reference prepared; and that on these papers, without any service of the new summons, a decree was obtained. *Held*, that it was proper for the court to characterize such decree as fraudulent; the principal question in the prosecution being whether there was a conspiracy to compass

the divorce by unlawful means, and that question having been left to the jury by instructions in which the necessity of finding a conspiracy was clearly expressed.—*People v. Flack*, 10 N. Y. S. 475.

4. It was shown that, in a deposition taken before the referee, a witness had not told the truth in regard to a certain matter, and in relation to such evidence the court asked whether the referee, if he had done his duty, would have secured from the witness "the truth about that, as she had told it upon the stand." No exception was taken to the use of the word "truth" at the time. *Held*, that such instruction could not be objected to on the ground that it assumed that the witness told the truth on the trial.—*People v. Flack*, 10 N. Y. S. 475.

New trial—Intrusion of reporter into jury-room.

5. The intrusion of a newspaper reporter into a jury-room during the deliberations of the jury is not a sufficient reason for a new trial, where it appears by the affidavits of the jurors that their verdict was not affected by such intrusion.—*People v. Flack*, 10 N. Y. S. 475.

6. The action of defendants, after obtaining knowledge of the intrusion of a reporter into the jury-room during its deliberations, in permitting the trial to go on without objection, and in asking for instructions to the jury, is a waiver of such intrusion.—*People v. Flack*, 10 N. Y. S. 475.

Appeal—Jurisdiction.

7. Code Crim. Proc. N. Y. § 515, abolishes *certiorari* in criminal actions, and provides that "hereafter the only mode of reviewing a judgment or order in criminal action is by appeal." Laws N. Y. 1884, c. 872, provides that the only mode of reviewing a judgment or order in a criminal action or special proceeding of a criminal nature is by appeal. Code Crim. Proc. N. Y. § 749, provides that "a judgment upon conviction rendered by a court of special sessions may be reviewed by the court of sessions of the county upon an appeal." Laws N. Y. 1882, c. 410, (consolidation act,) § 1456, provides that "any appeal from or amendment to an order of a police magistrate, convicting one as a disorderly person, shall be exclusively for the action of the court of special sessions." *Held*, that the court of general sessions of New York county has jurisdiction of an appeal from an order of the special sessions affirming a conviction by a police magistrate of one as a disorderly person.—*People v. Vitan*, 10 N. Y. S. 909.

—Record.

8. Where the appeal-book in a prosecution for unlawfully selling intoxicating liquors shows that defendant withdrew his plea of not guilty, and interposed a de-

murrer, which was overruled, and that he was convicted, and sentenced to pay a fine, there is a sufficient judgment, within Code Crim. Proc. N. Y. § 485, which provides what the judgment roll shall contain.—*People v. O'Donnell*, 10 N. Y. S. 250.

CURTESY.

See, also, *Dower*.

Rights of divorced husband.

A divorced husband is not entitled to a tenancy by the curtesy in property acquired by the wife subsequent to the divorce.—*Schult v. Moll*, 10 N. Y. S. 703.

DAMAGES.

For breach of warranty, see *Sale*, 8.
libel, etc., see *Libel and Slander*, 6.

Proximate and remote cause.

1. Under a covenant in a lease to furnish the lessee with "steam-power and live steam daily, as required * * * for the general business of book-binding," the lessee cannot recover for injury to his business caused by the insufficient and irregular supply of steam, which he nevertheless continues to use, without attempting to procure an adequate supply from other sources. Such damages are too remote, and not within the contemplation of the parties. Affirming 5 N. Y. S. 545.—*Russell v. Giblin*, 10 N. Y. S. 815.

2. Plaintiff contracted with defendant to weld heads into 540 tubes, which, as plaintiff knew, had been ordered by a boiler company of defendant for use in making boilers. Plaintiff delivered the tubes to the company with the heads "sweated" in, and they were on that account rejected, and the company was compelled to plug up the holes in which the tubes were to be placed, and procure other tubes, and insert them in the boilers at such times as they were not in use, and also to pay for extra carting. Held, that these expenses were the natural consequence of plaintiff's breach of contract, and that it was not necessary for defendant to have actually paid the claim of the company therefor in order to recover it against plaintiff.—*Eagle Tube Co. v. Edward Barr Co.*, 10 N. Y. S. 113.

Measure of damages for torts.

3. In an action for damages to property by negligent blasting, it is not error to allow for repairs to premises of which plaintiff is only lessee, it not appearing that the landlord was bound by any covenant to keep the property in repair, and the re-

pairs being necessary to make the building tenable after the injury.—*Buddin v. Fortunato*, 10 N. Y. S. 115.

Personal injuries.

4. In an action for personal injuries, the amount of physicians' bills which plaintiff has paid on account of the injuries is admissible without proof of the value of the physicians' services.—*Morseman v. Manhattan Ry. Co.*, 10 N. Y. S. 105.

5. In an action for personal injuries, testimony by a medical witness as to what results are likely to flow from the injuries is inadmissible.—*Atkins v. Manhattan Ry. Co.*, 10 N. Y. S. 432.

6. Testimony of plaintiff that she paid her nurse \$100 is sufficient evidence of the value of such services to authorize an instruction that the nurse's bill was proved at \$100.—*Colwell v. Manhattan Ry. Co.*, 10 N. Y. S. 636.

Nominal damages.

7. While, in an action for personal injuries, the absence of evidence of the value of plaintiff's earnings precludes a recovery of substantial damages for loss thereof, he is nevertheless entitled to nominal damages on that account, and, to make an objection to a recovery of more than nominal damages for such loss available to defendant, a specific request that nominal damages could only be recovered for loss of wages is necessary.—*Seitz v. Dry-Dock, E. B. & B. R. Co.*, 10 N. Y. S. 1.

Excessive damages.

8. In an action for personal injuries, a verdict for \$4,680 is not excessive where it is shown that before the accident plaintiff was a strong man, earning \$2.50 a day; that, in consequence of the injury, he is unable to work; that his condition is growing constantly worse; and that his breathing and heart action are affected, and his physician fixes eight years as the limit of his life.—*Hughes v. Orange County Milk Ass'n*, 10 N. Y. S. 252.

9. The injury to plaintiff, 63 years old, consisted in a fracture of the neck of the femur, causing her the most intense pain. At the time of the trial she was not able to attend to her household duties, or to dress herself without the assistance of others. The evidence went to show that the injury resulted in a shortening of the leg, that plaintiff would never be free from pain, and that she would never recover the full use of her leg. Held, that a verdict of \$7,000 was not excessive.—*Fitch v. Broadway & S. A. R. Co.*, 10 N. Y. S. 225.

Dangerous Premises.

See *Negligence*, 5-10.

Decedents.

Estates of, see *Executors and Administrators*.

Transactions with, see *Witness*, 5-9.

DECEIT.**Evidence.**

1. In an action for deceit in the sale of a horse, evidence of the condition of the animal after its death, 31 days after the sale, is irrelevant, unless followed up by proof that the horse was unsound at the time of the sale.—*Kiernas v. Wolff*, 10 N. Y. S. 79.

2. An action for procuring goods by defendant's false representation that he owned \$20,000 worth of property, free and clear of liabilities, is properly dismissed when the complaint contains no allegation of damages arising out of this representation, and the plaintiffs' own proof shows that defendant owned property to the amount stated by him, and that he is amply responsible for the debt, though it also appears that he owed debts aggregating about \$3,500 when the representation was made.—*Wilson v. Ryder*, 10 N. Y. S. 233.

DEED.

See, also, *Covenants; Fraudulent Conveyances; Vendor and Vendee*.

Description.

1. A deed describing the granted premises as "subdivision of lot No. 4 of division No. 16," etc., followed by the total number of acres contained in lot 4, and then excepting land previously sold, is not void for indefiniteness, though lot 4 was never subdivided, as it evinces a clear intent to convey the balance of whatever land the grantor owned in lot 4; and the deed will be construed as though the word "of" after the word "subdivision" had been omitted.—*Weeks v. Martin*, 10 N. Y. S. 656.

Delivery.

2. An antenuptial trust-deed of land reserved to the grantor a power of appointment to be exercised by deed or will, under her hand and seal, and duly made and executed in the presence of two or more witnesses. At the grantor's death there was found in her bureau a deed, purporting to execute the power in favor of her husband, but bearing no certificate of acknowledgment, and not subscribed by any witness. The deed had been retained by the grantor for more than 20 years with her husband's consent. *Held*, that the instrument had never been delivered.—*Wainwright v. Low*, 10 N. Y. S. 883.

Proof of deed.

3. A finding in favor of the genuineness of the signature to a deed is not justified where the evidence shows that three weeks prior to her death the grantor showed the deed to a witness, and stated that her husband got it and signed her name to it, and it was not like her writing; and the witness also testifies that the writing was not like that of the grantor, and there is no proof to the contrary, except the testimony of an expert based upon his comparison with the grantor's bank-book.—*Wainwright v. Low*, 10 N. Y. S. 883.

Demurrer.

See *Pleading*, 1.

Deposit.

With bank officer, see *Banks and Banking*, 1.

DEPOSITION.

In criminal cases, see *Constitutional Law*, 2.

Application to take—Averments.

1. Under Code Civil Proc. N. Y. § 887, which permits the testimony of material witnesses "not within the state" to be taken by commission, it is not sufficient to aver in the application that material witnesses are residents of a foreign country, but there must be a distinct allegation that they are not then within the state.—*Apolinaris Co. v. Venable*, 10 N. Y. S. 469.

Place of taking.

2. A person who lives in New Jersey, but does business in New York city, "sojourns" in such city, within Code Civil Proc. N. Y. § 918, providing that the place where a witness is required to attend to be examined under a commission to take testimony in an action pending in another state, "must be in the county in which he resides or sojourns."—*Wittenbrock v. Mabus*, 10 N. Y. S. 738.

DESCENT AND DISTRIBUTION.

See, also, *Executors and Administrators; Wills*.

Order of distribution, see *Executors and Administrators*, 13.

Compromise of contest of will—Distribution of proceeds.

1. Where the contest of a will between the legatee and the testator's next of kin is compromised by the payment to the next of kin of a sum of money, whereupon the contest is abandoned, the sum thus paid will be distributed as the proceeds of an

intestate estate.—*Fletcher v. Severs*, 10 N. Y. S. 6.

Next of kin.

2. 8 Rev. St. N. Y. (6th Ed.) p. 105, § 90, subd. 5, provides that "in case there be no widow and no children, and no representatives of a child, then the whole surplus shall be distributed to the next of kin in equal degree to the deceased and the legal representatives." Subdivision 9 provides that "where the descendants or next of kin of the deceased, entitled to share in his estate, shall all be in equal degree to the deceased, their shares shall be equal." *Held*, that where the next of kin of a decedent are all the children of her deceased brothers and sisters, they take *per capita*, and not *per stirpes*, though subdivision 11 provides that "no representation shall be admitted among collaterals after brothers' and sisters' children."—*Fletcher v. Severs*, 10 N. Y. S. 6.

Realty—Rights of aliens.

8. P. died intestate, seised of certain real estate devised to him by his father, leaving surviving him two maternal aunts and the children of deceased maternal aunts, who were all aliens. *Held*, that they took an absolute title to the land under Laws N. Y. 1845, c. 115, as amended by Laws 1874, c. 261, and Laws 1875, c. 88, declaring that "if any alien resident of this state, or any naturalized or native citizen of the United States, who has purchased and taken, or hereafter shall purchase and take, a conveyance of real estate within this state, has died, or shall hereafter die, leaving persons who, according to the statutes of this state, would answer the description of heirs of such deceased person, or of devisees, under his last will, and being of his blood, such persons so answering the descriptions of heirs or of such devisees of such deceased person, whether they are citizens or aliens, are hereby declared and made capable of taking and holding, and may take and hold, as heirs or such devisees of such deceased person, as if they were citizens of the United States, the lands and real estate owned and held by such deceased alien or citizen at the time of his decease."—*Daly v. Beer*, 10 N. Y. S. 893.

4. A. died intestate in 1871, seized of certain real estate, and leaving her surviving, her husband, and plaintiff, her sister, who was an alien, and, as such, incapable of inheriting the premises. Laws N. Y. 1874, c. 261, provides that "if any alien or citizen * * * has died or shall hereafter die leaving persons who, according to the statutes of this state, answer the description of heirs of such deceased persons," they shall inherit it, whether they were citizens or aliens. Laws N. Y. 1876, c. 184,

authorized A.'s husband to take the premises, and released the interest of the state acquired by escheat upon the death of A. provided that nothing contained in the act should be construed so as to affect the right in the property of any heir at law. *Held*, that the act of 1874 was retroactive, and removed the disability of plaintiff to inherit the real estate as sole heir of her sister, and that, therefore, prior to the passage of the act of 1876, the state had parted with all its interest in the property, and had nothing left to release.—*Wainwright v. Low*, 10 N. Y. S. 888.

Rights of husband and wife.

5. In New York, a bond and mortgage executed to a husband and wife jointly become the property of the wife on the death of the husband, by right of survivorship. The common-law rule is in force in respect to personal property as well as realty. Affirming 4 N. Y. S. 462.—*In re Albrecht's Estate*, 10 N. Y. S. 883.

Inheritance and legacy taxes.

6. Testator's will gave to H. "any and all benefit, so far as his interest may appear and be proved," in the moneys payable at testator's death under his membership in an insurance association; the balance to testator's wife. The insurance was effected to secure testator's debt to H. *Held* that, as H. took nothing unless he proved a debt against the estate, the money he would receive was not, within Laws N. Y. 1887, c. 713, § 1, taxing legacies.—*In re Roger's Estate*, 10 N. Y. S. 23.

7. Where property is left by will to a trustee with power to appoint the legatees, the latter take as by the will whenever the power is exercised, and the property is subject to the legacy tax provided for by Laws N. Y. 1887, c. 713, § 1, in the same manner as when the legatees are named by the will.—*In re Stewart's Estate*, 10 N. Y. S. 15.

8. At the time of testatrix's marriage, about 30 years before her death, her husband had four daughters by a former wife. One was married, and the other three lived with their father and testatrix until they married. They called testatrix "mother," and received a mother's care from her. The same friendly relations continued after the marriage of the daughters. *Held* that, as to the three daughters who were unmarried at the time of testatrix's marriage, testatrix had, "for not less than 10 years prior to her death, stood in the mutually recognized relation of parent," within the legacy tax law, so as to exempt legacies to them, but that this relation did not exist as to the other daughter.—*In re Capron's Estate*, 10 N. Y. S. 28.

9. Under Rev. St. N. Y. (7th Ed.) p. 962, § 4, subd. 4, which provides that "every

poor-house, almshouse, * * * and the real and personal property used for such purposes," shall be exempt from taxation, a legacy to a home for consumptives, whose inmates are entirely supported by charity, is not subject to the succession tax provided for in Laws N. Y. 1887, c. 718, § 1, since that act excepts "societies, corporations, and institutions now exempted by law from taxation." Following 7 N. Y. S. 832.—In re Herr's Will, 10 N. Y. S. 680.

10. Under Rev. St. N. Y. (7th Ed.) p. 962, § 4, subd. 4, providing that every "almshouse," and "the real and personal property" "belonging to or connected with the same," and used for the purposes thereof, shall be exempt from taxation, a legacy to such an institution is not subject to the succession tax provided for in Laws N. Y. 1887, c. 718, § 1, since that act excepts "societies, corporations, and institutions now exempted by law from taxation."—In re Neale's Estate, 10 N. Y. S. 718.

11. The Metropolitan Museum of Art and the American Museum of Natural History, which derive an income from membership and admission fees, from the sale of books, specimens, etc., and from investments of property left by will, are subject to taxation, under Rev. St. c. 18, tit. 4, § 1, which provides for the taxation of all moneyed corporations deriving an income from their "capital or otherwise;" and hence legacies to them are not exempt from taxation under Rev. St. c. 18, tit. 1, § 4, subd. 7, exempting the personal property of every incorporated company not made liable to taxation by title 4.—In re Vanderbilt's Estate, 10 N. Y. S. 239.

12. Laws N. Y. 1881, c. 546, as amended by Laws N. Y. 1888, c. 523, § 7, which exempts the Christian Home for Intemperate Men from "local taxation or other purposes," does not exempt it from state taxation, and hence a bequest to it is subject to the legacy tax.—In re Vanderbilt's Estate, 10 N. Y. S. 239.

13. A charitable institution which maintains a home and provides lodgings and meals free, but which also maintains a day nursery, for which it makes a small charge, is not a pure charity, and hence is not exempt from the legacy tax as an almshouse.—In re Vanderbilt's Estate, 10 N. Y. S. 239.

— Executor's liability.

14. Laws N. Y. 1885, c. 483, § 1, provides that the executors shall be liable for legacy taxes until they have been paid. Section 6 requires the executor to deduct the tax from any money in his possession before paying legacies therewith, and provides that he shall not be compelled to deliver any specific legacy until he has collected the tax thereon. Section 8 provides that the executor shall not be discharged from

liability for the tax until he shall produce the comptroller's receipt therefor. *Held*, that the executor is personally liable for the payment of the tax, and that he must account therefor on the final settlement and adjustment of the estate.—In re Vanderbilt's Estate, 10 N. Y. S. 239.

15. On the application of executors, an appraiser was appointed to appraise the property of an estate subject to the legacy tax; and, after notice of the time and place of appraisement, he made his report. *Held*, that a confirmation of the report by the surrogate, after due notice to the comptroller, is such an adjudication of the question as will relieve the executors from personal liability for taxes on other legacies which the appraiser had without authority considered as exempt, and which he had not included in his report, and that the state could look only to the omitted legatees for these taxes.—In re Vanderbilt's Estate, 10 N. Y. S. 239.

— Enforcement.

16. Laws N. Y. 1885, c. 483, relating to the legacy tax, requires (section 17) the county comptroller, whenever he has reason to believe that any tax is due and unpaid, to notify the district attorney, who shall then institute proceedings to collect it. Section 18 provides that the surrogate shall appoint an appraiser, and order him to give notice, to such persons as may be designated by the surrogate, of the time and place at which he will appraise the property. *Held*, that it is the surrogate's duty to order the appraiser to notify all persons interested in the imposition of the tax, including the legatees, district attorney, and comptroller.—In re Vanderbilt's Estate, 10 N. Y. S. 239.

17. Laws N. Y. 1885, c. 483, entitled "An act to tax gifts, legacies," etc., imposes a tax on the devolution of property; and hence Code Civil Proc. N. Y. § 884, requiring all actions to recover a statutory penalty or forfeiture to be brought within two years after the cause of action accrues, has no application to a proceeding to enforce such a tax.—In re Vanderbilt's Estate, 10 N. Y. S. 239.

Description.

In deed, see *Deed*, 1.

Devise and Legacy.

See *Wills*.

Discharge.

See *Release and Discharge*.

Of lien of mortgage, see *Chattel Mortgages*.

Discontinuance.

See *Practice in Civil Cases*, 4.

DISCOVERY.

When granted.

1. An heir who, on attaining majority, brings action against the administrator of her father's estate, who is also her guardian, to set aside a collusive sale to himself of shares of stock belonging to the estate, is entitled to an examination of defendant before trial as to the relations existing between himself and the persons to whom he ostensibly sold the stock, and as to who received the dividends thereon.—*Carter v. Good*, 10 N. Y. S. 647.

2. In an action wherein it was sought to impeach defendant's discharge in bankruptcy for fraud in the conveyance of land, an order for defendant's examination before trial was obtained on an affidavit stating it to be material and necessary for plaintiff to ascertain whether defendant retained any interest in the property conveyed, or whether the conveyances were not made to protect the property as against creditors or the claim sued on. *Held*, that the order was properly vacated, the conveyances being matters of record, and no reason appearing for directing the examination before, rather than at, the trial.—*Waters v. Shayne*, 10 N. Y. S. 772.

3. An order for the examination of defendants before trial, asked for on the ground that such examination is necessary to enable plaintiff to amend his complaint, will be reversed where the affidavits on both sides show that plaintiff has sufficient knowledge of the facts constituting his alleged cause of action, and seeks information concerning an anticipated defense, and to ascertain whether the cause of action cannot be extended to other parties.—*Bloom v. Patten*, 10 N. Y. S. 228.

4. Plaintiff's motion to vacate an order for his examination before trial is properly denied where it appears from the affidavit that it is defendant's intention to use plaintiff's testimony on the trial, and that the knowledge of the facts established by the evidence are peculiarly possessed by plaintiff, and cannot be obtained by defendant in any other way.—*Spero v. West Side Bank*, 10 N. Y. S. 397.

Inspection of books.

5. In an action for breach of a contract to pay plaintiff a commission on renewal premiums on insurance policies procured by him as defendant's agent, an order granting a discovery and inspection of defendant's books, to enable plaintiff to prove the amount of his damages, will be vacated where the moving papers show that plaintiff kept books of his agency, and before the order was made was offered a statement of the desired facts as to every policy procured by him, in which he would furnish

to defendant the name of the assured, and if further appears that, if the desired evidence ever becomes material, it will be available by a *subpoena duces tecum*.—*Peris v. Metropolitan Life Ins. Co.*, 10 N. Y. S. 110.

Dismissal.

Of action, see *Practice in Civil Cases*, 1-3.

Dissolution.

Of corporation, see *Corporations*, 17, 18.
partnership, see *Partnership*, 4-8.
state bank, see *Banks and Banking*, 2.

District Attorney.

Compensation of subpoena server, see *Officer and Officer*.

DIVORCE.

Publication—Affidavit.

1. In an action for divorce, an order of publication will not be granted on the affidavit of plaintiff alone, without other proof of defendant's non-residence.—*Hall v. Hall*, 10 N. Y. S. 228.

Counsel fees.

2. In an action by a wife for a limited divorce, an order was entered allowing alimony, and "\$100 for counsel fees, pending the litigation." Plaintiff recovered judgment. *Held*, that defendant was not entitled to have any portion of the \$100 applied to payment of witness fees, and that the fact that the check therefor stated that \$50 was for witnesses did not change the order.—*Pountney v. Pountney*, 10 N. Y. S. 192.

3. Where a wife has been allowed \$100 counsel fees to prosecute her action for a limited divorce, she cannot, after she has succeeded in making out her case, have another allowance. Following *Beadleston v. Beadleston*, 103 N. Y. 402, 8 N. E. 735.—*Pountney v. Pountney*, 10 N. Y. S. 192.

Alimony.

4. Alimony *pendente lite* will not be granted in a suit for divorce on the ground of adultery where all the charges of adultery are made on information, and it does not appear that plaintiff believes the charges, and defendant positively denies them.—*Moriarty v. Moriarty*, 10 N. Y. S. 228.

—Renewal of motion for.

5. Though by Code Civil Proc. N. Y. § 1769, it is provided that the court may, on motion of either party to a divorce case, make, and from time to time modify, an order for an allowance for counsel, alimony, or expenses of trial, yet after an or-

cler has been made granting defendant an allowance for counsel and expense, but refusing her prayer for alimony, she cannot thereupon, on the same grounds, move before another justice, at a different special term, for additional allowance, and for that part of the relief which was before refused, without a showing of a subsequent change of circumstances materially affecting the rights of the parties, and furnishing grounds for the granting of the relief which did not previously exist.—*Simonds v. Simonds*, 10 N. Y. S. 606.

Rights, after divorce, in land.

6. Where husband and wife are seised of a tract of land by the entirety, and a divorce *a vinculo* is granted on the ground of the wife's adultery, they are thereafter seised as tenants in common.—*Stelz v. Schreck*, 10 N. Y. S. 790.

Domicile.

Taxation of non-resident, see *Taxation*, 1.

DOWER.

See, also, *Curtesy*.

Devise in lieu of.

1. A legacy given in lieu of dower, even though it exceed in value the dower right relinquished, does not abate on the failure of the estate to pay legacies in full.—*In re Brooks' Estate*, 10 N. Y. S. 20.

— **Election.**

2. 3 Rev. St. N. Y. (7th Ed.) p. 2198, § 14, as amended by Act 1890, provides that a woman shall have one year from the death of her husband in which to elect whether she will take dower or accept a provision for her in his will, and that where the year has begun to run and has not expired the time for election may be enlarged by order of court upon an affidavit showing the pendency of proceedings to contest or construe the will, or other reasonable cause therefor. By a codicil, a testator revoked a trust created in favor of the wife, and directed that his trustees should "pay to her the sum of \$10,000" in lieu of dower. *Held*, that an action by the wife to construe the will, brought to enforce her contention that she was entitled to \$10,000 annually, could not be sustained, both because she had only a legal interest in the estate, and because it was entirely clear that she was only to receive \$10,000 in all, and therefore an order extending the time within which she might make her election until 50 days after the termination of such action was improper.—*Bradhurst v. Field*, 10 N. Y. S. 452.

8. Where, pending an action to construe a will, the wife had allowed the year to ex-

pire without making an election, it was proper to make an order giving her a reasonable time in which to make such election.—*Bradhurst v. Field*, 10 N. Y. S. 452.

Drafts.

See *Negotiable Instruments*.

DURESS.

What constitutes.

1. A mortgage procured from a mother in the belief that her son had been guilty of forgery, and would be prosecuted unless she secured the debt, is executed under duress.—*Strang v. Peterson*, 10 N. Y. S. 189.

2. Evidence that while plaintiff, in an action for malicious prosecution, was under arrest for embezzling money of defendant, the latter made threats that unless plaintiff paid him a certain amount, and gave him a general release from liability for causing the arrest, he would send him (defendant) to the state-prison, and that plaintiff executed the release, will not sustain an action to have the release set aside as having been obtained by duress *per minas*, unless followed by proof that the threats were the inducing cause of the execution of the release.—*Stono v. Weiller*, 10 N. Y. S. 828.

EJECTMENT.

See, also, *Adverse Possession*.

Statutory new trial as of right, see *New Trial*, 7.

Title to support.

1. C. conveyed mortgaged property to R., her heirs, etc., in trust to receive the income, and apply it to the use of C. for life, and after her death to convey the property to C.'s children and grandchildren. *Held* that, under 1 Rev. St. N. Y. p. 729, § 59, providing that land to which a power in trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the power, R.'s power to convey not having been exercised, the legal title to the land passed to the purchaser at the sale under the mortgage during C.'s life, and C.'s children and grandchildren, after her death, had no such title as would support an action of ejectment. *Following Townshend v. Frommer*, 5 N. Y. S. 442.—*Townshend v. Loew*, 10 N. Y. S. 918; *Same v. McGuire*, *Id*.

Pleading—Amendment.

2. After two trials in ejectment, in which the defense is adverse possession, an amendment introducing a new party plaintiff is improperly allowed, both because of the laches of plaintiff in making the mo-

tion to amend, and because on a new trial, to which defendant is entitled as a matter of right, a new issue will be presented as to whether adverse possession can be shown as against the new party.—*Crowley v. Murphy*, 10 N. Y. S. 698.

Documentary evidence.

3. A purchase-money mortgage describing a lot is not admissible, where the deed fails to describe the lot, to show its dimensions, under the doctrine that a deed and a purchase-money mortgage are to be construed as one instrument, as this doctrine does not mean that the mortgage, as against a third person, can increase or diminish the amount of land conveyed by the deed.—*Burke v. Jackson*, 10 N. Y. S. 577.

4. Where a deed of a lot fails to give its dimensions, describing it simply by its boundaries, a purchase-money mortgage executed by the grantee at the same time, which describes the lot as being 50 feet wide on a specified street, does not constitute such a declaration of the nature and extent of the grantee's claim as will render the mortgage admissible in evidence in ejectment by the grantee's heirs against an adjoining lot-owner, who is a stranger to both the deed and the mortgage.—*Burke v. Jackson*, 10 N. Y. S. 577.

Election.

To take devise in lieu of dower, see *Dower*, 2, 8.

ELECTIONS AND VOTERS.

Offenses against election law.

Under Laws N. Y. 1880, c. 56, § 18, (Election Code, § 244,) declaring it an offense for an inspector of election to make or attempt to make a false canvass of the ballots cast at an election, or any false statement of the result of any canvass, an indictment against inspectors of election for attempting to make a false statement of the returns several days after the election, charges an offense, though they made a statement of the returns on the election day, as required by law, and though section 804 of the Election Code provides that, on making up such return on election day, the board of inspectors shall be dissolved.—*People v. Sullivan*, 10 N. Y. S. 243.

EMINENT DOMAIN.

Powers of streets railways.

1. Laws N. Y. 1884, c. 252, § 1, relating to street railways, provides that "such corporations shall have all the powers and privileges, and be subject to all the liabilities,

imposed by this act." or the act of April 2, 1850, authorizing the formation of railroad companies, and the several acts amendatory thereof. *Held*, a street-railway company organized under the act of 1884 has power to condemn private property to subserve the purposes of its organization.—*In re Rochester Electric Ry. Co.*, 10 N. Y. S. 879.

Powers of aqueduct commissioners.

2. The legislature can delegate the power to determine whether New York city shall acquire the fee or only an easement in the different parcels of land condemned for the new Croton aqueduct, under Laws N. Y. 1883, c. 490, providing for its construction.—*In re Commissioner of Public Works*, 10 N. Y. S. 705.

3. The legislative intent to confer upon the aqueduct commissioners the power to determine what lands shall be taken in fee, and in what an easement only shall be acquired, is shown by section 4 of chapter 490, Laws N. Y. 1883, requiring them to adopt maps and plans of the sites of the proposed aqueduct dams, reservoirs, etc., indicating thereon in what parcels the fee, and in what an easement, is to be acquired; and also by sections 6 and 10, requiring that the title, interest, or easement sought to be acquired in each parcel shall be stated in the petition for the appointment of the commissioners of appraisal, and that upon the filing of their oath the city shall be seized in fee of those parcels of which it has been determined by the aqueduct commissioners that the fee should be acquired.—*In re Commissioner of Public Works*, 10 N. Y. S. 705.

4. When, in conformity with the act, the aqueduct commissioners make maps and plans of the proposed route, and indicate on them that only a permanent easement is to be acquired in certain parcels, through which the aqueduct is to run 20 feet beneath the surface, and also state in the petition for the appointment of the commissioners of appraisal that an easement only is to be acquired, the city acquires such permanent easement only, and not the fee of the parcels designated.—*In re Commissioner of Public Works*, 10 N. Y. S. 705.

5. Nor does the city, under section 10, providing that it or its agents may enter, use, and occupy in perpetuity, all the parcels described in the map for the purpose of constructing and maintaining the aqueduct and all of its appurtenances, acquire the fee of those parcels in which a permanent easement only was taken; for this section does not confer upon the city the power to enter or use the land in any other way, or for any other purpose, than that designated in the plans and maps in accordance with which the parcels were con-

demned.—In re Commissioner of Public Works, 10 N. Y. S. 705.

Map of route to be condemned.

6. Laws N. Y. 1850, c. 140, § 22, as amended by Laws 1871, c. 560, requires that "every company formed under this act, before constructing any part of their road into or through any county named in their articles of association, shall make a map and profile of the route." *Held*, that street railways are not excepted from this provision, and a map should be filed.—In re Rochester Electric Ry. Co., 10 N. Y. S. 879.

Compensation.

7. In an action for damages to abutting property, caused by the construction and operation of an elevated railroad, the obstruction of the street, while the road was being built, is a proper item of damage.—*Williams v. Brooklyn El. R. Co.*, 10 N. Y. S. 929.

8. In an action for damages to abutting property, caused by the construction and operation of an elevated railroad, it is not error to prove the effects of the railroad on the street, as manifested by a storm which happened after the commencement of the action, the fact proven not being a basis of recovery, but merely evidence in support of the injury done to the street by defendant's structure.—*Williams v. Brooklyn El. R. Co.*, 10 N. Y. S. 929.

9. Under Laws N. Y. 1888, c. 490, authorizing the construction of the new aqueduct, and providing that the owner of lands contiguous to land taken, "which may be affected by the construction and maintenance" of the aqueduct and its appurtenances, may present a bill for damages, damages cannot be recovered for injury to contiguous lands by reason of the noise, dust, and smoke made by the building of the aqueduct.—In re Squire, 10 N. Y. S. 881.

10. A claim against the estate of a decedent was composed of two items, one arising out of a special contract to furnish board to two nieces of decedent, and the other was for nursing decedent. Three witnesses testified to statements by decedent that she would pay plaintiff the amount claimed for the board of her nieces, and deceased was also proven to have said that plaintiff was attending her as a professional nurse, and she would pay him "all he lost," "and the same as any professional nurse." *Held*, that the claim was fully proven.—*Heyne v. Doerfler*, 10 N. Y. S. 906.

Equalization.

Of taxes, see *Taxation*, 8, 9.

EQUITY.

See, also, *Discovery; Fraudulent Conveyances; Injunction; Interpleader; Mortgages; Partition; Partnership; Receivers; Specific Performance; Trusts.*

Pleading, see *Injunction*, 8.

Rescission of contract.

1. A complaint to rescind an agreement for fraud and for damages, which offers to reassign and deliver the property acquired, should be upheld even though complete restoration is impossible.—*Baker v. Ziegler*, 10 N. Y. S. 249.

Parties.

2. The lessees of water from the canal company, who have the privilege of drawing a specific quantity of water from the canal at a fixed yearly rent, are not necessary parties to an action brought by the land-owner against the canal company to compel it to turn off the water, as they are represented by the company, which has the title to and control of the canal as a whole.—*United States Life Ins. Co. v. Oswego Canal Co.*, 10 N. Y. S. 668.

ESTOPPEL.

Res adjudicata, see *Judgment*, 3-10.

In pais.

1. Where plaintiff, at the time, makes no objection to the sale of stock bought by his brokers on a margin, and subsequently receives back his note given to secure the margin, and asks for, receives, examines, and approves the statement of his account, and accepts a check in full settlement of the balance appearing due him, and afterwards acquiesces therein until the stock have greatly increased in value, he will be estopped to repudiate the acts of the brokers, and hold them for the advance.—*Gould v. Trask*, 10 N. Y. S. 619.

2. A judgment debtor, who, with his attorney, was present when a receiver was appointed in supplementary proceedings, and who made no objections thereto, cannot, two years afterwards, when his wife has become involved in litigation with the receiver, be heard to say that at the time of their institution the proceedings were barred by the statute of limitations.—*Bolt v. Hauser*, 10 N. Y. S. 897.

3. A land-owner, whose building was erected over stone piers placed in a canal, agreed to remove the piers within a year, and substitute iron columns, so as not materially to obstruct the flow of the water. The canal company agreed that these iron columns should remain in the canal as long as the building stood. *Held*, that the land-owner's violation of his agreement in per-

mitting the piers to remain for several years, until they had become so dilapidated as to render his building insecure, did not justify the canal company, which had acquiesced in the delay, in its refusal to shut off the water from the canal for a sufficient time to enable the land-owner to make the alterations provided for in the agreement; the removal of the water being necessary to make the repairs.—*United States Life Ins. Co. v. Oswego Canal Co.*, 10 N. Y. S. 668.

4. The fact that the water had all been drawn from the canal some months previous to the land-owner's discovery of the dilapidated condition of the piers, and that he had then failed to examine them, and repair the defect, will not justify the company's refusal to turn off the water so as to enable him to make the repairs.—*United States Life Ins. Co. v. Oswego Canal Co.*, 10 N. Y. S. 668.

EVIDENCE.

See, also, *Deposition; Witness.*

Admissibility, see *Breach of Marriage Promise; Decit; Malicious Prosecution.*

In action for libel, see *Libel and Slander*, 8, 4.

— for obstruction of highway, see *Highways*, 7, 8.

— on contract, see *Contracts*, 15-18.
criminal cases, see *Criminal Law*, 2;
Intoxicating Liquors, 2.

Newly-discovered evidence, see *New Trial*, 4-6.

Of payment, see *Payment*, 1.

Production of books and papers, see *Practice in Civil Cases*, 9.

Proof of handwriting, see *Negotiable Instruments*, 5.

Judicial notice.

1. Judicial notice will not be taken, on appeal, of the existence or operation of telegraph lines of the relator outside of the state, nor that, under authority of an act of congress, such relator, a private corporation, has entered into certain business relations with the United States.—*People v. Terney*, 10 N. Y. S. 940; *Id.* 948.

Burden of proof.

2. Where the defense in an action for services rendered is that plaintiff embezzled moneys of defendant, the embezzlement need not be shown beyond a reasonable doubt. A fair preponderance of evidence, having due regard to the presumption of innocence, is sufficient.—*Davis v. Rome, W. & O. R. Co.*, 10 N. Y. S. 334.

3. Where, in an action upon a contract for building a house, plaintiff shows performance, and defendant thereupon testifies that he has paid the amount due, the

burden of proving that something is still due is on plaintiff.—*Hall v. Abells*, 10 N. Y. S. 581.

Best and secondary.

4. Parol evidence is admissible, in an action against the president of an unincorporated association, to prove the number of the members, after defendant fails to produce the constitution and by-laws on notice.—*Haden v. Clarke*, 10 N. Y. S. 291.

Hearsay.

5. In an action for the alleged conversion of money left with defendant to be sent to a third party, the testimony of plaintiff that he received letters from such third party, saying that she had not received the money, is hearsay evidence, and not admissible against defendant.—*Goldberg v. Wolff*, 10 N. Y. S. 544.

6. In an action to recover the value of certain carpets, gas-fixtures, etc., alleged to have been conveyed to plaintiff with a house, but which were not referred to in the written contract of sale, evidence of conversations had before the signing of the contract concerning such articles is inadmissible.—*Bopp v. Atkins*, 10 N. Y. S. 539.

7. In an action to recover back an overpayment for cabbages delivered by defendant to plaintiffs, where the dispute is as to the number delivered, it is error to permit plaintiffs' witness to testify that defendant's man had told him that he did not draw cabbages on a certain day, when the fact whether he did or not is directly in issue.—*Strawbridge v. Vandemburgh*, 10 N. Y. S. 610.

8. The quarterly bill of a city hospital against the city, showing when plaintiff went to and left the hospital, is the mere statement of the hospital authorities, and is not evidence against plaintiff to show the length of time he was confined by the injuries for which he sues the city.—*Lynn v. City of Troy*, 10 N. Y. S. 594.

9. Evidence of a physician, who examined plaintiff's injuries, as to statements made to him by plaintiff during the examination, was properly admitted on the understanding that it should be stricken out unless the truth of such statements should be proven.—*Davidson v. Cornell*, 10 N. Y. S. 521.

Declarations and admissions.

10. An offer of compromise made is inadmissible in evidence against the party making it.—*Gommersall v. Crew*, 10 N. Y. S. 231.

11. Where defendant, after driving into and breaking plaintiff's wagon, requests plaintiff to have the wagon repaired, and promises to pay the cost thereof, and plaintiff acts on the promise, it is a substantial

on fession by defendant of his negligence, and an agreement as to the measure of damages.—*Dunn v. O'Keefe*, 10 N. Y. S. 84.

12. In an action for personal injuries it was error to admit evidence of declarations made by plaintiff to his mother, more than a month after the accident, as to the pain he was then suffering.—*Ryan v. Porter Manufacturing Co.*, 10 N. Y. S. 774.

13. In an action by a vendee's assignee against the vendor for the conversion of hay grown on the land, a written statement by the vendee that an order drawn by him in the vendor's favor after the oral rescission of the contract was intended to be applied on the contract is inadmissible, as it is but an unverified declaration by the vendee, not binding on the vendor.—*Davis v. Willis*, 10 N. Y. S. 888.

Opinion evidence.

14. Any person knowing the value of personal property may testify to his opinion as to its value.—*Moore v. Baylis*, 10 N. Y. S. 62.

15. In an action for personal injuries, testimony by a physician, who had no knowledge of plaintiff's medical history prior to the accident, that he treated her for certain symptoms due entirely to the injuries, is inadmissible.—*Atkins v. Manhattan Ry. Co.*, 10 N. Y. S. 483.

16. A surgeon testifying as an expert for plaintiff in an action for personal injuries, having stated that he had heard "most" of the plaintiff's testimony, was asked the following question: "Take such a fall as he describes here, resulting from a collision of two cars, and the symptoms following that fall, he having theretofore been a sound and healthy man, can you state with reasonable certainty that the consequences that have followed are natural and usual?" *Held*, that such question should not be allowed, as it permitted the witness to state his conclusions from the testimony, instead of confining his opinion to a supposed state of facts.—*Page v. City of New York*, 10 N. Y. S. 826.

17. In an action on a life insurance certificate, which prohibited recovery for death caused by suicide, it appeared that assured's dead body was found near a highway, in a cleared space surrounded by underbrush, with a bullet hole through the back of his head. When found, his right hand was lying by his side, unclenched, and a revolver with one empty chamber lay between his legs. *Held*, that testimony of a physician that, in cases of instantaneous death, there is an involuntary and immediate rigidity of the muscles, which would have caused the hand to cling to the revolver, and rendered it impossible or deceased to place the revolver between his legs after shooting himself, was ad-

missible.—*Washburn v. National Acc. Soc.*, 10 N. Y. S. 866.

Bill of items.

18. In an action for work and materials, an itemized bill, which plaintiff testifies was made within a month of the transaction, and delivered to defendant, years before, and the items in which are not disputed, is admissible to show when the work was done, over an objection that it is incompetent, irrelevant, and immaterial, where defendant pleads the statute of limitations, though it would have been incompetent had the items been disputed.—*Coffey v. Lyons*, 10 N. Y. S. 817.

Parol evidence.

19. In an action for the breach of a written contract of employment for a "season," in which the duration of the season is not specified, parol evidence is admissible to define the term.—*Wachtershauser v. Smith*, 10 N. Y. S. 535.

20. Where a written contract for the sale of timber provides that, unless it is removed before a certain day, it shall revert to the seller, evidence of a subsequent parol agreement, made before the expiration of the time limited in the original contract, by which the purchaser is given further time to remove the timber, does not alter the written contract, but is admissible to show that the seller waived strict performance of the original requirement as to removal.—*Grange v. Palmer*, 10 N. Y. S. 201.

21. In an action for compensation for selling land for defendant, the latter introduced testimony that after the contract of sale was made it was agreed that plaintiff's compensation should be paid when the vendee should pay the balance of the purchase money on the day named in the contract of sale. *Held* that, it appearing that the purchase was not completed on the day named because of an outstanding lease, oral testimony was admissible, as against plaintiff, to show that when the contract of sale was entered into it was understood by both plaintiff and the vendee that the latter was to take his deed subject to the lease.—*Lipski v. Peth*, 10 N. Y. S. 504.

Evidence at former trial.

22. The words "former trial," as used in Code Civil Proc. N. Y. § 880, providing that, where a party has died since the trial of an action, decedent's testimony taken or read "at the former trial" may be given in evidence at a new trial, do not mean the last trial only, but include any former trial where evidence was given by a party since deceased.—*Koehler v. Scheider*, 10 N. Y. S. 101.

Exceptions, Bill of.

See *Appeal*.

v. 10 N. Y. S.—68

EXECUTION.

See, also, *Attachment*.

Time of issuance.

1. Where a transcript of a justice's judgment is filed in the county clerk's office six months after its rendition, Code Civil Proc. N. Y. § 882, subd. 7, barring an action on a justice's judgment after six years from its rendition, does not affect section 1877, which permits an execution to issue on a judgment after the lapse of five years from its docketing, on an order of the court. Distinguishing *Davidson v. Horn*, 47 Hun, 51.—*Townsend v. Tolhurst*, 10 N. Y. S. 878.

2. On a motion for leave to issue execution upon a default judgment against a married woman, she, by leave of court, filed an answer, pleading coverture, whereupon plaintiff was required either to submit to a dismissal or amend his complaint. He elected to amend, and afterwards prosecuted the case to judgment. After the return unsatisfied of an execution upon the new judgment, an order was made allowing plaintiff to issue execution upon the original judgment as of the date of his first motion therefor. Held that, under Code Civil Proc. § 1877, subd. 2, which provides that after five years execution may issue by leave of the court, it was proper to allow such execution, but improper to grant it *nunc pro tunc*, and a new execution may be issued as of the present date.—*Hausee v. Fiero*, 10 N. Y. S. 494.

Property subject to.

3. Goods sold to a son cannot be seized on execution issued on a judgment obtained by the sellers against the father, by mistake, for the price thereof.—*Crouse v. Bailey*, 10 N. Y. S. 278.

Levy—Time of making.

4. A sheriff cannot levy an execution after the return-day, though the execution plaintiff gives him an indemnity bond.—*Crouse v. Bailey*, 10 N. Y. S. 278.

Return of writ.

5. A return of an execution *nulla bona* is *prima facie* evidence that the debtor has no property subject to levy.—*Crouse v. Bailey*, 10 N. Y. S. 278.

Supplementary proceedings.

6. As Code Civil Proc. N. Y. § 2485, which provides for supplementary proceedings "at any time within 10 years after the return * * * of an execution" unsatisfied, does not require these proceedings to be founded on a court of record judgment, supplementary proceedings on a judgment of a justice of the peace may be maintained at any time within 10 years.—*Bolt v. Hauser*, 10 N. Y. S. 397.

7. A corporation which has been summoned in supplementary proceedings to disclose any indebtedness from it to the judgment debtor may be required by *compensatio duces tecum* served on the proper officer to produce its books and papers to be used on the examination.—*Pendergast v. Dempsey*, 10 N. Y. S. 938.

EXECUTORS AND ADMINISTRATORS.

See, also, *Descent and Distribution*; *Will*. Liability for costs, see *Costs*, 4. Personal liability for legacy tax, see *Descent and Distribution*, 14, 15.

Appointment—Incapacity of surrogate.

1. Letters of administration granted in 1886 by the special surrogate of Oneida county, with record proof of his authority to act by reason of the surrogate's incapacity, are validated by Laws N. Y. 1887, c. 455, which legalizes the official acts of the special surrogate performed by him since January, 1885, in so far as such acts may be affected by the failure to make and file a certificate showing the occurrences of the surrogate's disability.—*In re Moulton's Estate*, 10 N. Y. S. 717.

— **Notice.**

2. Since Rev. St. N. Y. pt. 2, c. 6, tit. 2, art. 2, § 27, marg. p. 74, gives the widow of a decedent the first right to administer his estate, no citation need issue on her petition for letters of administration, under Code Civil Proc. § 2662, which provides that every person who has a right of administration prior to or equal to the petitioner must be cited on a petition for letters of administration.—*In re Moulton's Estate*, 10 N. Y. S. 717.

Removal.

3. Though Laws N. Y. 1858, c. 314, authorizes executors or administrators to maintain an action to set aside fraudulent conveyances made by a deceased person, the fact that an administratrix, in her individual right, claims the ownership of a mortgage formerly belonging to her intestate under an assignment alleged to be fraudulent as to his creditors, is no ground for the removal of the administratrix. On her refusal to bring an action to set aside the assignment, the creditors may bring the action, alleging her refusal and making her a defendant.—*In re Moulton's Estate*, 10 N. Y. S. 717.

4. Since Code Civil Proc. N. Y. § 2655, subd. 8, provides for the removal of an administratrix where she has "willfully refused or without a cause neglected to obey" an order by the surrogate, and since

section 2715 provides that the surrogate may by order compel her to file an inventory, her failure to file the inventory, in the absence of an order by the surrogate directing her so to do, is not a ground for removal.—In *re Moulton's Estate*, 10 N. Y. S. 717.

5. Persons interested in an estate cannot insist on a summary removal of the administratrix because her bond is inadequate in amount, or her sureties insufficient, since Code Civil Proc. § 2598, directs that, after such inadequacy or insufficiency shall have been determined in a proceeding instituted before the surrogate, the administratrix shall be given a reasonable time, not to exceed five days, in which to procure a new bond, before her letters can be revoked.—In *re Moulton's Estate*, 10 N. Y. S. 717.

Right to life insurance policy.

6. In an action on a life insurance policy, it appeared that the assured died a resident of Maine, and an administrator was there appointed, who obtained possession of the policy, and recovered upon it. Plaintiff was appointed administrator of the assured in New York, and sued for the amount of the policy. *Held*, the fact that he never had possession of the policy is fatal to a recovery.—*Morrison v. Mutual Life Ins. Co.*, 10 N. Y. S. 445.

Settlement and accounting.

7. Code Civil Proc. N. Y. § 2606, authorizes a surviving executor, who is also personally interested in the estate, to cite the executors of a deceased executor to account.—In *re Hodgman's Estate*, 10 N. Y. S. 491.

8. In the hearing on a citation, issued against the executors of a deceased executor, an inventory signed by the deceased executor was properly admitted in evidence against his executor.—In *re Hodgman's Estate*, 10 N. Y. S. 491.

9. A will provided that \$10,000 should be held by the executors until the death of Angeline M. Cobb, and then paid to Frederick D. Cobb, if he survived her, and arrived at 21 years,—if not, to fall into the residue,—and that the other legacies should be paid when the estate was ready for settlement, and that, if there was not enough to pay the legacies in full, they should abate equally. *Held*, the estate could not be settled until the happening of the contingencies determining the disposition of the \$10,000, and limitation did not begin to run before that time against the authority of the surrogate to order an accounting.—In *re Hodgman's Estate*, 10 N. Y. S. 491.

10. Where three separate petitions were filed, requiring different surviving executors, and executors of deceased executors,

to file accounts, and that all persons interested should be cited to attend a final settlement of the estate, an order requiring an executor to account will not be reversed because the surrogate heard all the proceedings together, when no evil result is shown; and, where the rights of all persons were protected, it was immaterial whether the proceedings were consolidated, and a single order made, or were separately entitled, and separate orders entered.—In *re Hodgman's Estate*, 10 N. Y. S. 491.

Liabilities.

11. Where a will provides that the expenses of administration shall be charged upon, and paid out of, the estate of the testator, both real and personal, the administratrix, to whom one-half of the estate has been devised for life, and who is the assignee of the other half, is not personally liable for such expenses.—*Boynton v. Ladd*, 10 N. Y. S. 622.

12. The estate of an administrator, who in that capacity held stock in a national bank, and never had it transferred to himself, though he was the sole heir of intestate, is not liable to an assessment on it, under Rev. St. U. S. § 5152, providing that persons holding stock as administrators shall not be personally subject to any liability as stockholders.—In *re Faulkner's Estate*, 10 N. Y. S. 825; In *re Bingham*, Id.

Order of distribution.

13. An order for a partial distribution and the conveyance of land to the heirs will not be disturbed because made during the pendency of the executor's accounting and an action against him for the same object when sufficient funds are left in his hands to pay all liabilities.—In *re Ockershausen's Estate*, 10 N. Y. S. 928.

Sales under order of court—Petition.

14. Under Code Civil Proc. N. Y. § 2752, providing that a petition by the creditors of an estate to subject testator's lands to the payment of his debts, shall contain all the names of creditors and a description of all decedent's real estate, a petition is not fatally defective because of an omission to describe one tract of land owned by testator, of which the petitioners neither knew, nor could have known by diligent inquiry.—In *re Faulkner's Estate*, 10 N. Y. S. 825; In *re Bingham*, Id.

15. Names of creditors of the estate, not known at the time of filing the petition, may be subsequently added.—In *re Faulkner's Estate*, 10 N. Y. S. 825; In *re Bingham*, Id.

Allowance to widow.

16. Laws N. Y. 1889, c. 406, § 1, gives a widow of a decedent leaving children a life-interest in \$1,000 worth of decedent's land "in addition to" her dower. Section

2 provides that there shall also be appraised and set apart to the widow household furniture, provisions, etc., not exceeding \$150; and in case the interest of a widow in the realty of her deceased husband, "in addition to her dower right, and together with said \$150," shall be of less value than \$1,000, then there shall also be set apart to her personal property which, together with the realty, shall amount to \$1,000 in value. *Held*, that the value of the additional amount of personal property to be set apart to the widow under section 2 is the difference between \$1,000 and the present value of the life-interest in the \$1,000 worth of land given her by section 1, excluding the value of her dower and the \$150 of household goods, etc.; the words, "in addition to her dower right, and together with said \$150," used in section 2, being construed to mean, "exclusive of her dower right and said \$150." *In re Daggett's Estate*, 9 N. Y. S. 652, disapproved.—*In re Steward's Estate*, 10 N. Y. S. 24.

Probate practice — Appraisal of estate.

17. Surrogates' courts, in ordering an appraisal of a decedent's estate, have the incidental power to judicially ascertain the incumbrances on the land and the widow's age, so as to determine the value of her dower interest, and in the order appointing appraisers to instruct them in regard thereto.—*In re Steward's Estate*, 10 N. Y. S. 24.

Actions.

18. In a special proceeding to determine the validity of claims against a decedent's estate, the parties stipulated that the claimant should serve a complaint, and the executor his answer, and that the issues thus made should be referred. *Held* that, after the hearing before the referee on the issues made by the pleadings, the executor's motion to amend his answer, so as to set up the statute of limitations, should be allowed without imposing on him the costs of the action so far incurred; it appearing that the stipulation was hastily drawn, and that the executor did not suppose that it changed the general rule in special proceedings, allowing any defense at the hearing, whether pleaded or not.—*Dryer v. Brown*, 10 N. Y. S. 58.

— Check paid after drawer's death.

19. An administrator of a solvent estate cannot recover moneys obtained from a bank, after deceased's death, upon a check given by him a few days before death, in payment of debts, though the holder knew of his death, and failed to inform the bank thereof.—*McMurray v. Ennis*, 10 N. Y. S. 698.

EXTRADITION.

Rights of extradited persons.

1. A defendant who is brought into a state by extradition proceedings, cannot, at the expiration of the term of imprisonment imposed, be arrested on a requisition from another state until he has had reasonable time to return to the state from which he was extradited.—*In re Hope*, 10 N. Y. S. 28.

Who may be extradited.

2. Const. U. S. art. 4, § 2, subd. 2, providing that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall * * * be delivered up to be removed to the state having jurisdiction of the crime," authorizes the extradition of a person who escapes after conviction.—*In re Hope*, 10 N. Y. S. 28.

Experts.

See *Evidence*, 14-17.

FACTORS AND BROKERS.

See, also, *Principal and Agent*.

Rescission of sale by factor to customer.

1. Plaintiff ordered defendant, as a broker, to buy for him a number of shares in a mining company, and the shares were delivered to him by defendant. Afterwards the mine was bought by another company, and the shares made convertible into shares of the new company, and plaintiff so converted his shares. Subsequently he claimed to have discovered that defendant did not buy the shares, but simply turned over some which he himself owned, and thereupon sought to repudiate the purchase, and for that purpose borrowed the requisite number of shares in the original company and tendered them to defendant. *Held* that, in order to rescind the sale, plaintiff should have tendered the shares which he received in the new company, as he could not retain the subject of his purchase, and at the same time maintain an action for the wrongful act of the broker in delivering stock owned by himself.—*Mayo v. Knowlton*, 10 N. Y. S. 280.

Rights and liabilities.

2. Defendants, as brokers, purchased certain stocks for plaintiff under a contract by the terms of which he was to deposit a certain per cent. of their par value as margins, and in case a decline in stocks should reduce the margins below an agreed minimum per cent. defendants might demand deposits sufficient to increase the margins to the original amount required to be de-

deposited, in default of the payment of which they were authorized to sell without notice. Plaintiff, having been repeatedly called upon for margins, gave defendants his note, which was placed to his credit and receipted for as "temporary collateral," but there was no settlement of the accounts between the parties at the time. Afterwards, on plaintiff's failure to comply with repeated demands for margins, defendants sold the stock, rendered an account of this and other sales, returned his note, and on his approval of the account, and at his request, paid him the balance due. *Held* that, in the absence of an express agreement, the note did not amount to a deposit, nor operate to extend the time for depositing margins until the note should mature.—*Gould v. Trask*, 10 N. Y. 3. 619.

Lien for advances—Rights of creditors.

8. W. & Co., stock-brokers in Syracuse, filled orders to purchase stocks on margin, by directing plaintiffs, their New York correspondents, to buy the stocks desired. Plaintiffs held the certificates of the stock thus purchased, and also received other stocks from W. & Co., as collaterals, to secure the price, and kept their accounts with W. & Co., knowing no other person in the transactions. During this course of dealing, W. & Co. made an assignment for benefit of creditors, and plaintiffs sued to determine the rights to the stocks thus held by them. *Held*, that plaintiffs' advances to W. & Co. would first be satisfied out of the proceeds of the stocks in their hands at the time of the assignment, and that, as between the assignee and the customers of W. & Co., who identified stocks in plaintiffs' hands as having been purchased for them, the customers had the prior right.—*Willard v. White*, 10 N. Y. S. 170.

4. Among the collaterals pledged by W. & Co. to plaintiffs was stock which M., a customer of W. & Co. had, deposited with them to cover margins, but plaintiffs had no knowledge of M.'s rights. *Held* that, after satisfying plaintiffs' claim, M. was entitled to the proceeds of the stock pledged by him before the alleged owners of the securities bought on margin could receive anything.—*Willard v. White*, 10 N. Y. S. 170.

Commissions.

5. A real-estate broker employed to sell and concealed the fact that the proposed vendee had accepted the vendor's terms, and endeavored to persuade the vendor to accept a less price, which she refused to do. Afterwards she refused to complete the contract, though her price was to be paid. *Held*, that the broker was guilty of such bad faith towards his employer that

he could not recover his commission.—*Martin v. Bliss*, 10 N. Y. S. 886.

FALSE IMPRISONMENT.

Who liable.

1. One who, without malice or bad faith, makes a statement before a magistrate of what he regards as constituting a criminal charge against plaintiff, but does not ask that a warrant issue, or take any part in its service, is not liable to an action for false imprisonment on the consequent arrest of plaintiff, though such arrest is not warranted by law or the facts of the case.—*Nowak v. Waller*, 10 N. Y. S. 199.

2. A justice of the peace, having jurisdiction of the subject-matter, is not liable to an action of false imprisonment by a person arrested, merely because he made a mistake in failing to take an examination of the complainant, and to reduce the same to writing, as required by Code Crim. Proc. N. Y. § 148.—*Nowak v. Waller*, 10 N. Y. S. 199.

8. The fact that the affidavit was not sufficient to authorize the issuance of the warrant did not render the constable executing it, and the complainant, liable to an action for false imprisonment, where the justice deemed the affidavit sufficient.—*Nowak v. Waller*, 10 N. Y. S. 199.

4. Where the certificates provided for by Laws N. Y. 1874, c. 446, § 1, forbidding the confinement of any person in any asylum except on the sworn certificate of two physicians setting forth the insanity, are false, fraudulent, and malicious, the physicians making them are liable to an action for false imprisonment.—*Hurlehy v. Martine*, 10 N. Y. S. 92.

False Representation.

See *Deceit*.

Fellow-Servant.

Negligence of, see *Master and Servant*, 18-23.

Fines.

Of members of societies, remedies, see *Benevolent Societies*, 1.

Fires.

Set by locomotives, see *Railroad Companies*, 6.

FISHERIES.

Disturbance of oyster-bed.

1. Where it is shown that defendant sailed over an oyster-bed with his rakes overboard, and that they were such as

would disturb the oysters planted there, it is sufficient evidence to sustain a conviction under Pen. Code N. Y. § 640, subd. 8, providing for the punishment of any one who unlawfully disturbs or interferes with the oysters of another.—*People v. Decker*, 10 N. Y. S. 676.

2. The admission of expert testimony to show that defendant's rakes were such as would disturb planted oysters is not prejudicial to defendant when he himself admits that his rakes, if overboard when he was sailing over the bed, would have disturbed the oysters.—*People v. Decker*, 10 N. Y. S. 676.

Foreclosure.

Of mortgages, see *Mortgages*, 10-16.

Foreign Corporations.

See *Corporations*, 19.

Foreign Receiver.

Actions by, see *Receivers*, 8, 4.

Forgery.

Evidence of, see *Negotiable Instruments*, 5.

Fraud.

See *Deceit; Fraudulent Conveyances*.

In marriage settlement, see *Husband and Wife*, 4.

FRAUDS, STATUTE OF.

Promise to answer for debt of another.

1. A promise by defendant for whom a building was being constructed to see that the workmen of the subcontractor were paid was a promise to pay the debt of another, and, not being in writing, was void.—*Dirringer v. Moynihan*, 10 N. Y. S. 540.

2. Where plaintiffs refused to furnish any more lumber to a contractor for use in the erection of a house for defendant unless defendant became responsible, defendant's promise to pay for lumber thereafter delivered was an original undertaking, and therefore not void, under the statute of frauds, because not in writing.—*Bayles v. Wallace*, 10 N. Y. S. 191.

Agreements relating to land.

3. Where a vendee of land in possession under his contract of sale becomes dissatisfied with the quantity of land embraced in his contract, a readjustment of the boundary line between himself and his vendor, whereby he is to become the owner of an additional six acres, and a parol

agreement that the line so fixed shall be considered as the true boundary, is not a location of a disputed boundary line, but a parol agreement to sell additional land and is void under the statute of frauds.—*Weeks v. Martin*, 10 N. Y. S. 656.

4. A contract to peel and take away a certain number of cords of bark yearly from trees growing on plaintiff's land is a contract for an interest in land, which must be in writing; and, in action to enforce it, a subsequent verbal modification of the contract in writing is inadmissible.—*Thomson v. Poor*, 10 N. Y. S. 597.

Pleading.

5. Where a complaint alleges that the contract sued on was in writing, as required by the statute of frauds, and that it has been modified, it need not allege that the modification was in writing.—*Ottomann v. Fletcher*, 10 N. Y. S. 128.

FRAUDULENT CONVEYANCES.

What constitutes—Consideration.

1. In an action to set aside an assignment of a mortgage for \$2,000 as in fraud of creditors, it appeared that before the assignor became indebted he made a gift of several mortgages to the assignee, his daughter, two of which, aggregating \$3,800, had been foreclosed, and purchased by the assignee for the amount of the mortgage debt; that after the assignor became indebted the assignee conveyed the lands that she had bought at the foreclosure sale to the assignor, to enable him to raise money. Held, that the value of the lands so conveyed was the consideration of the assignment sought to be set aside.—*Foote v. Stryker*, 10 N. Y. S. 472.

—Change of possession.

2. Under 8 Rev. St. N. Y. (7th Ed.) p. 2928, § 5, which provides that a non-change of possession on a sale of chattels shall be "conclusive evidence of fraud" in favor of the vendor's creditors, unless the vendee shall make it appear that the sale was made in good faith, and without intent to defraud, the payment of an adequate price by the vendee is not, as a matter of law, sufficient to overcome the presumption of fraud arising from the non-change of possession, but is evidence to be considered by the jury in passing on the question of fraudulent intent.—*Wallace v. Nodine*, 10 N. Y. S. 919.

Action to set aside.

3. In a suit to set aside a conveyance as fraudulent, evidence as to the acts and declarations of the grantor after the execution of the deed was properly excluded, as against the grantee, when there was no

proof of a conspiracy between them, and no evidence that the grantor was still in possession at the time.—*Noyes v. Morris*, 10 N. Y. S. 561.

Evidence.

4. In an action by the vendor's creditors, attacking as fraudulent, on the ground of non-change of possession, a sale of farm produce on the vendee's farm, which had been operated by the vendors as lessees, a declaration by one of them, on abandoning the farm, that he delivered possession to the vendee, is admissible in evidence, as it is a statement of a matter of fact, and not the vendors' opinion on a question of law.—*Wallace v. Nodine*, 10 N. Y. S. 919.

5. Where one of defendants, in an action to subject to a judgment property alleged to have been fraudulently received from the judgment debtor, had at various times loaned money for the debtor, and received compensation from the borrowers, evidence of the amount received is admissible, as tending to negative any claim for compensation from the debtor.—*Gilmore v. Ham*, 10 N. Y. S. 48.

6. That a conveyance for an expressed valuable and adequate consideration was made two days before the grantor executed a general assignment for the benefit of creditors, that she on the same day conveyed other property to third persons, and that, several months before the assignment, she gave notes aggregating a large sum, constitute no evidence of fraud on the part of the grantees.—*Noyes v. Morris*, 10 N. Y. S. 561.

7. Defendant L., a stockholder in the R. Co., indorsed notes given by the company to plaintiffs. About the same time he transferred his interest in a certain firm to defendants F. and C., the consideration being an indebtedness of L. to the firm, and shares of stock held by F. in the R. Co. L. continued to occupy the same position towards the firm that he had always done, and the R. Co. was financially embarrassed to the knowledge of F. Judgments were also rendered against L., in favor of defendant B., it being alleged that they were based upon loans made to L., and that the stock of the latter in the R. Co. had been transferred to B. as collateral therefor. But L. testified that he had asked B. to buy the stock, and that he had offered to guaranty him against loss, and the stock was transferred to B.'s name. *Held*, that such conveyance and judgment, as well as a conveyance made to L.'s wife before the indorsement of the notes, were a part of a scheme to defraud creditors, and would be set aside; but a transfer of property by L. to defendant W. for a valuable consideration will be sustained, there being no evidence of any participation by

W. in the fraudulent designs of L.—*Windmuller v. Lovejoy*, 10 N. Y. S. 578.

Gambling Contracts.

See *Gaming*.

GAMING.

Gambling contracts—Action to recover money paid.

1. In an action under 8 Rev. St. N. Y. (7th Ed.) p. 1962, § 9, providing that a person who shall pay any money on the event of any wager may recover the same of the winner, it appeared that plaintiff gave defendant written orders to buy wheat for him, and paid the money sued for as margins to defendant, who agreed to carry the wheat until ordered to sell by plaintiff. *Held*, that parol evidence was admissible to show that the real understanding between the parties when the orders were given was that wheat should not be delivered, but that only the difference in the market price should be paid or received.—*Peck v. Doran Wright Co.*, 10 N. Y. S. 401.

2. Plaintiff testified that at the commencement of his dealings he asked defendant's agent as to their course of business, and the latter replied that they had no wheat to deliver, and did not expect their customers to want any; that it was merely to adjust the difference between the price at the time of ordering wheat bought and ordering it sold. The agent denied that any such conversation took place. There was no proof that any wheat was bought or sold. *Held* sufficient evidence to support a verdict for plaintiff, even against the evidence furnished by the form of the contract.—*Peck v. Doran Wright Co.*, 10 N. Y. S. 401.

Gifts.

From husband to wife, see *Husband and Wife*, 6.

GUARANTY

Promise to answer for another's debt, see *Frauds, Statute of*, 1, 2.

Consideration.

1. A promise, made at the time a guaranty was given by a married woman, that outstanding notes of her husband should be renewed as they fell due, is a sufficient consideration for the guaranty to support an action against her on such renewal notes.—*Hayes v. Hood*, 10 N. Y. S. 265.

2. In an action against a married woman on an instrument reciting that, "for value received," defendant guarantied the payment to a certain bank of all the debts of her husband, defendant is not entitled to

go to the jury upon the question of consideration merely upon evidence that on the day the guaranty was executed the husband did not receive any money or notes from the said bank.—*Hayes v. Hood*, 10 N. Y. S. 265.

GUARDIAN AND WARD.

Action by guardian—Estoppel of ward.

1. Where an action is brought by a general guardian in his own name, as guardian for the infant named, and the recovery was for the infant's sole benefit, she is estopped, on coming of age, from suing on the same cause of action, though under Code Civil Proc. N. Y. §§ 468, 469, and 1686, the better practice requires the action to be brought in the infant's name by a guardian *ad litem*.—*Carr v. Huff*, 10 N. Y. S. 861.

Accounting.

2. Lapse of time since the majority of a ward will not bar a petition to compel the guardian to account, when the guardian has kept the fund separate from his own property, and has never informed the ward of its existence, and has in no way repudiated or denied the trust. Affirming 3 N. Y. S. 335.—*In re Camp*, 10 N. Y. S. 141.

Adverse claim of guardian.

3. A father was appointed general guardian of his children to enable him to obtain the amount of an award in proceedings to condemn land owned by their mother at the time of her death, and he received the money in pursuance of the appointment, and receipted therefor as guardian. *Held* that, if he had or claimed any personal interest in the fund so received by him, it was his duty to have at once asserted it; and, having failed to do so, he could not, after the fund had been converted to his own use, and lost, set up an adverse claim to any portion of the money in contravention of his trust.—*In re Camp*, 10 N. Y. S. 141.

Hearsay Evidence.

See *Evidence*, 5-9.

HIGHWAYS.

Duty to erect bridges, see *Bridges*, 2.

Location of street railways, see *Horse and Street Railroads*, 1, 2.

Establishment by prescription.

1. Laws N. Y. 1865, c. 6, providing for highways by user for 20 years in the counties of Suffolk and Queens, immediately upon its taking effect, converts roads in those counties which had been previously used by the public as thoroughfares for 20

years into public highways, by operation of law.—*James v. Sammis*, 10 N. Y. S. 143.

Establishment by statutory proceedings.

2. Rev. St. N. Y. (7th Ed.) p. 1239, § 59, requires every person applying for the laying out of a highway to cause notices in writing to be posted in three of the most public places in the town, specifying as near as possible the proposed route of the highway, etc. *Held*, that it is not sufficient to deposit such notices in the mail, addressed to the persons whose land is to be affected by the proposed highway.—*People v. Stedman*, 10 N. Y. S. 787.

3. The appearance by one claiming to be the attorney of the land-owners, and his argument against the necessity of the highway, are not sufficient to waive the failure of the commissioners to comply with the statute in the preliminary proceedings.—*People v. Stedman*, 10 N. Y. S. 787.

Review of proceedings by certiorari.

4. Since the appeal from commissioners of highways to the county judge allowed by 2 Rev. St. N. Y. (7th Ed.) p. 1246, § 34, only authorizes a review of the merits involved in their order, *certiorari* will lie to review the regularity of their proceedings.—*People v. Stedman*, 10 N. Y. S. 787.

Action for negligence—Obstructions.

5. Under Laws N. Y. 1881, c. 700, § 1, imposing a liability on towns for injuries caused by defective highways in cases where the highway commissioners were personally liable at common law, a recovery can be had of a town for personal injuries sustained by reason of the branches of a tree being permitted to hang so low over the traveled portion of a highway as to leave a space insufficient for the passage of a load of hay.—*Embler v. Town of Wallkill*, 10 N. Y. S. 797.

6. Where the alleged negligence consists in obstructing the highway with a pile of stones calculated to frighten horses, and to render driving on the highway dangerous, an instruction that, to warrant a finding of negligence, the stones must have been so placed as "necessarily" to frighten horses, is properly refused, as the town is liable if that result would naturally and probably follow from the commissioner's neglect to remove them.—*Wilson v. Town of Spafford*, 10 N. Y. S. 649.

7. Evidence that plaintiff's horse shied on being driven past the stones the day following the accident is admissible in rebuttal of defendant's evidence that the accident occurred by reason of the horse's having been frightened by something else,

after having passed the stones.—*Wilson v. Town of Spafford*, 10 N. Y. S. 849.

8. Evidence that other horses had been frightened by the same stones at about the time of the accident is admissible as bearing on the question whether or not the stones were calculated to frighten horses.—*Wilson v. Town of Spafford*, 10 N. Y. S. 849.

Law of the road.

9. While plaintiff was going along the right-hand drive way of a street, (the middle of the street being occupied by car tracks,) he collided with defendant, who was going in the opposite direction on the same side. There was room for vehicles to pass on the drive-way, and each party contended that he attempted to avoid the accident. The court charged that defendant was presumptively negligent in being on the side of the street where the accident occurred; yet plaintiff must show that such negligence produced the injury, and that he was free from contributory negligence. *Held*, that a verdict for defendant would not be disturbed.—*Newman v. Ernst*, 10 N. Y. S. 810.

HOLIDAYS.

Service of summons.

Laws N. Y. 1881, c. 80, providing that certain days and half-days, including Christmas day, shall be considered Sunday, for the purpose of presenting and protesting commercial paper, and for the purpose of transacting business in a public office within the state, does not diminish the number of judicial days, and service of a summons on Christmas day is valid.—*Didsbury v. Van Tassel*, 10 N. Y. S. 82.

HORSE AND STREET RAILROADS.

Power to condemn land, see *Eminent Domain*, 1.

Location of road.

1. A public highway which has been acquired by a turnpike company does not cease to be a highway, and, under Laws N. Y. 1850, c. 140, requiring the consent of the local authorities to the construction of railways on any portion of the highways under their control, a grant by such company of a strip from the side thereof, in a town, is invalid unless consented to by the highway commissioner and the local authorities.—*In re Rochester Electric Ry. Co.*, 10 N. Y. S. 879.

2. Laws N. Y. 1860, c. 10, § 1, providing "it shall not be lawful to lay, construct, or operate any railroad in, upon, or along any or either of the streets or avenues of the city of New York, wherever such railroad may

commence or end, except under the authority and subject to the regulations and restrictions which the legislature may hereafter grant and provide," applies to every kind of a railroad, and to one to be constructed part of the way under ground, and at other points crossing over streets at right angles on bridges resting on piers built on private lands.—*In re People's R. T. R. Co.*, 10 N. Y. S. 849.

Forfeiture of charter—Violation of labor law.

3. A street railroad company does not forfeit its charter by requiring its employes to work more than 10 hours a day, in violation of Laws N. Y. 1887, c. 529, which provides that "it shall be a misdemeanor for any officer or agent of any such corporation [street railway company] to exact from any of its employes more than 10 hours' labor" per day.—*People v. Atlantic Ave. R. Co.*, 10 N. Y. S. 907.

Liability for negligence.

4. In an action against an elevated railroad company for injuries to a person in the street below by the falling of an iron bar from defendant's track while undergoing repairs, a charge that the "ordinary care with which the railroad is chargeable requires it * * * to use reasonable and ordinary care in selecting such appliances as are in practical use and of easy application. * * * You must say whether the railroad company has used ordinary and reasonable care in performing this work upon its tracks. * * * Has it neglected the precautions which reasonable and prudent people would have taken to prevent an accident similar to the one upon which you have to pass?"—is not objectionable as inviting the jury to make affirmative suggestions as to possible safe-guards which might have been supplied.—*Morsemann v. Manhattan Ry. Co.*, 10 N. Y. S. 105.

5. The falling from an elevated railway structure of a crow-bar which was in use by an employe repairing the track, whereby a person in the street below was injured, raises a presumption of negligence, which is not overcome by proof that the crow-bar was dropped through the employe's efforts to save himself from falling.—*Morsemann v. Manhattan Ry. Co.*, 10 N. Y. S. 105.

6. Evidence that the driver of defendant's horse-car would have been able to control the horses, and thus to prevent an accident, but for the fact that the rear brake had been mischievously interfered with by boys; that the usual mode of preventing such interference, the liability to which was matter of common knowledge to all familiar with the operation of the cars, was by tying the brake down; and

that defendant's superintendent knew that the brake of that particular car had been tied down at one time to prevent such interference,—is sufficient to show negligence on defendant's part.—*Dintruff v. Rochester City & B. R. Co.*, 10 N. Y. S. 402.

7. In an action against an elevated railway company for the wrongful death of a painter who was engaged in painting the superstructure when struck by a passing train and killed, it appeared that deceased was in the employ of a company which did the painting, and that he could see an approaching train from where he was at work, and that he was not seen by the engineer or any one on the train. *Held*, that there could be no recovery.—*Pallett v. Kings County El. Ry. Co.*, 10 N. Y. S. 691.

HUSBAND AND WIFE.

See, also, *Curtsey; Divorce; Dower.*

Husband as wife's agent, presumption, see *Principal and Agent*, 1.

Rights of divorced husband, see *Curtsey*.—survivor, see *Descent and Distribution*, 5.

Wife's liability for agent's negligence.

1. A married woman is liable for the negligence of her agent in making improvements on her separate property.—*Schmidt v. Keehn*, 10 N. Y. S. 287.

Wife's separate estate — Rights of husband.

2. Where a husband assumes the possession and control of his wife's separate estate, and collects the rents and income thereof, his estate will be held liable for moneys so collected and improperly expended by him for his own benefit.—*Nosstrand v. Ditmis*, 10 N. Y. S. 931.

Wife's contracts.

8. Notes executed by a wife to her husband for his accommodation are not contracts between them; and under Laws N. Y. 1884, c. 381, giving to married women the power to contract as if they were unmarried, and making them and their separate estate liable on their contracts, whether they relate to such separate estate or not, but excepting from the provisions of the act all contracts between husband and wife, a bank taking such notes in payment of an indebtedness of the husband is entitled to recover thereon against the wife. Following *Bank v. Sniffen*, 7 N. Y. S. 520.—*Queens County Bank v. Leavitt*, 10 N. Y. S. 198.

Marriage settlement—Fraud.

4. A girl sued for breach of promise, pleading seduction and pregnancy in aggravation. On a compromise she with-

drew the charge of a promise to marry. After the birth of the child, she was taken to wife by her betrayer, an antenuptial contract providing that neither should have any interest, present or future, in the estate of the other. She was then 21 years old, and had \$1,400. The husband was 65, had three adult children, and was worth \$50,000. *Held*, that the agreement is not so harsh and unequal that fraud or undue advantage taken of her situation can be inferred.—*Davis v. Wood*, 10 N. Y. S. 460.

Action against wife.

5. Coverture is a matter of defense only, and a default judgment against a married woman as indorser of a note is valid, though the complaint does not aver that she charged her separate estate.—*Hausee v. Fiero*, 10 N. Y. S. 494.

Gifts—From husband to wife.

6. Where the husband and wife are living together, an executed gift of the household furniture by the husband to the wife is not proved by a mere parol gift, where there is nothing to show her possession beyond the ordinary use of the family.—*Tyrrell v. York*, 10 N. Y. S. 611.

Action by wife — Personal injuries.

7. A married woman can recover in her own name damages for the pain and suffering caused by personal injuries. *Bennett v. Bennett*, 23 N. E. 17, followed.—*Haden v. Clarke*, 10 N. Y. S. 291.

— Joinder of husband.

8. Laws N. Y. 1860, c. 90, as amended by Laws 1862, c. 172, authorizing a married woman to sue, in all matters relating to her separate property and for injury to her person or character, as if she were a *feme sole*, was repealed by Laws 1880, c. 245, § 1, subds. 36, 38. Code Civil Proc. § 450, provides that "in an action or special proceeding a married woman appears, prosecutes, or defends alone, or joined with other parties, as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property." Section 1906, relating to actions for slander, imputing unchastity to a woman, provides that, if plaintiff is married, the damages recovered are her separate property. *Held*, that an action against a physician for negligent and unskillful treatment of a married woman is properly brought in the names of the husband and wife jointly.—*Ball v. Burleson*, 10 N. Y. S. 955.

Abandonment.

9. Where a wife leaves her husband in another state, they being at that time residents of that state, and comes to and resides in New York county, and he after-

wards comes and lives in another county in New York, he is not guilty of abandoning her in New York county by reason of his refusal, when calling upon her at her request in New York county, to live with or support her. Her offer to return to him should have been made at his residence.—*People v. Vitan*, 10 N. Y. S. 909.

Incumbrances.

Covenants against, see *Covenants*, 1.

INDICTMENT AND INFORMATION.

For rape, see *Rape*.

Description of offense—Variance.

1. Under Code Crim. Proc. N. Y. § 276, which requires an indictment to state both the name of the crime, and the facts whereby it was committed, a substantial variance between the crime charged and the facts charged is fatal to the indictment.—*People v. Maxon*, 10 N. Y. S. 598.

Amendment.

2. On the trial of an indictment for libel, which omits, by mistake, three words of the published libel, which is set out in the indictment, the indictment may be amended by the insertion of the words to conform to the proof, under Code Crim. Proc. § 298, providing that the court may, in its judgment, allow such amendment, if the defendant cannot be prejudiced in his defense on the merits thereby.—*People v. Clegg*, 10 N. Y. S. 875.

Joinder of counts.

3. An indictment in several counts for the illegal sale of intoxicating liquors, each count of which avers a sale to a different person and at a different time, though at the same place, violates Code Crim. Proc. N. Y. § 278, providing that an "indictment must charge but one crime, and in one form, except as in the next section provided," which section (279) declares that "the crime may be charged in separate counts to have been committed in a different manner or by different means; and, where the acts complained of may constitute different crimes, such crimes may be charged in separate counts."—*People v. O'Donnell*, 10 N. Y. S. 250.

INFANCY.

See, also, *Guardian and Ward*; *Parent and Child*.

Effect on statute of limitations, see *Limitation of Actions*, 7.

Contracts.

1. A purchase of goods by an infant for the purposes of his business, not being

clearly to his disadvantage, is not void, but only voidable.—*Stern v. Meikleham*, 10 N. Y. S. 218.

Employment of children—Criminal prosecution.

2. On an indictment under Pen. Code N. Y. § 292, as amended by Laws 1886, c. 81, which forbids the employment in a theatrical exhibition of children under the age of 16 years, it is sufficient to prove that there was a theatrical exhibition, that defendant employed children under the age of 16 years to perform in it, and that they did perform in such exhibition.—*People v. Meade*, 10 N. Y. S. 948.

Infringement.

Of trade-mark, see *Trade-Marks*, 2.

INJUNCTION.

Against erroneous taxation, see *Taxation*, 14, 15.

—Infringement of trade-mark, see *Trade-Marks*, 2.

Power of special surrogate to grant, see *Judge*.

To prevent possible nuisance, see *Nuisance*, 8.

When granted.

1. In an action by the receiver of one of the corporations in the combination known as the "Sugar Trust," to dissolve the combination, an injunction restraining defendants from disposing of the property and effects of the corporation, of which plaintiff is receiver, is properly granted on a showing that, if the combination is finally held unlawful under the laws of the state, then its property and effects will be removed from the state. Such injunction, however, should not extend to other property of the combination.—*Gray v. De Castro & Donner Sugar Refining Co.*, 10 N. Y. S. 682.

Restraining violation of contracts.

2. Injunction will lie to restrain a singer of reputation from violating his contract with an opera company by singing under other employment or management during the period covered by the contract, where the moving papers allege, with a fair degree of probability to sustain the allegation, that defendant intends to identify himself with a rival organization.—*Pratt v. Montegriffo*, 10 N. Y. S. 908.

Pleading.

3. A complaint praying that defendant be restrained from desecrating the burial ground of plaintiff's ancestors, which was reserved in a grant of the land to defendant's predecessor in title as a burial-place

for the grantor and his heirs forever, need not aver the intestacy of the ancestor.—*Mitchell v. Thorne*, 10 N. Y. S. 682.

Violation—Contempt.

4. The mere fact that defendants removed a quantity of hay from a leased farm in violation of a valid injunction issued at plaintiff's instance, is sufficient to support a finding that plaintiff's rights were "defeated, impaired, impeded, or prejudiced" thereby, as required by Code Civil Proc. N. Y. § 2266, to justify summary punishment; and the fact that they afterwards brought upon the farm the equivalent in manure of the hay so taken, thus substantially complying with the provisions of the lease, did not deprive the court of power to punish them for contempt, but was only a fact to be considered in mitigation.—*Aldinger v. Pugh*, 10 N. Y. S. 684; *People v. Same*, Id.

5. An agent who, with knowledge that notice of an injunction has been served upon his principal, violates the injunction while acting as agent, may be punished for contempt, although he himself was not served.—*Aldinger v. Pugh*, 10 N. Y. S. 684; *People v. Same*, Id.

Insolvency.

See *Assignment for Benefit of Creditors*.
Of corporation, see *Corporations*, 15, 16.

Instructions.

See *Criminal Law*, 3, 4; *Trial*, 7-9.

INSURANCE.

Mandamus to compel issue of certificate to company, see *Mandamus*, 4, 5.
Right of administrator to life policy, see *Executors and Administrators*, 6.

Assignment of policy.

1. In 1846 B. assigned a policy on his life to M., under an agreement that the proceeds, when collected, were to be applied to the liquidation of any indebtedness from B. to M. that might arise out of transactions then commenced between them, and that the balance, if any, should be paid over to B.'s legal representatives. In 1851 the parties had a settlement, and M. accepted one-half the balance due him, and gave a written discharge of all his claims against B. Nothing was then said or done concerning the policy, and M. continued to carry it until his death, 21 years afterwards, and during that time, and for 10 years longer, B. in no way indicated that he had any interest in the policy, though M.'s executors had negotiated with him to take it up. Held that, in the ab-

sence of any evidence as to the agreement of the parties after the settlement of 1851, it must be presumed that the original agreement continued, and that B. retained an interest in the policy.—*Shackelford v. Mitchell*, 10 N. Y. S. 123.

Condition of policy.

2. A policy of life insurance stipulated that, upon a failure to pay any premium when due, the policy should become void. There was such a failure: and, upon a tender of the amount thereafter, the insurer accepted it, and gave a receipt which stated that it was accepted upon condition that the insured was of temperate habits, and in as good health as when the policy was issued, otherwise the payment and receipt and the original policy should be void. Such acceptance and receipt were provided for in the constitution and by-laws of the insurance company, which were made a part of the original contract of insurance. Held, that such payment and receipt constituted a new contract, by which insured was bound, whether he read the receipt or not; and, it appearing that he was not at the time of temperate habits, nor in as good health as when he was originally insured, the receipt was of no effect, and the policy remained void. Affirming 7 N. Y. S. 152.—*Ronald v. Mutual Reserve Life Fund Ass'n*, 10 N. Y. S. 632.

Waiver.

3. A life insurance company does not waive a forfeiture of a policy by requesting proofs of the death of the insured, and giving instructions in regard thereto. Affirming 7 N. Y. S. 152.—*Ronald v. Mutual Reserve Life Fund Ass'n*, 10 N. Y. S. 632.

Agents.

4. An insurance agent can authorize his clerk to contract for risks, deliver policies, and collect premiums in cash or securities; and the act of the clerk in such cases is the act of the agent, and binds the company as effectually as if it were done by the agent in person.—*Moore v. New York Bowery Fire Ins. Co.*, 10 N. Y. S. 44.

Negligence.

5. On May 12th, plaintiffs, desiring to insure their premises, applied to one N., who had possession of blanks issued by defendant company, but no written appointment from it, and N. made out the application and forwarded it to S., defendant's agent in a neighboring town, who acknowledged the receipt, and stated that he would advise N. as soon as he heard from the company. About May 18th, S. was notified that the company declined the risk, but omitted to so inform N. until after a loss, which occurred on June 6th. The premium for the insurance had been previously paid to N. by plaintiffs. Held, that the

negligence of S. in failing to notify plaintiffs that the risk had been declined rendered defendant liable. — *Moore v. New York Bowers Fire Ins. Co.*, 10 N. Y. S. 44.

Action—Limitation.

6. A certificate of membership issued by defendant association to plaintiff's husband provided that a certain amount should be paid plaintiff, should her husband die from an injury, and within 90 days from such injury. The policy also provided that proof of death must be furnished the association within six months from the accident, and that claims should be payable within 90 days after satisfactory proof. *Held*, that the further provision that action should be begun within "one year from the time of the alleged accidental injury" meant not a year from the accident, but from the time when the right of action was complete. — *Cooper v. United States Mut. Acc. Ass'n*, 10 N. Y. S. 748.

— Question for jury.

7. In an action on a life insurance certificate, which prohibited a recovery for death of the assured caused by suicide, it appeared that assured's dead body was found near a highway, in a cleared space surrounded by underbrush, with a bullet hole through the back of his head. The bullet had entered his head $1\frac{1}{2}$ inches back of his right ear, and passed upward towards his left eye. He was 21 years of age, temperate, cheerful, industrious, and honest, was on good terms with all members of his family, and had given them a portion of his earnings. He had been out of employment for a while, and about a week before his body was found told his parents that he was going away. When found, his right hand was lying by his side, unclenched, and a revolver with one chamber empty lay between his legs. The bullet in his head was of the same caliber as this revolver. There was no evidence of a struggle. Five cents, a silver watch, a necktie pin, and a receipt for payment of premium to defendant were found on his person. One witness testified that the hair on the back of his head was singed, but this was denied, and it was shown that insanity had never existed in his family. No motive for committing suicide was shown. *Held*, that whether he had committed suicide was a question for the jury. — *Washburn v. National Acc. Soc.*, 10 N. Y. S. 866.

Mutual benefit insurance.

8. Laws N. Y. 1889, c. 520, § 8, provides, with reference to the preliminary organization of fraternal beneficiary societies, that when, among other things, a sworn statement has been filed that at least 200 persons have made application in writing for membership in such an association, the

superintendent of insurance shall issue a license, etc. The section further provides that when the license has been filed, and when at least 200 persons have subscribed in writing to be beneficiary members, etc., such persons shall be constituted a body politic and corporate, etc. *Held*, that it was necessary, in order to become a body corporate under the law, not only for the prescribed 200 persons to make application for membership before the issuance of the preliminary license, but they must subscribe in writing to be beneficiary members after the issuance of the license. — *In re Schmitt*, 10 N. Y. S. 588.

9. An assessment life insurance association issued a certificate to the insured, covenanting to pay his estate \$5,000 upon his death, "as provided in the constitution." That instrument provided that "the company shall not be liable, in case of the death of a member, for more than one-fifth the net amount of the bi-monthly premiums next following said death on all the members of the department to which such deceased member belongs, for each \$1,000 of death benefit named in his policy. This, however, does not prohibit the board of directors from paying a loss in full, but the amount paid shall in no case exceed the amount stated in policy." *Held*, that the amount stated in the policy was *prima facie* the amount due thereon, and that, in the absence of evidence showing the department to which deceased belonged, and the amount of the bi-monthly premiums next after his death, a verdict for the full amount of the policy was properly ordered. — *La Manna v. National Security Life & Accident Co.*, 10 N. Y. S. 221.

10. A by-law of defendant that if a member is in arrears when taken sick he shall not be entitled, by paying up such arrearages, to benefits during such sickness, is not waived by the acceptance of arrearages from a member. — *Nagel v. Glasburger*, 10 N. Y. S. 508.

11. The constitution of a benevolent association provided that notice of assessments should be sent by the supreme council to the assessment collectors of subordinate councils, who should notify the members; that the notice to the members should bear the date of the notice to the assessment collector; and that, unless a member paid the assessment within 40 days from the date of the notice, he should "stand suspended from the council." *Held*, that an order suspending a subordinate council on the ground that its members "stood suspended" because of their failure to pay assessments within 40 days from the date of the notice from the supreme council is void where it appears that, through the negligence of the assessment collector, the members never received the notice. — *Peo-*

ple v. Supreme Council, Catholic Benev. Legion, 10 N. Y. S. 248.

12. In an action by a member of a benevolent society for weekly benefits, it is no defense that plaintiff was in arrears for dues, where it appears that he paid his dues until he was unlawfully expelled, and that he afterwards tendered them, and they were refused.—*Simmons v. Syracuse, B. & N. Y. & Oswego & S. R. Benev. Soc.*, 10 N. Y. S. 293.

Foreign insurance company.

18. Laws N. Y. 1877, c. 211, providing that no "insurance company hereafter organized under the laws of this state shall use a corporate * * * title which shall at the time of such organization be used to designate any * * * other insurance company already existing under the laws of this state," does not apply to foreign insurance companies.—*Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co.*, 10 N. Y. S. 845.

Interest.

See *Usury*.

INTERPLEADER.

When lies.

A purchaser arranged with a bank that it should give the seller its acceptance for the price of the goods, taking the purchaser's acceptance for the same amount. The bank failed before its acceptance to the seller matured, and assigned the purchaser's acceptance to a third person, who sued the purchaser on it; and the seller also brought suit for the price of the goods. *Held*, that interpleader against the seller and the holder of the acceptance would not lie, as they did not claim the same debt of the purchaser.—*Bassett v. Leslie*, 10 N. Y. S. 483.

Interstate Commerce.

See *Constitutional Law*, 1.

INTOXICATING LIQUORS.

Criminal prosecution—Complaint.

1. A complaint alleging that defendant sold "one bottle of port wine" without a license does not charge an offense under Laws N. Y. 1857, c. 628, § 18, prohibiting the sale of liquors "in quantities less than five gallons at a time without having a license therefor."—*People v. Bradt*, 10 N. Y. S. 157.

Evidence.

2. Where defendant in a prosecution for selling liquor without a license introduces evidence that he was not the proprietor of

the place in question, but had leased it to another, evidence that defendant was arrested about a year before for keeping a disorderly house at the place in question is not admissible to prove proprietorship, unless there is also evidence that it was the practice to refuse licenses to persons who had been charged with such offenses, of which fact defendant knew, or that an application by him had been refused on that ground, or that he had reason to fear that it would be so refused, as showing a motive for his making a pretended lease, and applying for a license in the name of another.—*People v. Bradt*, 10 N. Y. S. 157.

JAIL AND JAILER.

Prosecution for inflicting unusual punishment.

A complaint in an action against the officers of a prison for inflicting cruel and unusual punishment on a convict is fatally defective when it fails to allege that the acts complained of were not in accordance with the regulations of the prison, or that they were not necessary for the proper punishment of plaintiff, or to secure submission and obedience on his part, or that the punishment was not administered in accordance with legal regulations upon the subject.—*Wightman v. Brush*, 10 N. Y. S. 76.

JUDGE.

See, also, *Justices of the Peace*.

Power of special surrogate to grant injunction.

1. Laws N. Y. 1849, c. 806, § 2, as amended by Laws 1851, c. 108, declare that the special county judge and special surrogate provided for in the preceding section "shall possess all the powers and perform all the duties which are possessed and can be performed by a county judge out of court." By the old Code Proc. § 218, the county judge then had express authority to grant an injunction, and also, by section 408, in an action in the supreme court, to exercise within his county the powers of a judge of the supreme court in chambers. *Held*, that the special surrogate of Oneida county (whose office was created by said act) is authorized to grant a temporary injunction in an action in the supreme court.—*Aldinger v. Pugh*, 10 N. Y. S. 684; *People v. Same*, *Id.*

2. No implication arises from the adoption of the Code that said amended act of 1849 was intended to be repealed; nor is there any inconsistency between that statute and the provisions of the Code upon the subject of special county judges and special surrogates, which would work a re-

peal thereof; especially as that was a special act, applying only to the counties enumerated.—*Aldinger v. Pugh*, 10 N. Y. S. 684; *People v. Same*, *Id.*

JUDGMENT.

Appealable judgment, see *Appeal*, 8.
Offer of judgment by partner, binding firm, see *Partnership*, 2.

By confession—Contingent liability.

1. Code Civil Proc. N. Y. § 2864, giving jurisdiction to justices of the peace to enter confessions of judgments, does not confer authority to confess for a contingent liability. Section 8011 provides that, on the confession of judgment before a justice, there must be an affidavit stating that the defendant is honestly indebted to plaintiff in the sum specified, over and above all just demands which defendant has against plaintiff. *Held*, that a justice of the peace had no authority to enter a confession of judgment in favor of a surety on certain notes against the principal maker, where the surety had not paid the notes at the time of the entry of judgment, although before such entry he had agreed with the principal to make such payment.—*Adams v. Tator*, 10 N. Y. S. 617.

2. The judgments being based principally on such notes, they were not valid as to certain minor items, covered by the judgments, which were actually due at the time confession was made.—*Adams v. Tator*, 10 N. Y. S. 617.

Res adjudicata.

3. Plaintiff, as a residuary legatee of his father, filed objections to the accounts of the executors on the ground that they charged him with \$26,000 advanced to him by testator, but instead of introducing evidence before the referee to show the invalidity of the accounts, the issues raised by the objections were, by consent of his counsel, reserved for argument before the surrogate. *Held*, that decrees of the surrogate overruling the objections and directing a distribution were conclusive against plaintiff, until reversed upon appeal, and a bar to a subsequent action to recover his distributive share of his father's estate, his right to which depended upon whether he had been properly charged with the \$26,000.—*Foulks v. Foulks*, 10 N. Y. S. 785.

4. Defendants made advances to plaintiff, taking his notes therefor, which were collaterally secured by deeds of his lands. On the failure of defendants their assignee brought an action at law against plaintiff on the notes, which were declared invalid and a judgment with costs was rendered

against the assignee. *Held*, that such judgment was not a bar to a subsequent action by plaintiff against defendants, for the recovery of the notes and a reconveyance of his lands.—*Henderson v. Kohn*, 10 N. Y. S. 828.

5. A complaint for foreclosure asked a judgment for any deficiency against an indorser of the note secured by the mortgage, who answered, denying liability. At the trial the plaintiff waived all claim for a personal judgment against her, and the court stated in its findings that her liability was not tried, and dismissed the complaint as to her for any deficiency. *Held*, no bar to an action on another mortgage given by her to secure the same note.—*National Hudson River Bank v. Reynolds*, 10 N. Y. S. 669.

6. Where judgments in actions involving the rights of the parties under a certain agreement are modified so as to leave open the question whether a certain clause in the agreement was abrogated, and neither party appeals therefrom, an objection that such judgments are a bar to a subsequent proceeding to determine whether the clause was abrogated is without merit.—*Buhler v. Hubbell*, 10 N. Y. S. 254.

7. An order, entered by consent, denying an application to vacate an assessment for a street improvement, is a bar to a subsequent action to have a portion of the assessment declared invalid, and to recover back money paid thereon by plaintiff, and parol evidence that the denial of the application was consented to because it was discovered that the assessment had been paid is not admissible in such action.—*Brooks v. City of New York*, 10 N. Y. S. 778.

8. In an action involving the sole issue whether defendant had wrongfully used plaintiffs' trade-mark, and should be enjoined from further using it, a finding of fact that defendant had been employed to sell plaintiffs' goods on a certain commission is immaterial, and therefore not *res adjudicata* as against defendant on the question as to his contract with plaintiffs.—*Springer v. Bien*, 10 N. Y. S. 580.

9. An agreement provided that defendant should have the benefit of the proceeds of certain notes and mortgage belonging to the estate, if any, after paying the expenses and commissions proper in collecting the mortgage, and settling and administering the estate. *Held*, in an action against defendant to recover an amount alleged to be due from him under the agreement after crediting to him the proceeds of the mortgage to which he was entitled, that a decree of the surrogate rendered after the commencement of the action was not admissible to show the costs of collecting the mortgage, and the expenses and commissions of plaintiffs in settling the

estate.—*Lawrence v. Church*, 10 N. Y. S. 566.

Res adjudicata—Persons affected.

10. Where H., claiming a city office under an invalid appointment, sued the city for his salary for a certain year, plaintiff, who claimed the salary of such office for the same year, was not bound to come in and defend the action, and, not having been a party, he was not bound by the judgment in the action.—*King v. City of Buffalo*, 10 N. Y. S. 564.

Lien.

11. Under Code Civil Proc. N. Y. § 1430, providing that the term "real property," as used in chapter 18, arts. 3, 4, relating to the execution sale of land, shall apply to leasehold property where the lessee or his assignee, at the time of sale, is possessed of "at least five years' unexpired term of lease," a judgment, though duly docketed, is not a lien on the judgment debtor's interest in the unexpired term of a lease having but two years to run.—*Taylor v. Wynne*, 10 N. Y. S. 644.

12. On a motion for leave to issue execution upon a default judgment against a married woman, she, by leave of court, filed an answer, pleading coverture, whereupon plaintiff was required either to submit to a dismissal or amend his complaint. He elected to amend, and afterwards prosecuted the case to judgment. *Held*, that this did not constitute a waiver of the original judgment, and it still remained in force.—*Hausee v. Fiero*, 10 N. Y. S. 494.

Collateral attack.

13. A defendant who was served with summons under a wrong name, and did not appear, may raise the question of jurisdiction in supplementary proceedings, though he has not appealed from the judgment.—*McGill v. Weil*, 10 N. Y. S. 246.

14. In an action by a judgment creditor to subject property alleged to have been fraudulently received by defendants from the judgment debtor, plaintiff's judgment against the debtor cannot be attacked by the alleged fraudulent transferees, by reason of mere irregularities in the entry thereof.—*Gilmore v. Ham*, 10 N. Y. S. 48.

15. The court having acquired jurisdiction over the parties and subject-matter in a proceeding, error, if any, committed therein can only be corrected by appeal.—*Brooks v. City of New York*, 10 N. Y. S. 778.

Opening and vacating.

16. Where it appears from a surrogate's decree that certain matters were litigated and passed on, when in fact the surrogate declined to consider such matters for want of jurisdiction, there is an "irregularity"

for which the decree may be set aside under Code Civil Proc. N. Y. § 1282, made applicable to surrogates' courts by section 2481, subd. 6.—*In re Foulkes' Estate*, 10 N. Y. S. 515.

17. Under Laws N. Y. 1882, c. 410, § 1367, (Consolidation Act,) providing that any justice may upon motion set aside any default made in any action tried before him, a plaintiff who has offered proof of personal service of summons upon defendant, and obtained a judgment by default in a justice's court, cannot object to the vacation of the judgment by the justice on proof that personal service was not had, on the ground that the justice had never acquired jurisdiction of the action.—*Edel v. McCone*, 10 N. Y. S. 533.

18. A judgment by default rendered against defendant, who swears that he was at his residence in New Jersey at the time summons was alleged to have been served on him in New York city, and who is supported by eight witnesses, will be opened so far as to enable him to appear and defend, though four witnesses for plaintiff directly contradict defendant, and swear that service was made as alleged.—*Kinne v. Meyer*, 10 N. Y. S. 443.

19. Where defendant is sued in the name of John Horn, which the complaint alleges is his correct name, and defendant answers in the name of John A. Horan, which he alleges is his correct name, and the answer is returned, and judgment taken by default, a motion to vacate the judgment will not be passed on until the court has ascertained which is defendant's name.—*Anderson v. Horn*, 10 N. Y. S. 8.

Assignment.

20. In a suit against plaintiff and another, on a partnership liability, a several judgment was entered against each. The creditor assigned for a valuable consideration its judgment against plaintiff's partner, reserving its rights against plaintiff. The assignee, without consideration, executed a release to plaintiff, who seeks to enjoin the collection of the judgment against him, claiming that the release was valid because the original judgment would be considered in equity as a joint judgment, and the assignment of a part carried the whole. *Held*, that plaintiff cannot be heard to complain that defendants seek to take advantage of the fact that it is too late to have the mistake in entering the original judgments corrected.—*Whittemore v. Judd L. & S. Oil Co.*, 10 N. Y. S. 737.

Judicial Sales.

In partition proceedings, see *Partition*.
Of decedent's estate, see *Executors and Administrators*, 14, 15.

Jurisdiction.

Of justice of the peace, see *Justices of the Peace*, 1, 2.

On appeal, see *Appeal*, 1-4; *Criminal Law*, 7.

JURY.

Summoning and impaneling.

1. Where some of the jurors in a criminal case are drawn and sworn in the absence of one of the sessions justices, and objection thereto is first made at the close of the trial by a motion to dismiss, the irregularity will be deemed to have been waived.—*People v. De Camp*, 10 N. Y. S. 811.

Right to jury trial.

2. A complaint demands equitable relief, and not a judgment for a sum of money only, within Code Civil Proc. N. Y. § 968, providing what issues are triable by jury, which states that a chattel mortgage purporting to secure a debt due the defendant was made in trust for her by the plaintiff's husband, induced by undue influence, and that it has been foreclosed, and the proceeds appropriated by the defendant; the prayer being that he be required to account for the amounts received, with interest, and that the chattel mortgage be adjudged null and void.—*Krenzle v. Miller*, 10 N. Y. S. 835.

3. An action wherein the complaint seeks to have set aside, on the ground of fraud, a release to defendant of all liability for causing plaintiff's arrest, and to recover damages for malicious prosecution, is for equitable relief, and is not triable by jury.—*Stono v. Weiller*, 10 N. Y. S. 828.

4. In an action to foreclose a mortgage, defendant is not entitled, as a matter of right, to a trial by jury of a defense of fraud.—*Stephens v. Humphreys*, 10 N. Y. S. 455.

JUSTICES OF THE PEACE.

Jurisdiction.

1. Under Code Civil Proc. N. Y. § 2861, providing that a justice of the peace has only the civil jurisdiction given him by statute, a justice has no jurisdiction of the person of defendant in an action brought in violation of Code Civil Proc. N. Y. § 2869, providing that an action must be brought before a justice of a town or city wherein one of the parties resides, or a justice of an adjoining town or city in the same county.—*Larocque v. Harvey*, 10 N. Y. S. 576.

2. Under Code Civil Proc. N. Y. § 2865, providing that "an action cognizable by a justice of the peace may be brought * * * by or against a town or county v.10N.Y.S.—64

officer in his official character," a justice has jurisdiction of an action on the official bond of a constable to recover damages for an insufficient levy of an attachment.—*Sutherland v. McCreary*, 10 N. Y. S. 876.

Procedure before.

3. Where the summons in a justice's court is returnable at 9 A. M., and the justice calls the case at 9:45, and, in the absence of defendant, waits until 10 before proceeding, it is a compliance with Code Civil Proc. N. Y. § 2893, requiring the justice to wait one hour after the hour specified in the summons for its return, unless the parties sooner appear.—*Dunn v. O'Keefe*, 10 N. Y. S. 84.

4. Under Code Civil Proc. § 2940, which provides that pleadings in justices' courts shall be sufficient if they enable a person of common understanding to know what is intended, a complaint in replevin which alleges ownership of, and right of possession to, the property in plaintiff, and that defendant wrongfully detains it under an execution against a third person, is not defective because of its failure to allege that the taking was wrongful, as the facts averred clearly show this to have been the fact.—*Button v. Lusk*, 10 N. Y. S. 582.

KIDNAPPING.

What constitutes.

Inducing a person to go to a foreign country by the promise of work at a specified compensation, when the person making the promise knows that such compensation will not be obtained, is not an inveiglement, within Pen. Code N. Y. § 211, providing that any person is guilty of kidnapping who willfully "seizes, confines, inveigles, or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of the state, or to be sold as a slave, or in any way held to service, or kept or detained against his will." Distinguished from *People v. De Leon*, 109 N. Y. 226, 16 N. E. 46.—*People v. Fitzpatrick*, 10 N. Y. S. 629.

LANDLORD AND TENANT.

Rights and liabilities.

1. Under the covenants of a lease providing that the lessee shall return the premises in good repair, injury by the elements excepted, and that he shall comply with all orders of the city health department at his own expense, he must remove the carcasses of horses destroyed by fire in the building during the term, and the landlord is bound to remove the debris to enable the lessee to get at the carcasses.—*Fleischmann v. Topplitz*, 10 N. Y. S. 471.

Rights and liabilities.—Injuries to tenant.

2. In an action against a landlord for personal injuries by a tenant who was tripped and thrown by a ragged matting on a stairway which belonged to the landlord, but was used by the tenant as the only means of reaching her apartments, the non-production by defendant of the matting in evidence, even though it has been constantly used for more than two years since the accident, is a circumstance which may be considered by the jury.—*McGuire v. Joslyn*, 10 N. Y. S. 384.

Action by tenant—Repairs.

3. In an action by a lessee to recover money paid for repairing the roof of the leased house, a collateral agreement binding the lessor to make such external repairs is admissible in evidence where the only provision of the lease relating to that subject is that the lessee shall make all repairs except those to the exterior of the building.—*Weil v. Kahn*, 10 N. Y. S. 236.

Leases—Termination.

4. A notice by a landlord to his tenant to move "on or before" the date when the lease expires is not a continuing offer to accept a surrender of the existing lease whenever the tenant elects to make it, but simply means that the landlord will insist on his legal right to have the tenant move out before the last day of the term.—*Koehler v. Scheider*, 10 N. Y. S. 101.

5. In a lease of the top floor of a building it was provided that the landlord should furnish steam-power every working day of the year, "excepting such time as may be necessary for repairs, * * * and the accumulated delays" thereof shall not exceed 12 working days each year, "except in case of accident to landlord's plant by explosion or otherwise, in which case the tenant may terminate this lease." The boilers and engine were in a separate building, and the lessee took power from the main shaft by its own counter-shaft. *Held*, that an injury caused to the landlord's machinery by a fire which originated in the demised premises was not "by explosion or otherwise," and did not authorize the termination of the lease.—*Reliable Steam-Power Co. v. Solidarity Watch-Case Co.*, 10 N. Y. S. 525.

6. The floor of the demised premises and the tenant's own belting and shafting were so injured as to require about three weeks for repairs, but the landlord could have been ready to furnish power within a few days. *Held*, that, even though the destruction were held to have occurred "by explosion or otherwise," the tenant was not authorized to terminate the lease.—*Reli-*

able Steam-Power Co. v. Solidarity Watch-Case Co., 10 N. Y. S. 535.

Rent.

7. In an action for rent reserved in a lease the defense that defendant was evicted by a third person from a right of way to the North river from the leased premises, which was appurtenant to the lease, is not established where it appears that the premises were not bounded by the river, and that the only communication with the river was over other property which did not abut thereon, and which defendant held under a lease from another person.—*Baylies v. Philadelphia & R. Coal & Iron Co.*, 10 N. Y. S. 316.

8. In an action for the rent, where the tenant sets up as a defense a conversion of property mortgaged as security for the rent, it is error to exclude the landlord's testimony that he never used the property or allowed others to use it, and that he had never reaped any advantage from its possession.—*Lathers v. Hunt*, 10 N. Y. S. 529.

9. Even if the landlord had converted the property to his own use, he would not be chargeable with its value at the time of the appropriation, in the absence of any evidence that he took it in full satisfaction of his debt; and the exclusion of testimony as to the value of the property is error.—*Lathers v. Hunt*, 10 N. Y. S. 529.

10. Where, after final order awarding the possession of the premises to the landlord, the tenant from month to month voluntarily surrenders them before the issuance of a warrant for his removal, the tenancy is terminated by such surrender, and the landlord cannot recover rent for the ensuing month, under Code Civil Proc. N. Y. § 2258, providing that the warrant cancels the agreement, and annuls the relation of landlord and tenant.—*Gallagher v. Reilly*, 10 N. Y. S. 536.

Action for unlawful dispossession.

11. A tenant was dispossessed in a summary proceeding, in which he made default; and, on appeal to the county court, it was decided that there was no error of law for which the judgment could be reversed, but that the default might be opened, and judgment was entered that payment of costs the final order awarding possession be reversed, and a new trial directed, which resulted in favor of the tenant. *Held*, that he has an action for damages under Code Civil Proc. N. Y. § 2258, providing that, if the final order is reversed on appeal, the one dispossessed may sue for the damages he has sustained.—*Wood v. Kernan*, 10 N. Y. S. 654.

12. In an action by a tenant for being unlawfully dispossessed by a summary proceeding, the final order in which has been reversed on appeal, he may recover the

value, over and above the rent, of the use of the premises, including the crops and fruit he might have gathered, up to the time restitution was ordered.—*Woods v. Kernan*, 10 N. Y. S. 664.

18. In such case the failure of the tenant to re-enter after restitution was ordered, does not bar his action for any loss he had suffered to that time.—*Woods v. Kernan*, 10 N. Y. S. 664.

Law of the Road.

See *Highways*, 9.

Leases.

See *Landlord and Tenant*, 4-6.

Levy.

Of attachment, see *Attachment*, 3.
execution, see *Execution*, 4.

LIBEL AND SLANDER.

Malice.

1. In an action for libel all of the separate publications prior to the commencement of the action that make the same charge, and relate to the same subject-matter, are admissible in evidence on the question of malice, though they are not all set out in the complaint.—*Ward v. Deane*, 10 N. Y. S. 431.

Action—Bill of particulars.

2. In an action for slander, plaintiff will be required to furnish a bill of particulars giving the name of at least one person present on each of the occasions on which the alleged slander was uttered. Following *Dempewolf v. Hills*, 53 N. Y. Super. Ct. 105.—*Turner v. Beavan*, 10 N. Y. S. 128.

Evidence.

3. In an action for slander, testimony hat defendant offered to apologize to plaintiff is admissible in mitigation of damages.—*Blohm v. Bamber*, 10 N. Y. S. 98.

4. Testimony as to plaintiff's character is inadmissible, unless it was pleaded in mitigation of damages.—*Ward v. Deane*, 10 N. Y. S. 431.

Instructions.

5. It is proper to refuse to instruct that a verdict for nominal damages is a vindication. Following *Sanderson v. Caldwell*, 5 N. Y. S. 398.—*Blohm v. Bamber*, 10 N. Y. S. 98.

Damages.

6. Mental anxiety, grief, and loss of society, resulting from the libelous publication, may be considered in estimating plaintiff's damage.—*Ward v. Deane*, 10 N. Y. S. 431.

Liens.

See *Mechanics' Liens*.

Of attorneys, see *Attorney and Client*, 8-9.
chattel mortgage, see *Chattel Mortgages*.
judgment, see *Judgment*, 11, 12.
mortgages, see *Mortgages*, 1-5.

Life Insurance.

See *Insurance*.

LIMITATION OF ACTIONS.

On insurance policy, see *Insurance*, 6.

When statute applicable.

1. An action for wrongfully causing death is "for personal injuries," within Laws N. Y. 1886, c. 572, limiting to one year actions against the mayor, aldermen, and commonalty of any city having 50,000 inhabitants or over, for damages for personal injuries alleged to have been sustained by reason of its negligence.—*Titman v. City of New York*, 10 N. Y. S. 689.

Running of statute.

2. The statute of limitations begins to run against a cause of action for enticing away plaintiff's husband and depriving her of his society and assistance from the time of the enticement, and is not in the nature of a continuing trespass.—*Hogan v. Wolf*, 10 N. Y. S. 896.

3. The statute runs against an action for the specific performance of a certificate entitling the holder to shares of the capital stock of a company on surrender of the certificate at the company's office, from the time the company delivers the certificate.—*Ryder v. Bushwick R. Co.*, 10 N. Y. S. 748.

4. Code Civil Proc. N. Y. § 410, provides that "where a right exists, but a demand is necessary * * * to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete." *Held*, that where money was deposited to be applied towards the discharge of a church debt, but "to be returned, if demanded, in case there is not sufficient amount subscribed by January 1, 1880," limitation against an action to recover the same because sufficient was not subscribed, began to run on that date, although demand was not then made.—*Duer v. Twelfth St. Reformed Church*, 10 N. Y. S. 526.

5. Such payment did not come within the exception of subdivision 2 of that section, which provides that, "where there is a deposit of money not to be repaid at a fixed time, but only upon a special demand, * * * the time must be computed from

the demand."—*Duer v. Twelfth St. Reformed Church*, 10 N. Y. S. 526.

Running of statute—Suspension.

6. Supplementary proceedings on a judgment rendered by a justice of the peace are not an action within the meaning of Code Civil Proc. N. Y. § 382, subd. 7, which provides that an action on a judgment rendered in a court not of record must be commenced within six years after its rendition.—*Bolt v. Hauser*, 10 N. Y. S. 897.

Disabilities—Infancy.

7. Where minor heirs were necessary parties to the partition action, the purchaser, who has been in open and continuous possession for 88 years, has an indefeasible title by adverse possession; Code Civil Proc. N. Y. § 875, providing that, where one is under a disability when his cause of action accrues, the time during which such disability continues shall not be considered in computing the 20 years within which actions for the recovery of land must be brought, but that he must bring his action within 10 years after the disability ceases.—*Hœpfner v. Sevestre*, 10 N. Y. S. 61.

Liquor Selling.

See *Intoxicating Liquors*.

LIVERY STABLE KEEPERS.

Vicious horses—Injuries to customers.

1. A keeper of a livery stable, who hires a horse without giving notice of its known propensity to turn around in the road, is liable for personal injuries resulting to the customer from failure to give him such information, and is not exonerated by the fact that the customer was informed by employees at the stable that the horse was "a little skeery;" that he wanted to look out; but that, if he kept a "taut" rein, there would be no danger.—*Kissam v. Jones*, 10 N. Y. S. 94.

2. In an action to recover for injuries caused by a vicious horse hired from defendant, after uncontradicted testimony that the horse was vicious, and had caused the injury by the very habit defendant knew he had, testimony as to the character or disposition of the horse is immaterial.—*Kissam v. Jones*, 10 N. Y. S. 94.

Magistrate.

See *Justices of the Peace*.

Malice.

See *Libel and Slander*, 1.

MALICIOUS PROSECUTION.

Evidence.

In an action for malicious prosecution and arrest, where different inferences might fairly be drawn from the facts in proof as to the existence or want of probable cause for the arrest and prosecution, that question should be left to the jury.—*Collins v. Manning*, 10 N. Y. S. 658.

MANDAMUS.

To courts—Appointment of court-crier.

1. Under 1 Rev. St. N. Y. (8th Ed.) p. 407, § 1, which provides that honorably discharged Union soldiers and sailors shall be preferred for appointment in every public department, such soldier is not entitled to a writ of *mandamus* to compel a judge to appoint him to the office of crier of the court, to which, in spite of his application, a civilian was appointed, even though he be qualified for the place, and was the only soldier who applied.—*People v. Wendell*, 10 N. Y. S. 587.

2. The judge had power, in his discretion, to appoint from the whole body of electors, and, having exercised that power and discretion, his duty was performed, and, since *mandamus* lies only to compel action by inferior officers and tribunals, there was nothing upon which the writ could take effect.—*People v. Wendell*, 10 N. Y. S. 587.

3. A person appointed to the office of crier, being in possession of the office, cannot be ousted by *mandamus* against the judge appointing him without being made a party to the proceeding.—*People v. Wendell*, 10 N. Y. S. 587.

To superintendent of insurance.

4. Laws N. Y. 1889, c. 520, relating to benefit associations, provides that the application for membership in such an association shall be made in good faith, and that, when the superintendent of insurance shall have certified that they have complied with the provisions of the act, the proposed corporators shall be constituted a benefit society, etc. Held that, the superintendent having refused to issue such a certificate on the ground that the membership of the proposed association was not entered into in good faith, *mandamus* would not issue to compel him to issue such certificate. His duties in the premises being judicial in their nature.—*In re Schmitt*, 10 N. Y. S. 583.

5. On application for *mandamus* to compel the issuance of such certificate, affidavits in the affidavits of the superintendent that the provisions of the said act be

not been complied with will be taken as true, where the relator proceeds to argument without controverting them.—In re Schmitt, 10 N. Y. S. 588.

To municipal boards and officers.

6. Under Laws N. Y. 1870, c. 175, § 8, as amended by Laws 1873, c. 549, § 4, providing that the board of excise of any city, etc., may, and upon the complaint of any resident of said city, etc., "shall," summon before them any person licensed to sell intoxicating liquors, and, if satisfied that he has violated any provision of the act, cancel his license, *mandamus* will lie to compel commissioners of excise of New York City to decide a complaint presented to them by a resident of their city against a saloon-keeper for keeping his saloon open on election day, in violation of the statute.—People v. Meakin, 10 N. Y. S. 161.

7. The complaint was presented to the commissioners on January 27th, set for hearing February 12th, and submitted for decision February 28th. On the last-named day the license had 58 days to run. When the *mandamus* proceedings were commenced the license had only 18 days to run. *Held*, that the facts justified the inference that the delay was equivalent to a refusal to act, and warranted the issuance of a peremptory writ.—People v. Meakin, 10 N. Y. S. 161.

MARINE INSURANCE.

Conditions of policy—Waiver.

A policy of insurance on a cargo of corn provided that the acts of the insurer in recovering, saving, or disposing of the property insured should not be considered as a waiver or acceptance of an abandonment, or as affirming or denying any liability under the policy, but that such acts should be considered as done for the benefit of all concerned, without prejudice to the rights of either party. *Held* that, by taking possession of and selling the injured portion of the cargo, with notice that the injury was caused by ice, the insurer did not waive a provision in the policy exempting it from liability caused by ice, or render itself liable to a charge of conversion. Distinguishing Carr v. Insurance Co., 109 N. Y. 504, 17 N. E. 869.—Schuyler v. Phoenix Ins. Co., 10 N. Y. S. 205.

Marriage.

See *Breach of Marriage Promise; Husband and Wife.*

Married Woman.

See *Divorce; Dower; Husband and Wife.*

MASTER AND SERVANT.

Employment of children for theatrical exhibition, criminal prosecution, see *Infancy*, 2.

Torts of servants, see *Carriers*, 10.

Violation of labor law, forfeiture of charter of corporation, see *Horse and Street Railroads*, 3.

Wife's liability for agent's negligence, see *Husband and Wife*, 1.

When relation exists.

1. In an action for wages for work done on defendant's building, it appeared that plaintiff was told to go to work by a subcontractor, and made no contract with any one else. Defendant gave plaintiff some money, but merely as a charity; he having paid the principal contractor in full. *Held*, that there was not sufficient evidence that defendant employed plaintiff to support a verdict for the latter.—Dirringer v. Moynihan, 10 N. Y. S. 540.

Compensation.

2. In an action for wages, where plaintiff relies on a contract of hiring at current wages, and defendant sets up a contract by which he was to give plaintiff such compensation as he should see fit, evidence as to any custom in defendant's neighborhood with regard to hiring plaintiff was properly excluded.—Smith v. Sheridan, 10 N. Y. S. 865.

3. Plaintiff asked \$5 per day to work for defendant, and was told that the company could not pay that "now," but would give \$75 per month, "and after 3 or 4 months then the company could pay wages." Plaintiff worked on that basis about a year, when his salary was raised to \$100 a month, which he accepted without objection. *Held*, that defendant was not liable to pay a greater sum.—Seeber v. American M. & M. Co., 10 N. Y. S. 851.

4. Plaintiff admitted that, before starting on his first business trip for defendant, he told the latter that he could not travel on \$50 per week, but would try to do so. On that trip he charged and was allowed \$80 per week for traveling expenses, but admitted that he subsequently submitted to a deduction from his salary for having charged more than \$50 per week. He claimed that he did not acquiesce in the deduction, denied that he ever contracted to fix his traveling expenses at \$50 per week, and testified that he actually expended \$80 per week therefor. *Held*, that the question whether he had agreed to receive \$50 per week for his traveling expenses was for the jury.—Rosenfeld v. New, 10 N. Y. S. 232.

Discharge.

5. In an action for the wrongful discharge of plaintiff as superintendent of de-

defendant's fire-works factories, where it was claimed the plaintiff was unfaithful, and had appropriated and given away defendant's property, it was shown that plaintiff gave some fire-works to the fireman of an engine company. *Held*, that proof of a custom to do this was properly admitted. —Linton v. Unexcelled Fire-Works Co., 10 N. Y. S. 928.

6. It was also proper to prove by plaintiff that the defendant's manager had never objected to his fidelity. —Linton v. Unexcelled Fire-Works Co., 10 N. Y. S. 928.

7. An engineer, employed by the month, who has been discharged for negligence after working nine days, and who has refused a tender of half a month's wages for his services, cannot recover for the services rendered on a *quantum meruit*. —Leacock v. Striker, 10 N. Y. S. 540.

Negligence of master.

8. A conductor was hurt by a collision between trains in a freight yard. The assistant yard-master was not on duty the night of the collision. There was no lack of men to attend the making up of trains and shifting cars. The gangs were full, and the men all there, and they were able and competent to do the work. It was unusual for the yard-master or his assistant to take any part in it. *Held*, that the verdict cannot be sustained on the ground that the jury had a right to say that the absence of the assistant contributed to the collision. —Harvey v. New York Cent. & H. R. R. Co., 10 N. Y. S. 645.

9. Deceased was shoveling coal for defendants, in the hold of a canal-boat, and the coal was raised in buckets attached to rope falls operated by steam. One of these falls broke, and a bucket fell on deceased, killing him. The fall that broke was worn on the outside, and pulpy on the inside, and its condition was known to the engineer, whose duty it was to inspect the ropes, and renew them when worn. Defendants provided new and good ropes for this purpose, which the engineer could get on application. *Held*, that defendants were liable for the negligence of the engineer in permitting the continued use of a defective rope. —Cregan v. Marston, 10 N. Y. S. 681.

Evidence.

10. In an action for injuries received while working on the construction of an elevated road, evidence was admissible as to the usual method employed in building overhead iron structures. —Davidson v. Cornell, 10 N. Y. S. 521.

11. Plaintiff was properly allowed to testify as to whether he knew the dangerous condition of a platform on which he was working. —Davidson v. Cornell, 10 N. Y. S. 521.

12. In an action by a servant for injuries alleged to have resulted from unsafe appliances, a declaration by defendant's foreman, made after the accident, that the appliances were unfit for use, is inadmissible, and the error of its admission is not cured by instructions to disregard it. —Whalen v. Standard Gas-Light Co., 10 N. Y. S. 105.

13. Disputes between the timber boss of a mine and the under-ground boss, the former's superior, relative to management of the lifting-cars while repairs were being made in the slope, are inadmissible to show negligence on part of the mining company in a suit by plaintiff, who was assisting the timber boss in the repairs. —Jenkins v. Mahopac Iron-Ore Co., 10 N. Y. S. 484.

— Question for jury.

14. Plaintiff, employed by defendants, was sent, on the application of defendant's foreman for more help, to assist in handling cases of glass weighing from 180 to 200 pounds. The foreman at first refused to set plaintiff at work, on the ground that he was not strong enough, and was inexperienced. But, on being sent back again by defendants, plaintiff was assigned to the duty of holding some of the glass at an elevated position, and was injured by some of the cases falling upon him. The work was dangerous to one without experience, and plaintiff had not been informed of such danger. *Held*, that the question of defendant's negligence should have been left to the jury. —Albertz v. Bache, 10 N. Y. S. 689.

15. Plaintiff was injured in a collision between a passenger train and a freight train, both of which belonged to defendant, and on the former of which plaintiff was a brakeman. The trains were coming from opposite directions on the same track, and it was the duty of defendant's flagman to fully stop the freight train far enough away to allow the passenger to take a switch, and then signal the passenger to come on. The flagman made some signal to the freight train, and then signaled the passenger to come on. Both trains came on, resulting in the collision. Plaintiff claimed that the freight train was not properly signaled, that the flagman was incompetent, and that defendant was negligent in employing and retaining him. *Held*, that the case should have been submitted to the jury on the questions of the negligence and incompetency of the flagman, and defendant's negligence. —Bossout v. Rome, W. & O. R. Co., 10 N. Y. S. 602.

16. In the construction of an elevated railroad by defendant, iron columns were erected on each side of the street. Girders, resting on the top of the columns, were

stretched across the street, and two girders on each side of the street were stretched from column to column; their ends resting on seat plates placed on the transverse girders, and also resting below on iron brackets extending out from the cross-girders. Two bolts were inserted through the flanges on the longitudinal girders and the seat plates. Upon the longitudinal girders was placed a platform or traveler which carried a weight of 10 or 12 tons. The platform was moved by means of a rope fastened to a post on the platform, carried forward about 60 feet to a leading block, and then returned to a block in the center of the platform. The leading block was attached by a clamp to an inside longitudinal girder on the same side of the street as the post on the platform. Plaintiff, working on the platform, was injured through the giving away of the longitudinal girders while the platform was in motion. Plaintiff contended that lateral bracings should have been put in between the longitudinal girders; that the ends thereof should have been fastened with bolts at the bottom, as well as at the top; that one of the longitudinal girders was bent; and that, by fastening the clamp to a longitudinal girder instead of a transverse one, the structure was subjected to a strain which helped to cause the fall. *Held*, that the question of the negligence of defendant was for the jury. — *Davidson v. Cornell*, 10 N. Y. S. 521.

— Instructions.

17. In an action for causing the death of plaintiff's testator, while performing his duties as car-repairer, by the absence of the red flag which defendant's rules required to be placed at the end of cars undergoing repairs, the court submitted to the jury the question whether a red flag thus posted was a reasonably safe protection, and, after referring to the rules of other companies for protection of car-repairers, and adding that it was not the duty of defendant to adopt such rules, the court told the jury they had a right to consider "whether some rule which occurs to you, even though no company had adopted it, would have been a better rule, and given better protection, and such a one that ought to have been adopted and maintained." *Held*, that the charge did not, in effect, tell the jury that, if they could think of some better rule, then they could find defendant negligent for not adopting it. — *Abel v. Delaware & H. Canal Co.*, 10 N. Y. S. 154.

Negligence of fellow-servant.

18. A timber boss who superintended the repairs of a mine, and assisted in making them, was a fellow-servant with plaintiff, who was assisting in the repairs. — *Jenkins v. Mahopac Iron-Ore Co.*, 10 N. Y. S. 484.

19. Plaintiff's intestate, who was employed as a ship caulker, is not the fellow-servant of one employed by the master to construct, with materials furnished by the latter, scaffolding for intestate to stand on while performing his duties. — *Butler v. Townsend*, 10 N. Y. S. 809.

20. The neglect of employes in a warehouse to perform the duty assigned to them of covering the hatches in the different floors at the end of each day does not render their employer liable to an employee for injuries caused thereby. — *McCoy v. Empire Warehouse Co.*, 10 N. Y. S. 99.

21. In an action for injuries received by plaintiff while in the employ of defendant as a brakeman, by the breaking of a defective coupling link, it is error to instruct, as a matter of law, that defendant is guilty of actionable negligence, where the evidence tends to show that a fellow-servant of plaintiff used the defective link, though the defect was apparent on inspection, and defendant had provided other links which were perfectly safe. — *Sweeney v. New York, N. H. & H. R. Co.*, 10 N. Y. S. 305.

22. Plaintiff was employed by a stevedore hired by defendant to unload its vessel. Defendant furnished the power and the men to apply the power. While the cargo was being hoisted the rope slipped out of the drum of the winch, and plaintiff endeavored to disentangle it, and at the proper time gave the word to the men at the winch to "come back," but instead of that the winch went forward, and plaintiff's fingers were caught between the rope and the drum, and he was injured. *Held*, that defendant was liable. — *Johnson v. Netherlands Amer. Steam Nav. Co.*, 10 N. Y. S. 927.

23. A conductor was hurt by a collision between his train and a fugitive freight-car. That car and another were on a side track. The train was made up on another siding, and, as it was leaving the yard, the two cars ran down and struck the caboose. What started them does not appear. The brakes were out of order: but the yardmen had put the cars on the siding without setting, or attempting to set, the brakes, or blocking the wheels. The rules required them to do one or the other. *Held*, that the failure to set the brakes or block the wheels was the neglect of fellow-servants, that there is no evidence that the defect in the brakes contributed to the collision, and that a verdict for the conductor was properly set aside. — *Harvey v. New York Cent. & H. R. R. Co.*, 10 N. Y. S. 645.

Assumption of risk.

24. Plaintiff was employed by defendant to keep in motion a heavy iron pipe suspended above some open vats containing hot liquors. Plaintiff performed his

work by pushing against the pipe with a pole, and was stationed upon some pipes laid upon the tops of the vats, and along their sides. *Held*, that it could not be said, as a matter of law, that plaintiff assumed the risk of falling into the vats.—*Heavey v. Hudson River Water-Power & Paper Co.*, 10 N. Y. S. 585.

23. Where the danger is obvious, and the servant is capable of noting it, and has sufficient opportunity to do so, he cannot recover when he voluntarily continues in the employment.—*Ryan v. Porter Manuf'g Co.*, 10 N. Y. S. 774.

26. A laborer was killed by the caving in of the sides of a sewer while he was at work thereon for the contractors. The cause of the accident was the bursting of a city water-pipe which was defective at the place of fracture, but the defect was not known to any one before the accident. The method of bracing the sides of the sewer was that generally used under similar conditions, and had been approved by the city engineer. *Held*, that the contractors were not liable, the accident not being one which they were bound to anticipate and guard against.—*Haskins v. Stewart*, 10 N. Y. S. 833.

27. In an action for wrongful death, it appeared that deceased was employed in defendant's foundry to handle, fill, and empty the ladles of melted iron operated by a crane. The chain to which the ladle was attached broke, and deceased was struck by the ladle. It was not shown what caused the chain to break, as it was of sufficient size, and had not been in use too long. It often got twisted while passing over the drum, and would slip from the previous coil upon which it "rode" onto the drum, "snapping" down an inch or two. Deceased was aware of the tendency of the chain to twist. *Held*, that a nonsuit was properly granted.—*Delaney v. Heartt*, 10 N. Y. S. 595.

Contributory negligence.

28. A conductor who, in the day-time, and in a freight-yard with which he was thoroughly familiar, steps from his moving train, and walks along a parallel track without looking behind him, and is injured by an engine coming from that direction, is guilty of contributory negligence, though he was engaged in watching a brakeman throw a switch to conduct the train upon a siding.—*Redmond v. Rome, W. & O. R. Co.*, 10 N. Y. S. 830.

29. In an action by a miner against a mining company for personal injuries, it appeared that plaintiff was assisting his boss to repair a stair-way beside the track on which the lifting-cars ran, and that while standing on the track a car struck him. Plaintiff was familiar with the move-

ment of the cars, and gave no warning to have them stopped while he was engaged on the track. *Held*, that plaintiff was negligent, and could not recover.—*Jenkins v. Mahopac Iron-Ore Co.*, 10 N. Y. S. 484.

30. In an action for personal injuries sustained by the insufficiency of the brakes to hold the train, on which plaintiff was a brakeman, while going down a steep grade, defendant relied on printed rules that instructed the brakeman to test all the brakes before leaving a terminal station, which plaintiff had failed to do. Plaintiff had never read the rules, and was ignorant of their existence. *Held*, that he was not negligent in failing to know the rules which had never been brought to his attention.—*Le Croy v. New York, L. E. & W. R. Co.*, 10 N. Y. S. 382.

31. Plaintiff fell into one of the vats through his pole slipping off the pipe as he was pushing against it. He had been given instructions with regard to the performance of his work; but he had not been told that his pole, the end of which had become soft and spongy through use, was unsafe. He was 15 years old, and without previous experience. *Held*, that the question as to whether defendant should have given further instructions was for the jury, and that it could not be said, as a matter of law, that plaintiff was contributorily negligent in using the pole.—*Heavey v. Hudson River Water-Power & Paper Co.*, 10 N. Y. S. 585.

Measure of Damages.

See *Damages*, 3-9.

MECHANICS' LIENS.

For what obtained.

1. An action to foreclose a mechanic's lien on a house and lot involved the issue whether plaintiff was entitled to the second payment of the contract price which was due "when cornice is set, siding on, and floors laid." It appeared that a small portion of the siding, which could better be done at a later stage of the work, had been omitted, and that the owner made no objection to the omission, but promised payment. *Held*, that a finding that the payment was due would not be disturbed.—*Rogers v. McGuire*, 10 N. Y. S. 831.

2. A contractor agreed with defendant to build three houses, and a sewer to connect each house with a sewer already built, for a stated sum per house. Various payments were made, the houses were completed substantially as agreed, and defendant took possession, but the sewers were not built because it was found that a connection could not be made with the existing sewer, which was not deep enough for

the purpose. Afterwards this sewer was deepened, the contractor allowing \$120 therefor. He failed, however, to build the connecting sewers, and defendant completed them at a cost of \$180. *Held*, this failure was not such a breach of the contract as would defeat the contractor's right to the balance due, less the sums of \$120 and \$180, and therefore a mechanic's lien for lumber furnished and used in the houses was enforceable for the amount due after such deductions.—*Hollister v. Mott*, 10 N. Y. S. 409.

Abandonment of work—Lien of employe.

8. By the terms of a contract to do work for defendant, the latter was entitled to retain 20 per cent. of the contract price for 90 days after the completion of the work. The contractor abandoned the work after being paid more than 80 per cent. of the value of the work already done. Plaintiff, an employe of the contractor, then filed his lien for work done. Thereafter the contractor's sureties, by agreement with defendant, completed the work for the balance of the contract price not already paid to the contractor. This was paid to them on the completion of the work, the value of which was more than the compensation paid. *Held*, that it was a mere right, and not a duty, for defendant to retain the 20 per cent. 90 days, and that, the contractor having received all he was entitled to, plaintiff had no remedy against defendant.—*Weisman v. City of Buffalo*, 10 N. Y. S. 569.

Lien of subcontractors.

4. In an action by subcontractors, the general assignee of the original contractor was made a defendant, and showed that the owner broke the contract by refusing to pay the second installment at the stage of the work agreed upon. *Held*, that the judgment properly directed the sale of the property for the liens, and that the difference between the liens and the second installment be paid to the assignee though the contractor had filed no lien; *Laws N. Y. 1885, c. 842, § 15*, providing that any claimant who fails to establish a valid lien may recover a judgment for whatever is due him against any party.—*Thomas v. Sahagan*, 10 N. Y. S. 874.

Merger.

See *Contracts*, 11.

MINES AND MINING.

Construction of deed.

1. Plaintiff conveyed to defendants "all of that certain mining lode or claim known

as the 'John,' " and the conveyance refers to the deed under which plaintiff acquired title, which conveyed all the dips, spurs, and angles, and metals, ores, gold and silver bearing quartz and rock and earth, and all privileges and franchises thereto incident, etc. It appeared that plaintiff had theretofore executed a deed to another person of "all that portion of the surface ground to the John mine, being and lying south of the John mine, commencing at the center of the vein, * * * and running its entire length. This deed is intended to convey the south 100 feet of the surface ground of the John mine," etc. *Held*, that this deed conveyed only the surface ground, and did not include any of the mineral rights, and therefore constituted no defense to an action for the price of the mining claim.—*McIntyre v. Buell*, 10 N. Y. S. 832.

Liability for purchase price.

2. But, even if such deed did include the property conveyed to defendants, it constitutes no defense to the action for purchase money, where it appears that it was not recorded, that no claim has ever been made under it, and that defendants have sold and conveyed the mine at a large advance, and without regard to any claim that might be made under it, and that the deed to defendants was without warranty or covenants.—*McIntyre v. Buell*, 10 N. Y. S. 832.

Minor.

See *Guardian and Ward; Infancy; Parent and Child*.

MORTGAGES.

See, also, *Chattel Mortgages*.

Jury trial in foreclosure proceedings, see *Jury*, 4.

Parties in foreclosure proceedings, see *Parties*, 1, 2.

Lien—Priorities.

1. In an action for foreclosure, it appeared that the mortgage was originally given to secure one H. against losses, past and future, in certain stock transactions, and that afterwards plaintiff loaned money to the mortgagor, who procured from H. an assignment of the mortgage to plaintiff. *Held*, that the mortgage could not be enforced as against a second mortgage executed before the assignment to plaintiff, unless something was due to H. under the transactions which the first mortgage was given to secure.—*Man v. Elkins*, 10 N. Y. S. 488.

2. Where a senior mortgagor procures the mortgage to be assigned to his wife, as security for a debt due her from himself, on which debt he has agreed to pay inter-

est, the mortgage is a lien on the land for interest as well as principal, as against the mortgagee of one to whom the husband sold the land subject to the prior mortgage.—*Newton v. Manwarring*, 10 N. Y. S. 847.

8. A mortgagor conveyed the mortgaged premises to M., and the latter subsequently executed a mortgage on the land to plaintiff. *Held*, that plaintiff, not being a creditor of the original grantor, could not contest the priority of the first mortgage, in the hands of one to whom it had been assigned at the instance of the original grantor, on the ground that such assignment was in fraud of creditors.—*Newton v. Manwarring*, 10 N. Y. S. 847.

Lien—Notice of default.

4. Under a mortgage to secure the payment of all notes, drafts, or engagements of a firm, indorsed by the mortgagor and held or to be held by a bank, it is not necessary, in order to preserve the lien, that notice of the non-payment of a note secured be given so as to charge him as an indorser.—*National Hudson River Bank v. Reynolds*, 10 N. Y. S. 669.

— Constructive notice.

5. A mortgagor conveyed the mortgaged premises to M., who subsequently executed a mortgage on the land to plaintiff. *Held*, that as the deed to M. was recorded, plaintiff had notice of a clause in such deed by which M. assumed the payment of such prior mortgage.—*Newton v. Manwarring*, 10 N. Y. S. 847.

Rights of mortgagees.

6. Where a *bona fide* debt, secured by mortgage on the debtor's property, has been paid by a sale of the property, the mortgagee cannot be required by other creditors to refund, because as to them the mortgage would have been adjudged void.—*Mandeville v. Avery*, 10 N. Y. S. 828.

7. A mortgagee who, before foreclosure, goes into possession of the mortgaged land under an agreement with the mortgagor authorizing him to do so, and to apply the net income of the land to the mortgage, does not thereby acquire any title to the land, and he is not entitled to a crop, growing upon the land at the time of the agreement, which had previously been sold to a third person.—*Sexton v. Breese*, 10 N. Y. S. 510.

Assignment of mortgage.

8. An assignment of a mortgage to the wife of the mortgagor does not effect a merger with her inchoate right of dower, where it is the intention of the parties that the wife shall hold the mortgage as a lien on the land.—*Newton v. Manwarring*, 10 N. Y. S. 847.

Conveyance of property—Liability of mortgagor.

9. Where a mortgagor, who had conveyed the premises to another subject to the mortgage, claims a release from liability on the ground that he notified the mortgagee to foreclose when the mortgage became due, which was not done, a judgment against him will not be disturbed when the notice relied on was given verbally at a casual meeting in the street, was not followed up in any way, and was of such a character that the mortgagee might well have failed to understand that he was required to elect between immediate action and a discharge of the mortgagor from personal liability.—*Blake v. Moore*, 10 N. Y. S. 674.

Foreclosure.

10. Where a mortgage, given to secure six annual installments of purchase money for a farm, contains a power of sale by the mortgagee, his executors, etc., and also a clause to the effect that "all unpaid balance to fall due, one-half in one year, and one-half in two years, after the death" of the mortgagee, should be payable, the first to his son, and the other to a person named therein, and it appears that all the installments secured had fallen due prior to his death, neither the persons named in such clause nor their personal representatives have any interest in the mortgage; and an action for the foreclosure thereof can only be brought in the name of the executor or administrator of the deceased mortgagee.—*Robinson v. Brower*, 10 N. Y. S. 854.

11. Defendant having refused to complete his purchase at a foreclosure sale, and told the mortgagee to sell the property to some one else, was informed that he would be liable for any loss on a resale. The property was then readvertised once, and sold without further notice to defendant. *Held*, that defendant had sufficient notice of the resale, no fraud or bias being shown, and was liable for any damages resulting therefrom.—*Gross v. Jancsok*, 10 N. Y. S. 541.

12. Code Civil Proc. N. Y. § 521, which permits a judgment to determine the ultimate rights of defendants as between themselves, applies only to those cases where the relief sought by defendants is based on facts involved in the litigation of plaintiff's claim; and in foreclosure proceedings the mortgagor, who has conveyed the land to her co-defendants by a deed absolute on its face, will not be permitted to litigate with them the question whether the deed was intended merely as security for a debt, and thereby delay plaintiff in obtaining satisfaction of his mortgage.—*Mutual Life Ins. Co. v. Cranwell*, 10 N. Y. S. 404.

Foreclosure—Rights of purchaser.

18. Where completion of title under a foreclosure sale is postponed, and in the mean time taxes on the property are reduced under the arrearages act, (Laws N. Y. 1883, c. 114,) the purchaser is entitled to allowance for the tax as it stood when his bid was made.—*Schell v. Elkins*, 10 N. Y. S. 167.

14. A purchaser at a foreclosure sale should be relieved from his purchase where the lot sold contains only 8 or 9 acres instead of 89 acres, as described in the notice of sale, and he made his bid in the honest belief it contained the larger quantity.—*Dunn v. Herbs*, 10 N. Y. S. 34.

— Setting aside sale.

15. A petition to set aside a sale on foreclosure on the ground of inadequacy of price is properly refused where it appears that plaintiff bid in the property for \$1,000, and, after holding it for more than 5½ years, paying about \$1,500 in taxes, a great part of which was a lien on the premises at the date of the sale, he sold the property for \$3,750, being \$750 above the amount of the mortgage.—*Provost v. Roedieger*, 10 N. Y. S. 812.

16. A sale on foreclosure will not be set aside on the ground of the insanity of the mortgagor at the date of sale, where the affidavits fail to show with any definite particularity when the insanity commenced, and it appears that the mortgagor did not give up business until two years after the sale.—*Provost v. Roedieger*, 10 N. Y. S. 812.

Sale under power.

17. At a sale of property under a power contained in a mortgage, defendant became the purchaser. His bid of \$325 was the highest offered, no one objected to the price at which the property was sold, and it did not appear that there was any "puffing." The property was actually worth more than defendant's bid. *Held*, that he could not object to the regularity of the sale because of a secret agreement between him and the mortgagee by which he was to get the property for \$325, no matter what any one else bid.—*Gross v. Jancsok*, 10 N. Y. S. 541.

Motion.

To make more definite, etc., see *Pleading*, 10-12.

strike out, see *Pleading*, 7-9,

MUNICIPAL CORPORATIONS.

See, also, *Counties; Highways; Schools and School Districts; Towns.*

Limitation of action against city, see *Limitation of Actions*, 1.

Mandamus to municipal boards and officers, see *Mandamus*, 6, 7.

Boundaries.

1. Land under Gowanus bay, within the county of Kings, and abutting on the city of Brooklyn, the successor to the town of Brooklyn, is within the city of Brooklyn.—*Tebo v. City of Brooklyn*, 10 N. Y. S. 749.

Ordinances—Sale and removal of sunken boats.

2. Laws N. Y. 1883, c. 298, tit. 3, § 14, empowers the city of Albany to enforce its ordinances by ordaining penalties for a violation not to exceed \$100, but no power is conferred in the charter to confiscate private property under any circumstance, and therefore so much of an ordinance as directs a sale of boats or cargoes sunken in the Hudson river to pay the expense of removal is void.—*Coonley v. City of Albany*, 10 N. Y. S. 512.

3. Albany city charter (Laws N. Y. 1883, c. 298, tit. 3, § 14, subd. 27) makes the common council commissioners of highways, with power to pass ordinances "in relation to the construction, repairs, care, and use of the markets, docks, wharves, piers," etc. Section 44 provides that nothing contained in the act shall be construed to render the city liable in damages for failure to pass or to enforce any ordinances pursuant to the provisions thereof. By Ordinances Albany, c. 42, § 15, it is provided that when any vessel is sunk in the Hudson river opposite the city, and within its jurisdiction, the street commissioners shall, after notice to the owner to remove it, and his failure to do so, take possession, remove, and sell the same, or so much of its load as will pay the expense of the removal. *Held*, that, where the commissioners refused to remove a vessel sunk near plaintiff's dock, he has no right of recovery against the city for the expense of removal, or for damages caused by the obstruction.—*Coonley v. City of Albany*, 10 N. Y. S. 512.

4. The Hudson river is not a highway of the city of Albany.—*Coonley v. City of Albany*, 10 N. Y. S. 512.

Interest on city deposits.

5. Laws N. Y. 1866, c. 623, (an act to regulate the deposit by the chamberlain of New York city and county money), provides that the banks in which the money is deposited shall proportionately pay the rent of the office of chamberlain and the salaries of his clerks and deputy, but says nothing as to the matter of interest. *Held*, that the chamberlain could stipulate for interest on deposits.—*City of New York*

v. National Broadway Bank, 10 N. Y. S. 555.

6. From the passage of the act until November, 1871, defendant bank regularly paid to the chamberlain 4 per cent. on deposits. It thereafter continued to pay its proportion of the expenses of the chamberlain's office, but paid no interest, for the reason that the city comptroller denied the chamberlain's authority to collect it, and directed the bank to add it as a credit to the deposits. Defendant's counsel advised it not to make the payments or credits, but to send monthly statements to the comptroller and chamberlain of the interest due. A communication of the comptroller to defendant was referred by the directors of the latter to its president, who had become the chamberlain, who, in a letter to the comptroller, said the interest was the result of a contract between the chamberlain and the bank. No action was taken by the stockholders or directors denying the existence of an agreement to pay interest or defendant's liability. *Held*, that there was an agreement to pay interest, and that, as it was not illegal, defendant could not, after having the benefit of the deposits, question the chamberlain's authority to make the agreement.—*City of New York v. National Broadway Bank*, 10 N. Y. S. 555.

Appointment of officers.

7. Under an ordinance providing for the annual appointment of a gas inspector by the city council, an appointment to such office, "subject to the further orders of this council," is invalid.—*King v. City of Buffalo*, 10 N. Y. S. 564.

8. Where the record of the proceedings of the village trustees shows that a street commissioner was appointed at a meeting of the trustees, and took the oath of office, and filed a bond, as required by Laws N. Y. 1870, c. 291, under which the village was incorporated, it cannot be objected to the validity of his appointment that no commission was issued, as the act does not provide for a formal commission.—*Cotanch v. Grover*, 10 N. Y. S. 754.

Discharge of officers.

9. Boiler inspectors in the city of Brooklyn are not within the protection provided for members of the police force, and cannot demand a trial before their removal.—*People v. Hayden*, 10 N. Y. S. 794.

10. Laws N. Y. 1882, c. 410, § 49, (consolidation act,) gives the heads of all departments power to appoint and remove all chiefs of bureaus, except the chamberlain, and also all clerks, officers, employees, and subordinates in their respective departments, provided that no regular clerk or head of a bureau be removed unless he

has been informed of the cause, and given an opportunity of making an explanation. Section 441 provides that an intention to reduce the force of the bureau of inspection of buildings shall be deemed sufficient cause for the removal of any officer or employee of the bureau except the chief officer thereof, and authorizes the board of fire commissioners to abolish any office, clerkship, or employment in said bureau. *Held*, that the two sections were not antagonistic, and that under section 48 the fire commissioners could remove an inspector of buildings without informing him of the cause, or giving him an opportunity for explanation.—*People v. Purroy*, 10 N. Y. S. 181.

11. Plaintiff, an apportionment clerk in the dock department of the city of New York, received a notice signed by the president of the dock board that a resolution had been adopted by the board that plaintiff's continuance as apportionment clerk was wholly unnecessary, and there was no present use for him as an *attaché* of the department, and that "there be but one apportionment clerk employed in this department, and that until the work of the department shall require further clerical assistance the said George O. Beach [plaintiff] be and he is hereby suspended and relieved from further duty or service in this department, and that his name be taken from the pay-roll thereof during such suspension." *Held*, that the resolution disclosed an intention to discharge, and not merely to suspend, plaintiff, and that therefore his claim for salary on the ground that the board's power to remove did not include a power to suspend could not be sustained. Distinguishing *Gregory v. Mayor*, 21 N. E. 119.—*Beach v. City of New York*, 10 N. Y. S. 793.

12. On *certiorari* to review the removal of relator from his position of clerk of markets on the ground that it was in violation of Laws N. Y. 1882, c. 410, § 48, declaring that no regular clerk or head of a bureau shall be removed until he has been informed of the cause of the proposed removal, and allowed an opportunity to explain, and that in every case of removal the true grounds thereof shall be entered on the records of the department or bureau, it appeared that in the course of an investigation relating to the allotment of market-stands witnesses testified to paying relator money for getting them stands; that the city comptroller caused to be sent to relator an oral communication informing him of the testimony and calling for an explanation; that a letter from relator was subsequently received by the comptroller showing relator had received information concerning his conduct, admitting that he had received the money, and stating

he had donated it for political purposes; and that thereupon his removal was ordered. *Held*, that relator had been afforded the opportunity secured by the statute for explanation, and that the legality of his discharge was not affected by the fact that relator's inability to discharge his duties was entered on the record as the cause of his removal.—*People v. Myers*, 10 N. Y. S. 815.

Police officers—Discharge.

13. Where the police commissioners accept the voluntary resignation of a police officer, no proceedings having been instituted by them for his removal, their action cannot be inquired into on *certiorari*.—*People v. Martin*, 10 N. Y. S. 511.

14. Relator was charged with conduct unbecoming an officer, and the specification was that, being a police sergeant, he engaged in an altercation at the station-house with a fellow-sergeant. The evidence showed an unprovoked assault by relator. *Held*, that an objection that the specification did not sustain the charge was untenable.—*People v. McClave*, 10 N. Y. S. 764.

15. A patrolman charged with sitting in a restaurant during his tour of patrol duty admitted being in the restaurant, and when asked what he was doing there stated it was a chilly night, and he went in for coffee. *Held*, that his dismissal from the force would be set aside for want of proof that he was on a tour of duty at the time.—*People v. McLean*, 10 N. Y. S. 808.

16. Where it appears that a policeman was so intoxicated as to be unfit for duty, his dismissal from the police force will be sustained, though the evidence goes to show that his intoxication was produced by very moderate drinking; he having been rendered peculiarly susceptible to the effects of liquor by an injury which he had received.—*People v. McClave*, 10 N. Y. S. 560.

17. It is no excuse for a violation of the rules of the department that the policeman made a mistake of judgment.—*People v. McClave*, 10 N. Y. S. 561.

18. The board of police commissioners of the city of New York is the judge as to whether dismissal from the police force is the proper penalty for a violation by a policeman of the rules of the department.—*People v. McClave*, 10 N. Y. S. 561.

19. Where, in proceedings before the police commissioners, the evidence is conflicting, their action cannot be reviewed, though some injustice may have been done.—*People v. McClave*, 10 N. Y. S. 764.

20. Relator was dismissed from the police force on the charge of being intoxicated at his residence. A physician who attended him at the time in question testi-

fied that relator told him that he had been drinking a little too much, and that relator's breath smelt strongly of alcohol. But relator testified that he told the physician that he had taken brandy and oil, and the testimony of several other witnesses was to the effect that he had taken brandy and oil for cramps. There was no evidence that he was in the habit of drinking liquor. *Held*, that the dismissal could not be sustained.—*People v. McClave*, 10 N. Y. S. 441.

21. Relator, a policeman, was charged with being so drunk as to be unfit for duty. His captain testified that he could not walk straight, smelt very much of liquor, and was unfit for duty, but could talk very well. Three of the sergeants testified that relator was unfit for patrol duty. Relator's denial as to his condition was only very slightly corroborated. *Held*, that the evidence created a question of fact for the police commissioners, and that their action in dismissing relator from the force would not be disturbed.—*People v. French*, 10 N. Y. S. 860.

22. A policeman was charged with conduct unbecoming an officer, the specification being that he was brought to the station-house by a roundsman, he having been taken from the Harlem river by certain other officers, so drunk as to be unfit for duty. *Held*, that the specification sustained the charge, and was sufficiently supported by evidence showing that defendant was so intoxicated as not to appreciate surrounding circumstances.—*People v. MacLean*, 10 N. Y. S. 851.

23. The dismissal of a patrolman from the police force upon a charge of willfully maltreating and using unnecessary violence towards a prisoner, in violation of rule 138 of the police department, will not be disturbed where an examination of the testimony introduced on the trial shows that relator while making an arrest several times struck the prisoner (who was intoxicated, and who neither resisted arrest nor assaulted relator) on the head with his night-stick.—*People v. Bell*, 10 N. Y. S. 829.

24. The dismissal of a policeman on a charge of being on a certain occasion so much affected by the habitual use of alcoholic drinks as to be unfit for duty will not be disturbed on *certiorari*, though relator was not actually intoxicated on the morning in question, where there is sufficient evidence to show that his peculiar condition was due to chronic alcoholism.—*People v. Robb*, 10 N. Y. S. 867.

25. Where a policeman has held his office for four years, it cannot be objected, on *certiorari* to review the action of the police commissioners in dismissing him for misconduct in office, that, on account of non-compliance with the civil service law, he

was an officer only *de facto*, and cannot be restored, though the proceedings against him were irregular.—*People v. Hannan*, 10 N. Y. S. 71.

26. The action of the police commissioners in discharging relator will not be disturbed on *certiorari* where the intoxication charged is proved by several witnesses, and relator's defense that his condition resulted from taking medicine prescribed by a physician is supported only by a certificate of the physician that he prescribed for relator "a mixture containing chloroform," the prescription not being produced.—*People v. French*, 10 N. Y. S. 217.

27. On the trial of relator for conduct unbecoming a police officer, in being absent from roll-call, and not reporting until some time thereafter, when he was so much under the influence of liquor as to make him unfit for duty, his excuse was that on being relieved from his post he boarded a car to return to the station-house, and was seized with so violent a pain in his back that he could not leave it, and rode to the end of the line, and, there being no car returning, had to walk back. A physician testified that he had some talk with relator in the car in respect to his illness, and that relator was not under the influence of liquor, and in this respect he was corroborated by the driver of the car. Two police sergeants, who were at the station-house when relator came in, testified that in their opinion he was under the influence of liquor, and gave their reasons for so believing, among which was that his breath smelled strongly of liquor. *Held*, that relator's dismissal from the force would not be disturbed.—*People v. French*, 10 N. Y. S. 792.

Police officers—Right to trial.

28. The charter of the city of Troy provides that no member of the police force shall be removed "without having written charges preferred against him, and the same having been publicly heard and examined, after due notice thereof, and upon due proof." A rule of the board of police commissioners of the city provides that no officer shall be removed except upon substantiation of the written charges preferred against him, after a fair trial, in which full opportunity shall be given him for his own defense, as prescribed by law. Another rule provides that "no counsel are needed for the investigation of any charges, but may be allowed." Const. N. Y. art. 1, § 6, provides that in any trial, in any court whatever, the accused shall be allowed to appear and defend in person and with counsel. *Held*, that the police commissioners could not deprive a policeman of the right to appear and defend with counsel on his trial for official mis-

conduct.—*People v. Hannan*, 10 N. Y. S. 71.

Duty to remove sunken boats.

29. Laws N. Y. 1826, c. 185, § 15, relating to the city of Albany, declares that the common council are constituted commissioners of highways, "and shall and may pass ordinances" to remove any nuisances in any street or wharf, and "to prevent all obstructions in the river near or opposite to such wharves, docks, or slips," etc. *Held*, that the statute does not impose the duty of keeping the river clear, and plaintiff cannot recover against the city for the expense of removing a boat sunk at his dock.—*Coonley v. City of Albany*, 10 N. Y. S. 512.

Defective streets.

30. In an action against a city for personal injuries, evidence that plaintiff fell in a hole in the sidewalk, which had caved on the side of a yard eight feet below its level, is sufficient to go to the jury on the question of defendant's negligence.—*Lynn v. City of Troy*, 10 N. Y. S. 594.

31. The defendant village constructed, along-side of a highway bridge over a stream, a sidewalk bridge, about three inches lower than the highway bridge, but otherwise with no line of demarkation between them. Plaintiff drove lengthwise upon the sidewalk, in front of a store close to the stream, to receive a load, and then continued to drive along the sidewalk onto the sidewalk bridge, which gave way, injuring him. Plaintiff had full knowledge as to where he was driving. Pen. Code N. Y. § 652, makes it a misdemeanor to willfully, and without authority, drive "along upon" a sidewalk, and defendant had established a penalty for the offense. *Held* that, though it was more convenient for plaintiff to drive as he did, and though others, to plaintiff's knowledge, had sometimes driven upon the sidewalk bridge, he was not justified in going upon such bridge, and a judgment for him could not be sustained.—*Fisher v. Village of Cambridge*, 10 N. Y. S. 623.

Change of street grade.

32. Under Laws N. Y. 1833, c. 113, providing that villages shall be liable to property owners for damages occasioned by changing the grade of the streets, the liability of the village is the same, whether the existing grade was established by formal proceedings or only by general use.—*In re Church of Our Lady of Mercy*, 10 N. Y. S. 633.

33. The act of 1833 is applicable to a village, though it is inconsistent with the local village charter previously enacted, and the village is liable in damages for the injury caused to property by changing the

grade of the street, though it may not have been liable for such damage under its charter.—In re Church of Our Lady of Mercy, 10 N. Y. S. 688.

Contracts—Delay in completion.

84. A contractor undertaking to grade a street within a certain time does not assume the risk of any delay he might suffer through the operation of section 828 of the New York city consolidation act, giving sewerage works a preference over work connected with other street improvements.—Dady v. City of New York, 10 N. Y. S. 819.

85. In an action on a contract for grading a street, which was to be done within a fixed number of days, allowance to be made for days in which work was delayed by the city, there being no evidence on which to make an apportionment of the overtime between the contractors and the city, it was proper to decline to charge that the jury might apportion the overtime so that plaintiff should recover only for the exact number of days that the work was delayed by the action of defendant, and in lieu thereof instruct the jury that, if defendant delayed the contractors so as to prevent the completion of the work within the contract time, plaintiff was entitled to a verdict for the full amount, but that if it had caused no such delay defendant was entitled to a verdict.—Dady v. City of New York, 10 N. Y. S. 819.

86. A contract for grading a street provided that, in computing the 800 days within which the work was to be completed, there should be excluded Sundays, holidays, and days when work was suspended by order of the commissioner of public works, and the time during which work was delayed by any act or omission of the city, "all of which shall be determined by the said commissioner of public works, who shall certify to the same in writing." *Held*, that the obtaining of such certificate was not a condition precedent to the maintenance of an action to recover moneys earned under the contract.—Dady v. City of New York, 10 N. Y. S. 819.

Construction.

87. Where, after the passage of an ordinance directing the grading and flagging of a New York city street, and before the letting of the contract, the proposal for which specified the work to be done and the material to be furnished by the successful bidder, but did not require him to furnish any material for filling, a large quantity of earth in the street, which was capable of being used to fill the lower portion of it up to the prescribed grade, was taken away by trespassers without the knowledge of the city, the contractor has no right to compensation therefor as against the city.—

Palladino v. City of New York, 10 N. Y. S. 66.

88. Specifications for the work of regulating and grading a street, which were inserted in the contract letting the work, provided that, "if the amount of material excavated that is needed for filling shall not be sufficient to regulate the street, the contractor shall furnish and supply material of proper kind and quality sufficient for the purpose, but only the difference between the total quantity of excavation * * * will be considered as filling to be furnished, and as such to be paid for." No price was paid for such filling, nor was there any provision in the contract binding the city to pay therefor; but, on the contrary, it was expressly provided that the contractor would not ask or recover for the entire work any extra compensation for the several classes of work therein enumerated, "which shall be actually performed, at the price therefor herein agreed upon and paid," and in the proposals for estimates, which were made part of the contract, it was stated that work or materials not specified, "and for which a price is not paid, in the contract, will not be allowed for." *Held*, that these definite provisions and stipulations in the contract controlled the general language of the specifications as to the filling to be furnished and paid for, and precluded any recovery by the contractor for the value of earth obtained from other localities, and used by him in filling up the street to its required grade, and that, conceding the specification to be controlling in this respect, there could still be no recovery, in view of the fact that the cost of the work exceeded \$1,000, and of Laws N. Y. 1892, c. 410, § 64, (the consolidation act,) providing that, whenever "any work is necessary to be done to complete and perfect a particular job," involving an expenditure of more than \$1,000, it shall be done by contract let to the lowest bidder.—Palladino v. City of New York, 10 N. Y. S. 66.

Restrainin illegal contract.

89. Laws N. Y. 1881, c. 581, as amended by Laws 1887, c. 673, entitled "An act for the protection of tax-payers," provides that the act shall apply as well to those cases in which the officer or board has not, as to those in which he or it has, jurisdiction over the subject-matter of its action. A complaint in an action to restrain municipal authorities from substituting electric lighting for gas lighting in a certain street alleged that the erection of poles for electric lighting would impair the value of the land along the street, including plaintiff's; that the contract price for the electric lighting was exorbitant, and largely in excess of the value thereof, and of the price

paid by other municipalities therefor; that the cost would be much greater than that of gas lighting; that the change would render useless many gas-lamps, etc., owned by the city; and that gas lighting was economical, satisfactory and such as was desired by a majority of the people of the city, and of tax-payers on the street. *Held*, that the allegations were sufficient, on demurrer, to warrant granting relief to the tax-payer, under the statute, though the municipal authorities had full control of the subject of street lighting.—*Talcott v. City of Buffalo*, 10 N. Y. S. 870.

Assessments.

40. Laws N. Y. 1880, c. 550, § 1, providing that "all officers charged with any duty connected with the imposition or confirmation of assessments for local improvements in the city of New York are hereby directed so to perform such duty that assessments for all local improvements heretofore completed shall be finally passed upon by the board for revision and correction of assessments, * * * within six months after the passage of this act," is merely directory, and an assessment may be levied within a reasonable time after the six months have expired.—*In re Gibbons*, 10 N. Y. S. 428; *In re Lexington Ave.*, *Id.*

Construction of sewer.

41. Under Laws N. Y. 1887, c. 136, § 72, authorizing the trustees of the village of Saratoga Springs to assess the cost of constructing sewers "upon the property adjoining and along the line of the same, and such other property as the board may deem to be benefited thereby, or may at any time enjoy the use thereof," an assessment for a sewer against plaintiff in person, where neither the list nor the warrant purports to be a proceeding *in rem*, or makes any mention of land, but merely locates plaintiff on a particular street, and describes the tax as "benefits," is a personal assessment, and not a compliance with the statute, and therefore void.—*Marvin v. Town*, 10 N. Y. S. 148; *Hanson v. Same*, *Id.* 150.

Action to set aside.

42. Under Laws N. Y. 1880, c. 68, § 8, making a deed executed by the receiver of taxes "presumptive evidence that the sale, and all proceedings prior thereto," were regular, and authorizing any person interested in property on which an assessment has been made to bring an action to restrain a sale, an action may be brought to set aside an assessment, and enjoin a sale thereunder, though the assessment is void, as a sale thereunder would create a cloud on plaintiff's title, and could be impeached only by proof *aliunde* the record.—*Marvin v. Town*, 10 N. Y. S. 148; *Hanson v. Same*, *Id.* 150.

43. The right to maintain such an action is not waived by plaintiff appearing before the board of trustees on grievance day, and objecting to the amount of the assessment. Distinguishing *Hilton v. Fonda*, 86 N. Y. 889.—*Marvin v. Town*, 10 N. Y. S. 148; *Hanson v. Same*, *Id.* 150.

Taking land for public parks.

44. Residents of a city seeking to condemn land for park purposes are disqualified by reason of interest to serve as commissioners to appraise the land to be taken.—*In re City of Rochester*, 10 N. Y. S. 436; *In re Warrant*, *Id.*

45. Laws N. Y. 1888, c. 193, § 4, providing that, before land can be taken by the city of Rochester for park purposes, the common council "shall," at its next regular meeting after the map of the land to be taken has been filed as required by section 8, "by resolution declare that the city intends to take" the land, is mandatory, and the power to pass such resolution expires with the next regular meeting held after the filing of the map.—*In re City of Rochester*, 10 N. Y. S. 436; *In re Warrant*, *Id.*

Action for personal injuries—Notice.

46. Laws N. Y. 1886, c. 572, § 1, providing that actions for personal injuries against municipal corporations having over 50,000 inhabitants shall be brought within one year after cause of action accrued, and that notice of the intention to bring an action must be served on the proper law-officer of the corporation within six months after right accrued, applies to the city of Buffalo, and is not in conflict with title 8, § 7, of its charter, providing that no action for unliquidated damages for wrong or injury shall be brought till 40 days after it has been presented to the common council for audit.—*Curry v. City of Buffalo*, 10 N. Y. S. 892.

47. A compliance with the provisions of the charter by presenting a petition to the council describing the injury, and praying that the damages be allowed and paid, is not a substantial compliance with the terms of the statute; and the action cannot be maintained without such compliance.—*Curry v. City of Buffalo*, 10 N. Y. S. 892.

Mutual Benefit Insurance.

See *Insurance*, 8-12.

National Banks.

See *Banks and Banking*, 2.

Necessary Parties.

See *Parties*, 1-3.

NEGLIGENCE.

Accidents at railroad crossings, see *Railroad Companies*, 1-5.

Action by wife, see *Husband and Wife*, 7.

Contributory, see *Master and Servant*, 28-31.

Defective bridges, see *Bridges*, 8.

—streets, see *Municipal Corporations*, 30, 31.

Injuries to passengers, see *Carriers*, 10.

—tenant, see *Landlord and Tenant*, 2.

Obstruction of highway, see *Highways*, 5-8.

Of fellow servants, see *Master and Servant*, 18-23.

horse and street railroads, see *Horse and Street Railroads*, 4-7.

Insurance agent, see *Insurance*, 5.

Joint wrong-doers, compromise by one, effect, see *Compromise*, 1.

master, see *Master and Servant*, 8-17.

wife's agent, liability, see *Husband and Wife*, 1.

What constitutes.

1. In an action for injuries to plaintiffs' team sustained by a collision between it and defendant's, evidence that defendant's driver, having drawn out of a railway track to allow the passage of a car, attempted to return immediately thereafter, though the space was then occupied by plaintiffs' light wagon, and that in making the attempt defendant's heavy truck came in collision with it, is sufficient to sustain a finding that defendant was negligent.—*Baumann v. Gilmore*, 10 N. Y. S. 584.

2. While crossing a street plaintiff was run over by defendant's wagon, and rendered unconscious. He testified that he remembered looking in both directions before attempting to cross. An eye-witness testified that plaintiff was knocked down by the wagon or the horse. Another eye-witness testified that he saw plaintiff fall, and thought that it was the horse or shaft that struck him; that the wagon was being driven "at a pretty nice gait," and that the driver did not stop until he had gone about 125 feet from where the accident occurred. The driver was not called as a witness. *Held*, that the case was properly sent to the jury.—*Atkinson v. Oelsner*, 10 N. Y. S. 822.

Who liable.

3. Where two persons together owned a tallion, and had agreed to divide his earnings between them, and to use him in serving plaintiff's mare, both were liable for the negligence of one in so doing, whereby the mare was injured.—*Newman v. Turkey*, 10 N. Y. S. 760.

4. One who contracts to do blasting in a street is not relieved from responsibility to any person injured thereby, though he has sublet the contract to a third person,

through whose negligence the injury occurred.—*Budd v. Fortunato*, 10 N. Y. S. 115.

Dangerous premises.

5. Plaintiff was injured by stepping on some loose boards which had been substituted for the sidewalk in front of some buildings in course of erection. Defendant had a contract with the owners of the building by which he was to do the mason, carpenter, and iron work, to dig the cesspools, trenches, etc., to flag the sidewalks, and by which he was to be responsible for accidents happening to individuals through his acts. Others had separate contracts to dig the cellar and do the plumbing. There was evidence that the boards had been placed across an excavation in the sidewalk by the cellar contractor, by direction of the architect. Defendant did not commence work on the sidewalk until after the accident. It appeared, however, that he was the only one who employed a watchman. *Held*, that plaintiff was entitled to go to the jury on the question as to whether defendant had charge of the premises, so as to be responsible for the accident.—*Peard v. Karst*, 10 N. Y. S. 463.

6. Plaintiff's intestate went to defendant's apartment house to visit a servant of one of the tenants, and entered an elevator used for carrying freight and servants. In one side of the elevator was a slide, movable up and down, for the purpose of taking on baggage. While the elevator was ascending, intestate, either through faintness or loss of consciousness, sank to the floor, and fell through the slide, which was open. *Held*, that the accident was a misadventure for which defendant could not be held liable.—*Man v. Berkshire Apartment Ass'n*, 10 N. Y. S. 116.

7. Where a hole in the pavement in front of a stable occupied by defendant as lessee is left open by a person who was removing manure from the pit under the pavement, for which he had a yearly contract with defendant, defendant is liable to persons injured thereby.—*Hughes v. Orange County Milk Ass'n*, 10 N. Y. S. 252.

8. An owner of real estate, who keeps the same in a reasonably safe condition, is not liable to a passer-by on the street who is injured by the falling of a fence during a storm of sufficient violence to unroof houses, and do like damage.—*Norling v. Allee*, 10 N. Y. S. 97.

9. Where defendant caused lumber to be placed in a street, the mere fact that a child about five years old, in attempting to climb upon the pile, pulled it over upon himself, was sufficient evidence of defendant's negligence to make a question for the jury.—*Earl v. Crouch*, 10 N. Y. S. 882.

10. The establishment of a toboggan slide across one of the principal streets of a populous city is of itself negligence sufficient to create liability for injuries caused thereby.—*Haden v. Clarke*, 10 N. Y. S. 291.

Contributory negligence.

11. Where, in an action for personal injuries, the question of plaintiff's contributory negligence is fairly submitted to the jury, their verdict must control.—*Schmidt v. Steinway & H. P. R. Co.*, 10 N. Y. S. 672.

12. Plaintiff's intestate, while diving from a trapeze on defendant's beach, struck his head against a rock under the water, and was killed. The deceased had been sitting for about two hours in full view of the bathing place, while the water was filled with bathers, many of whom were wading in the water, which was not more than 8½ feet deep. The trapeze was about 15 feet high. *Held*, that deceased was negligent, and the complaint was properly dismissed. Following 8 N. Y. S. 290.—*Hinz v. Starin*, 10 N. Y. S. 671.

13. A land-owner, whose building was erected over stone piers placed in a canal, agreed to remove the piers within a year and substitute iron columns, so as not materially to obstruct the flow of the water. The canal company agreed that these iron columns should remain in the canal as long as the building stood. The land-owner did nothing for several years. *Held*, that he will not be permitted to recover for his inability to rent the building on account of its insecurity resulting from the defective condition of the piers, though he requested the company to turn off the water so as to enable him to make the repairs, and notified it that he would hold it responsible for loss of rents, as his own failure to comply with his agreement, and his neglect to repair the piers when he had the opportunity, contributed to his loss.—*United States Life Ins. Co. v. Oswego Canal Co.*, 10 N. Y. S. 663.

Evidence.

14. Defendant constructed a bridge over a trench he was digging in a public thoroughfare. A wagon passing over the bridge struck a loose beam lying thereon, causing it to tilt up and strike and injure plaintiff. There was evidence from which it might be inferred that the beam was placed on the bridge by defendant to divide the drive-way from the footpath, and it appeared that defendant's employer replaced the beam when it was knocked out of position. *Held*, that the question of defendant's negligence should have been submitted to the jury, though the driver of the wagon might have been more careful.—*Clarke v. Crimmins*, 10 N. Y. S. 868.

NEGOTIABLE INSTRUMENTS.

Payment by check, see *Payment*, 2.

Indorsement and transfer.

1. Where a bank discounts a note with knowledge that the maker signed the note simply to make it in proper form, and with the understanding that he assumed no responsibility in doing so, there can be no recovery as against such maker in favor of the bank.—*Garfield Nat. Bank v. Colwell*, 10 N. Y. S. 864.

2. C. & Co., doing business in Mexico, were accustomed to draw on defendant in New York, who would accept their drafts, and credit them with goods they shipped to him from time to time. These drafts would not be drawn against any particular shipment. In a letter notifying defendant of the shipment of a large quantity of coffee, C. & Co. mentioned that they had drawn on him in favor of a Mexican bank, which would cash the draft on receiving telegraphic advice of acceptance. The bank indorsed the draft generally to plaintiffs, its New York correspondents, and, defendant having accepted it without objection, plaintiffs immediately telegraphed to the bank, which thereupon paid C. & Co. the face value of the draft, and plaintiffs credited the bank with the amount of it. The course of dealing between the bank and plaintiffs was for the former to make remittances from time to time to plaintiffs, and then draw on them. *Held*, that plaintiffs were *bona fide* holders of the draft.—*Coppell v. Philipson*, 10 N. Y. S. 901; *Id.* 903.

Rights of sureties on accommodation note.

3. Where the sureties upon an accommodation note payable to the payee or bearer supposed, when they signed it, that it was to be delivered to the payee, and the money upon it obtained from her, but there was no agreement to that effect, the fact that the principal debtor sold it to another did not constitute a diversion thereof; and the fact that the buyer, who paid full value, knew that they signed with that expectation, did not affect his *bona fides*, nor his right to recover from them.—*Benjamin v. Rogers*, 10 N. Y. S. 777.

Notice of non-payment—Waiver.

4. A mortgage was given to secure the payment of all notes of a firm indorsed by the mortgagor, which a bank then held or might hold thereafter. At the maturity of the last of a series of renewals the bank received from the firm by mail their note, indorsed by the mortgagor, with a letter stating that it was to take up the one due that day. This was held for the approval of the directors, which was refused. No

notice of non payment was given. It had been the custom of the bank to accept renewal notes, which would be applied by the cashier on the day of their receipt in payment of the maturing one. *Held*, the indorsement of the new note justified the bank in believing that the mortgagor knew that the one last discounted would not be paid at maturity, and was a waiver of notice of non-payment.—*National Hudson River Bank v. Reynolds*, 10 N. Y. S. 669.

Actions on—Defenses.

5. In an action upon a note purporting to have been executed to plaintiff by defendants' intestate, and to be payable after intestate's death, it appeared that plaintiff was a nephew of the intestate, that he had no property, and had had no business transactions with intestate of any significance. Experts testified against the genuineness of the signature to the note after comparison with known signatures. But other witnesses gave contradictory testimony after a similar comparison, and it was shown that plaintiff's father had been in partnership with intestate. *Held*, that a decision against the defense of forgery would not be disturbed.—*Holmes v. Roper*, 10 N. Y. S. 284.

6. Plaintiff had worked for defendant for a period of 22 weeks under a contract by which he was to be paid \$25 per week for that period, and the note sued on was given for a balance, admitted not to have been paid. *Held*, that it was proper to refuse to submit to the jury the defenses of failure of consideration, and of fraud in estimating the value of the work done.—*Redmond v. Tone*, 10 N. Y. S. 506.

Newly-Discovered Evidence.

See *New Trial*, 4-6.

NEW TRIAL.

In criminal cases, see *Criminal Law*, 5, 6.

Application.

1. Under Code Civil Proc. N. Y. § 1005, providing that entry, collection, or other enforcement of a judgment does not prejudice a subsequent motion for a new trial, such a motion does not come too late, where the judgment is entered on the 29th day of June, the case is settled and filed and notice of the motion served in the following September, and the motion is heard on the 1st of October.—*Holmes v. Roper*, 10 N. Y. S. 284.

Surprise.

2. In an action by a brakeman for personal injuries sustained by his being crushed between two cars, from one of which plaintiff alleged that the bumper

was gone,—which was denied by defendant,—a new trial will not be granted defendant on the ground of surprise because plaintiff adduces evidence to show that he was compressed within a space of six inches, and that his injuries are permanent and incurable, as such evidence is within the issues of the case, and cannot be regarded as a surprise.—*Cole v. Fall Brook Coal Co.*, 10 N. Y. S. 417.

Inadvertence.

3. The fact that plaintiff had forgotten the presence of a third person at a settlement of a disputed claim between himself and defendant, as to which settlement both parties testified at the trial, is not a reasonable ground for a new trial; and an affidavit by plaintiff that he was unable to procure the testimony of the third person at the trial, though he used every effort he thought necessary, is insufficient to show diligence, in the absence of a statement as to what he in fact did, or what efforts he in fact put forth, to procure such testimony.—*Wilcox v. Joslin*, 10 N. Y. S. 842.

Newly-discovered evidence.

4. In an action on a note alleged to have been made by defendant's intestate, on conflicting evidence, the jury found against defendant on the issues of forgery, duress, and no consideration. Affidavits supporting a motion for a new trial on the ground of newly-discovered evidence were to the effect that, at about the time and subsequent to the date of the note sued on, the intestate, in the presence of plaintiff, told several persons that he did not owe a dollar, and that he intended that his property should go to his only child, and that plaintiff did not dissent from such statement. Other evidence to be adduced was to the effect that, after the date of the note, plaintiff had said that his uncle was going to leave him a present when he died. A paper was also discovered after the trial bearing a date prior to the date of the note, and indicating a settlement of all transactions between the intestate and plaintiff's father, with whom intestate had been in partnership. *Held*, that the motion should have been granted.—*Holmes v. Roper*, 10 N. Y. S. 284.

5. Newly-discovered evidence to the effect that prior to the injury complained of plaintiff had been injured in a railroad accident is not available as ground for a new trial, though plaintiff's counsel stated in the course of the trial that plaintiff had already stated that he was perfectly sound and healthy before his fall and injury, and that he had received none other, as such statement of counsel will not be deemed a stipulation in the absence of anything to show that it was intended to be such.—*Page v. City of New York*, 10 N. Y. S. 826.

6. C. C. recovered property for the heirs of J., under an agreement that he should have 47½ per cent. of the amount recovered. After making the agreement, but before recovering the property, C. C. made an agreement with B., whom he had employed to discover the heirs of J., whereby, "in consideration of the services rendered in discovering the heirs of J., and in settling with them, in advance, the basis of the [above] contract," B. was to have, of the 47½ per cent., 7½ per cent., and, on certain contingencies, 10 per cent. C. C. also made agreements with other persons, securing to them shares of his interest in the agreement with the heirs of J. In an action to settle disputes as to the amounts the various parties were entitled to, it was adjudged that B. was entitled to 7½ per cent. Thereafter the attorney of B. gave D. C. an option to buy the interest of B. within six months. Towards the end of that period, D. C. availed himself of the option, and paid the money. Thereafter C. C. moved to set aside that part of the judgment giving B. 7½ per cent., and for a new trial, on the ground that, before he agreed to give B. the 7½ per cent., the latter falsely represented to him that the heirs of J. had agreed that B. should have that amount of the 47½ per cent. to be allowed for recovering the property. The affidavit of C. C. showed that he had discovered this about the time the option was given to D. C. Affidavits were made by B.'s attorney and by D. C. that they informed C. C. of the option, and of the time when the payment would be made, but that he said nothing of any objection to B.'s claim. It further appeared that C. C. was unfriendly to D. C. *Held*, that a new trial was properly denied, as the conduct of C. C. showed an intention to defraud D. C.; and, moreover, the contract itself showed that C. C. was not induced to make it by reason of any such misrepresentations, but in consideration of services therein specified.—*Chester v. Jumel*, 10 N. Y. S. 57.

Statutory new trial as of right.

7. A judgment in ejectment entered by the court of appeals, pursuant to a stipulation by appellant under Code Civil Proc. N. Y. § 191, subd. 1, that judgment absolute should be entered against him, if the order of the general term granting a new trial should be affirmed, is not within section 1525, providing that a new trial may be had as a matter of right "after a final judgment rendered upon an issue of fact."—*Roberts v. Baumgarten*, 10 N. Y. S. 519.

Next of Kin.

See *Descent and Distribution*, 2

Notice.

For appointment of administrators, see *Executors and Administrators*, 2.
Of meeting of trustees of religious society, see *Religious Societies*, 1.
non-payment of note, see *Negotiable Instruments*, 4.
proceedings to establish highway, see *Highways*, 2.

NUISANCE.

Public nuisance.

1. Under the authority of Rochester City Charter, § 276, which empowers the common council to provide by ordinance for the filling up, draining, and cleansing of any damp, foul, or unwholesome yards, slips, or cellars, the ordinance of October 25, 1887, § 4, provides that every owner or occupant of a stone-quarry shall either cause the same to be filled level with the ground, or the water therein to be drained, and the quarry kept dry. *Held*, the ordinance was intended for the abatement of nuisances dangerous to public health, and does not apply to a large pond which has existed in an abandoned quarry for more than 40 years, is fed by a copious spring, discharges into a sewer, contains bass and other valuable fish, and has been used as an ice pond for many years.—*City of Rochester v. Simpson*, 10 N. Y. S. 499.

2. The fact that in summer it sometimes emits an unpleasant odor, and a green scum gathers at the edge, that dead animals, such as cats and dogs, have been taken from it, and that when raised to a certain height the water soaks from it into neighboring cellars, does not make it a nuisance to which the ordinance can be applied.—*City of Rochester v. Simpson*, 10 N. Y. S. 499.

Injunction.

8. The fact that a building in course of construction may, when completed, be used for a business which will be a nuisance to an adjoining owner, is not a ground for restraining the completion of the building, where it is not of itself a nuisance.—*Depierre v. Mattern*, 10 N. Y. S. 626.

Obstruction.

Of highways, see *Highways*, 5-8.

OFFICE AND OFFICER.

See, also, *Judge; Justices of the Peace; Sheriffs and Constables*.

Liability of county treasurer, see *Counties*, 8.

Municipal officers, see *Municipal Corporations*, 7, 28.

Officers of corporation, see *Corporation*, 4.

Compensation—Power to reduce salary.

Under Laws N. Y. 1871, c. 588, creating a board of apportionment for the city and county of New York, with authority to regulate the salaries of officers and employes of the city and county, a subpoena server in the office of the district attorney, appointed under a resolution of the board of supervisors of the county, is a county officer, whose salary may be reduced by such board from the rate fixed by the legislature. Following *Dolan v. Mayor*, 6 Hun, 506.—*Reilly v. City of New York*, 10 N. Y. S. 847.

Opinion Evidence.

See *Evidence*, 14-17.

ORDERS.**Acceptance—Conditions.**

1. Where defendants accept an order on them for the payment of money by writing thereon "Accepted, payable out of" a certain payment, the acceptance is conditional, and becomes absolute when the specified payment is made to defendants. —*Flanagan v. Mitchell*, 10 N. Y. S. 284.

Consideration.

2. Where plaintiff testifies that he took an order in payment for plastering, in reliance on defendants' promise to accept it, and forebore to file a lien against the party giving the order for the amount due him, it is immaterial whether or not defendants received any consideration for their acceptance, as plaintiff's forbearance is sufficient to bind them. —*Flanagan v. Mitchell*, 10 N. Y. S. 284.

Ordinances.

See *Municipal Corporations*, 2-4.

Oysters.

Disturbing oyster-bed, see *Fisheries*.

PARENT AND CHILD.

See, also, *Guardian and Ward; Infancy*.

Custody of child.

1. On a petition by the father for a writ of *habeas corpus* to obtain the custody of his minor child from her grandmother, it appeared that respondent had reared the child from infancy, in a home of wealth and refinement, and that the child, who was about seven years old, was devoted to respondent, and desired to remain with her. Petitioner had no means to speak of, and no home, and intended to have the child

live with his father and step-mother. He had failed to support his wife during her life, and he did not attempt to get the custody of the child till after her death. *Held*, that the interests of the child required that she should be left with respondent. —*Pad-dock v. Eager*, 10 N. Y. S. 710.

2. On *habeas corpus* by the grandfather of a child two and a half years old, it appeared that the child's mother had died at the house of petitioner, her father; that the child remained there about one and a half years, when defendant, her father, obtained custody of her, and immediately placed her in an asylum for destitute children; that defendant had not married again, and had no home to which he could take his daughter, and no person who could take care of her; and that petitioner is able to give the child such care as one of her years should have. *Held*, that custody would be awarded to petitioner. —*In re Riemann*, 10 N. Y. S. 516; *In re Holzer*, *Id*.

Liability for services.

8. Upon her marriage plaintiff ceased to live with her parents, and became estranged from her mother. After several years the mother, who was then 80 years old, alone and helpless, sent for plaintiff to come and take care of her, and plaintiff did so for 50 weeks, and then left her. *Held*, that a promise to pay for the services would be inferred. —*Wilsey v. Franklin*, 10 N. Y. S. 838.

Parol Evidence.

See *Evidence*, 19-21.

PARTIES.

Misjoinder, demurrer, see *Pleading*, 1.

Necessary parties.

1. A *cestui que trust*, while a proper party, is not ordinarily a necessary party, in proceedings to foreclose a mortgage given by his trustee; and the complaint is not demurrable for defect of parties because of the non-joinder of the *cestui que trust*; the remedy being a motion that he be brought in. —*Harlem Co-op. Bldg. & Loan Ass'n v. Quinn*, 10 N. Y. S. 682.

2. A resolution granting permission to a railroad company to lay its tracks in the streets of a village required the company to give its bond conditioned to indemnify the village from all damages sustained from the building of the road. The bond was given, and the village brought suit thereon, claiming that the condition had been broken. *Held*, that this did not render the village a necessary or proper party to an action to foreclose a mortgage given by the company to secure a series of its bonds. —*Farmers' L. & T. Co. v. New Rochelle & P. R. Co.*, 10 N. Y. S. 810.

8. Where a complaint by an heir to restrain the desecration of his ancestors' graves prays damages for the destruction already committed, it is not defective for failing to show that all persons in interest are made parties, for plaintiffs can only recover for such damages as they have sustained, and not for those sustained by persons not parties to the suit.—*Mitchell v. Thorne*, 10 N. Y. S. 682.

Objection for defect of parties—How taken.

4. Code Civil Proc. N. Y. § 488, provides that where the defect appears on the face of the complaint defendant may demur. Section 498 provides that where the defect does not so appear the objection may be taken by answer. Section 499 provides that an objection not taken by answer or demurrer is waived. *Held* that, where the complaint in an action for slander shows that plaintiff is a married woman, the objection that her husband should have been joined can be taken only by demurrer.—*Ward v. Deane*, 10 N. Y. S. 421.

Substitution.

5. Under Code Civil Proc. N. Y. § 728, providing that the court may strike out parties, and add others, where a person is improperly joined in the complaint with others as a defendant, the court may strike out the name of such person, and substitute one who should have been made a defendant.—*Riley v. Stern*, 10 N. Y. S. 8.

PARTITION.

Rights of purchaser.

Where a testator devises all his property to executors in trust to apply the personality and the rents of the realty to the payment of his debts and of specific legacies, and, after their payment, then over to designated persons, the trust, even if invalid as such, is good as a power. The testator, therefore, did not die intestate as to any of his property; and a purchaser under a decree of sale rendered in an action for the partition of the land, to which all the devisees and legatees were parties, takes a marketable title, though testator's heirs were not represented.—*Höpfner v. Sevestre*, 10 N. Y. S. 51.

PARTNERSHIP.

Power of partner to bind firm.

1. Where a partner is designated on the cards of the firm as "general manager," opens bank accounts in behalf of the firm, and appears to be the leading partner, it cannot be objected, in an action on a note indorsed by such member in the firm name, that he was forbidden by the

articles of partnership to make the indorsement, where plaintiff denies that he knew of the restriction in the articles, which were in the Chinese language, and the proceeds of other similar notes discounted by plaintiff are traced to banks in which the firm accounts were kept.—*Johnson v. Mon Lee*, 10 N. Y. S. 9.

— Offer of judgment.

2. Code Civil Proc. N. Y. § 738, providing that "defendant may, before trial, serve on the plaintiff's attorney a written offer to allow judgment to be taken against him for a sum * * * therein specified," and that "if there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken," does not authorize one partner, on whom process against the firm is served, to bind his copartners by an offer of judgment against the firm.—*Rich v. Roberts*, 10 N. Y. S. 915.

Dissolution—Custody of books.

3. On the dissolution of a partnership between plaintiff and his father, it was agreed that the latter should retain the books of the firm, collect the accounts, and pay its debts. Subsequently plaintiff made a general assignment to his father for the benefit of creditors. On the death of the father, plaintiff brought suit against the next of kin and executors, to recover possession of the books. *Held*, that an order made therein, giving plaintiff the absolute and unrestricted custody of the books, should be modified so as to have them placed in the custody of some person, where both parties could have access to them.—*Davis v. Davis*, 10 N. Y. S. 897.

Dissolution and accounting.

4. A transfer, after notice of dissolution, by two members of a firm, of all the firm property, to a corporation organized by them for the purpose of continuing the business under a new arrangement, cannot affect the rights of a remaining partner who does not consent thereto; and he is thereafter entitled to the exclusive control of all the firm property for the purpose of winding up the partnership business. *Affirming* 9 N. Y. S. 888.—*Macdonald v. Trojan Button-Fastener Co.*, 10 N. Y. S. 91.

5. In such a case, a receiver of the firm's property will not be appointed unless the remaining partner neglects to perform, or improperly performs, his duty of closing up the business as expeditiously as may be, with due regard to the interests of all concerned.—*Macdonald v. Trojan Button-Fastener Co.*, 10 N. Y. S. 91.

6. In a suit for an accounting between partners, it appearing on a preliminary report of a referee that there are assets of

the firm not disposed of, an interlocutory judgment is proper, appointing a receiver and directing that, after passing his final account, the trial be resumed before the same referee.—*Smith v. Fitchett*, 10 N. Y. S. 459.

7. Though there are unpaid judgments against a firm, one partner may have an accounting and recover his share of the net surplus in the hands of the other, who holds all the assets.—*Smith v. Fitchett*, 10 N. Y. S. 459.

8. Where a referee has taken an account of partnership transactions covering four years, and the books are made part of the case, but not handed up, and no requests were made for findings as to disputed items, and it is practically impossible to re-examine the accounts without great danger of making more mistakes than would be corrected, that will not be done, but the findings of the referee will be affirmed.—*Smith v. Fitchett*, 10 N. Y. S. 459.

Firm Liabilities.

9. Plaintiff loaned money to one who put it into a partnership business with defendant. Afterwards the borrower retired from the firm, and assigned his interest to his wife. Defendant, upon inquiry, assured plaintiff that the interest on the borrower's note to her would be paid the same as before; and subsequently, but before the note was due, executed a new note in exchange therefor, payable on demand, and signed in the firm name. It was understood that the money should remain in the business, and thereafter the interest was paid by checks in the firm name. *Held* sufficient evidence that defendant considered it a firm liability, and a verdict against him was properly directed.—*Paul v. Stevens*, 10 N. Y. S. 442.

Passengers.

See *Carriers*, 2-10.

PAYMENT.

See, also, *Accord and Satisfaction; Compromise; Release and Discharge.*

Of legacies, see *Wills*, 22-24.

Evidence—Weight and sufficiency.

1. Plaintiff testified that defendant, a broker, had sold a note for him, and that he had refused to pay over the proceeds. Defendant gave evidence tending to show that the relation of banker and customer existed between him and plaintiff, and that he had paid out such proceeds on checks drawn by plaintiff. A letter from plaintiff was put in evidence in which he spoke of leaving money on deposit with the defendant. *Held*, that a judgment for plaintiff

for such proceeds would not be disturbed.—*Darrah v. Boys*, 10 N. Y. S. 697.

By check.

2. Defendant being indebted to plaintiff sent his check to the latter expressing in terms on its face that it was "in full." The check was for less than the debt, and was neither presented nor returned until tendered back at the trial. Defendant suffered no loss by reason of plaintiff's failure to present the check. *Held*, that this was not a payment in full or *pro tanto*.—*Flynn v. Woolsey*, 10 N. Y. S. 875.

Application.

3. Plaintiff's assignor was a stock-broker, and indebted to defendant, his mother, to whom he had given a policy of life insurance as collateral security. In an action to recover the policy, the question involved was the amount of the indebtedness still unpaid. Assignor's books contained two accounts, with entries in reference to his indebtedness to defendant,—one an account of the principal; the other an interest account, in which were entered every month the amounts of interest paid or credited to his creditors. The interest account showed, and defendant admitted, that assignor paid defendant a certain amount every month, for several years, which was in excess of the interest due her. These payments were not referred to in the account of the principal debt. *Held*, that the payments were not intended to and did not apply to any extent on the principal debt.—*Eberlin v. Palmer*, 10 N. Y. S. 680.

Performance of Contracts.

See *Contracts*, 12-14.

Physicians and Surgeons.

Privileged communications, see *Witness*, 2, 8.

PLEADING.

See, also, *Assumpsit*, 8; *Ejectment*, 2; *Frauds, Statute of*, 5; *Injunction*, 8.

Bill of particulars, see *Libel and Slander*, 2.

In justice's court, see *Justices of the Peace*, 4. Power of referee to allow amendment, see *Reference*, 6.

Time to answer, see *Practice in Civil Cases*, 7.

Demurrer.

1. Code Civil Proc. N. Y. § 488, providing that defendant may demur to the complaint when it appears that "there is a misjoinder of parties plaintiff," or "a defect of parties plaintiff or defendant," does not authorize a demurrer because there is a misjoinder of parties defendant.—*Paxton v. Brogan*, 10 N. Y. S. 808.

Answer.

2. A complaint alleged as plaintiffs' cause of action that defendant, as the agent of plaintiffs, sold goods for them, and received therefor certain moneys, which he refused to pay over on demand. The answer admitted the agency, the sale of the goods, and the receipt of moneys, but denied every other allegation in the complaint. *Held*, that a judgment for plaintiffs on the answer was erroneous.—*Harland v. Howard*, 10 N. Y. S. 449.

3. An answer in an action on a note which avers that there was "an entire failure of consideration" for the note, and which denies that "the amount, or any part thereof, is due," is not frivolous.—*Churchill v. Witbeck*, 10 N. Y. S. 263.

4. In an action for the value of specific merchandise sold and delivered, an answer which denies each and every allegation of the complaint, but admits that at the time alleged plaintiff furnished "certain" goods, but not of the value alleged, does not admit the purchase of the goods referred to in the complaint. Affirming 7 N. Y. S. 499.—*Claffy v. O'Brien*, 10 N. Y. S. 103.

5. An answer by one of several defendants, which denies that defendants executed the instrument sued on, and for a further defense alleges that the answering defendant was induced by fraud to sign the instrument, will be taken as an admission of the execution, with the qualification as to the fraud against the answering defendant, since the rule allowing inconsistent defenses will not be construed so as to permit such contradictory averments.—*McIntire v. Wiegand*, 10 N. Y. S. 8.

6. In an action on a sealed instrument, the answer alleged that it was agreed between plaintiff and defendant that plaintiff should advance certain money to be used by defendant in purchasing oil, the profits of which were to be shared by plaintiff; that, relying on this agreement, defendant purchased oil, but plaintiff refused to advance money with which to pay therefor; and that defendant, not being able to complete his purchases, was thereby damaged. *Held*, that it was not necessary for the answer to allege whether the agreement relied on was written or verbal.—*Rouget v. Haight*, 10 N. Y. S. 751.

Motion to strike out.

7. By answering a complaint defendant waives his right to move that portions thereof be stricken out as irrelevant, or made more definite.—*Williams v. Folsom*, 10 N. Y. S. 895.

8. Where it reasonably appears that the allegations in a complaint constitute a full exposition of plaintiffs' case, giving more details than is necessary, but germane to the subject, they cannot be properly stricken

out as irrelevant, especially where the action is one in which fraud is alleged, and there is no evidence that the retention of the allegations would embarrass defendant in his defense.—*Williams v. Folsom*, 10 N. Y. S. 895.

9. An answer in an action against the members of a partnership on a firm liability which pleads in bar a judgment against some of the defendants on the same cause of action rendered on an offer by them will not be stricken out as sham.—*Farnsworth v. Halstead*, 10 N. Y. S. 763.

Motion to make more definite and certain.

10. Where the complaint, in an action to recover a sum of money deposited with defendant for investment, which was not made, fails to aver the date of demand, a motion to make more certain and definite will be granted.—*Rosenthal v. Rosenthal*, 10 N. Y. S. 455.

11. Where the complaint alleges a modification of the contract sued on, plaintiff will be required to make the complaint more definite and certain by giving the full terms of the alleged modification, and by stating whether the word "contract," as used after the averment as to the modification, refers to the original contract, or to the contract as modified.—*Ottomann v. Fletcher*, 10 N. Y. S. 123.

12. In an action on a sealed instrument, the answer alleged that it was agreed between plaintiff and defendant that plaintiff should advance certain money to be used by defendant in purchasing oil, the profits of which were to be shared by plaintiff; that, relying on this agreement, defendant purchased oil, but plaintiff refused to advance money with which to pay therefor; and that defendant, not being able to complete his purchases, was thereby damaged. *Held*, that such averments sufficiently state the nature of the defense, though the items constituting it are not shown, and a motion to make more definite and certain, by stating the dates of purchase, the names of the sellers, and the quantities of oil purchased, and by showing wherein defendant was damaged, will be denied, as plaintiff has a complete remedy by motion for a bill of particulars.—*Rouget v. Haight*, 10 N. Y. S. 751.

Reply.

13. Code Civil Proc. N. Y. § 514, providing that plaintiff must reply where the answer contains a counter-claim, does not require a reply to an answer averring new matter, but not containing a counter-claim.—*Springer v. Bien*, 10 N. Y. S. 530.

14. A general denial of a counter-claim wherein defendant sets up a contract under which he permitted plaintiffs to cut logs on designated premises at a specified

sum per 1,000 feet does not raise an issue of payment or settlement of the sum due defendant under the contract.—*Wilcox v. Joslin*, 10 N. Y. S. 342.

Verification.

15. Code Civil Proc. N. Y. § 525, provides that a pleading must be verified "by the affidavit of the party. * * * except as follows: (1) Where the party is a domestic corporation, the verification must be made by an officer thereof;" and, (3) "where all the material allegations of the pleading are within the personal knowledge of the agent or attorney. * * * the verification may be made by the agent or of the attorney for the party." *Held* that, where a voluntary association is sued by its treasurer, (Code Civil Proc. N. Y. § 1919,) the answer cannot be verified by any other officer of the association, except as the agent or attorney of the treasurer. — *Tallmadge v. Lounsbury*, 10 N. Y. S. 129.

16. On the service of a copy of the complaint on him, defendant admitted due service of the complaint. The complaint was properly verified, but the copy served on defendant was not. Defendant then served an unverified answer, and, on its return for want of verification, notified plaintiff that the copy of the complaint served on him was not verified, but declined to allow plaintiff to correct the copy, whereupon plaintiff served a true copy of the complaint. *Held*, that defendant would be required to file a verified answer.—*Hamilton v. Gibbs*, 10 N. Y. S. 531.

Amendment.

17. In an action against a town for personal injuries resulting from a highway alleged to have been negligently obstructed by the town, plaintiff, at the close of his evidence, may amend his complaint so as to conform to the proof, which shows the negligence to have been that of the commissioner of highways, as such amendment does not change his cause of action.—*Wilson v. Town of Spafford*, 10 N. Y. S. 649.

18. A complaint alleged that plaintiff's cattle strayed upon defendant's railroad track without plaintiff's fault, and that, through the negligence of defendant's servants in managing a train, the cattle were killed or injured. *Held*, that an amendment to the effect that the cattle strayed upon the track through the failure of defendant to maintain a proper fence, as required by statute, did not change the cause of action, the action being still based on negligence, as before.—*Becker v. New York, L. E. & W. R. Co.*, 10 N. Y. S. 413.

19. Where an application to amend is made before the trial, and defendant is not surprised or misled, it is proper to grant the amendment without imposing

terms.—*Becker v. New York, L. E. & W. R. Co.*, 10 N. Y. S. 413.

20. In a suit against plaintiff and another, on a partnership liability, a several judgment was entered against each. The creditor assigned for a valuable consideration its judgment against plaintiff's partner, reserving its rights against plaintiff. The assignee, without consideration, executed a release to plaintiff, who seeks to enjoin the collection of the judgment against him, claiming that the release was valid because the original judgment would be considered in equity as a joint judgment, and the assignment of a part carried the whole. Plaintiff towards the end of the trial sought to amend his petition so as to charge the assignee, on the ground of deceit, with indemnifying him in case he were compelled to pay the original judgment. *Held*, the application was properly denied as introducing an inconsistent cause of action, and therefore forbidden by Code Civil Proc. § 484.—*Whittemore v. Judd L. & S. Oil Co.*, 10 N. Y. S. 737.

21. The amendment was properly denied, also, because, being based upon fraud, it was a legal and not an equitable claim, and one in which the defendant would be entitled to a jury.—*Whittemore v. Judd L. & S. Oil Co.*, 10 N. Y. S. 737.

Bill of particulars.

22. A complaint alleged that plaintiff, between certain dates, rendered defendant's testator services and advanced him money, in all of the value of \$2,000; that they adjusted their accounts at \$2,000, and agreed that the same should be payable at testator's death, and that he would make testamentary provision to that effect; and that testator died without having paid or made provision for the payment of said sum. *Held* that, as the complaint stated a cause of action on an account, as well as on the account stated and promise of testamentary provision, plaintiff would be required to furnish the items of her account.—*Hunter v. Stender*, 10 N. Y. S. 147.

23. Where the answer, in an action for goods sold, stated that some of the goods had been returned to and accepted by plaintiff, that others had never been purchased or received, and that defendant had paid more than the price of the goods delivered to him, defendant will be required to serve a bill of particulars of the articles declined and returned, but not to state therein what articles he was willing to admit had been delivered to him.—*Thoesen v. Crowe*, 10 N. Y. S. 177.

PLEDGE.

Lien for advances by factor, *see Factors and Brokers*, 8, 4.

Rights of pledges.

1. W. & Co., stock-brokers, in Syracuse, filled orders to purchase stocks on margin, by directing plaintiffs, their New York correspondents, to buy the stocks desired. Plaintiffs held the certificates of stock thus purchased, and also received other stocks from W. & Co. as collaterals to secure the price, and kept their accounts with W. & Co., knowing no other person in the transaction. W. & Co. failed, and plaintiffs sued to determine the rights to stock thus held by them. *Held*, that it was error to allow plaintiffs fees and disbursements claimed to have been paid to their counsel in examining the claims of the various parties and conducting the litigation, as the relation of trustee and *cestuis que trustent* in no sense existed between them and W. & Co.—*Willard v. White*, 10 N. Y. S. 170.

Sale of pledged property.

2. The retention of securities deposited as collateral security will not bar an action on the note secured, nor is there any obligation on the payee to sell the securities before bringing his action.—*Queens County Bank v. Leavitt*, 10 N. Y. S. 194.

Police Officers.

See *Municipal Corporations*, 18-28.

POWERS.**Power in trust.**

1. A grantor conveyed land to a trustee to receive the rents and profits, or to permit her (the grantor) to hold and use the same at her election, and at her death to convey it to such person as she should appoint by deed or will. *Held* that, though the deed was void as attempting to create a passive trust, which 1 Rev. St. N. Y. p. 727, § 45, and page 728, § 55, abrogate, it was valid as a power in trust, under section 58, which provides that if a trust, which is void because not enumerated in the preceding section, directs the performance of an act which may be lawfully performed under a power, it shall be valid as a power in trust, since the dormant power to convey might become active under a proper appointment by the grantor.—*Wainwright v. Low*, 10 N. Y. S. 888.

Testamentary powers.

2. Where a will empowers the executors, "or whoever shall execute this, my will," to sell testator's real and personal estate, an administrator with the will annexed can give a valid deed of the realty.—*Royce v. Adams*, 10 N. Y. S. 821.

3. A devise of 20 acres of certain specified land, "or such other twenty (20) acres of any land of which I may die seised or may be agreed upon between" the devisee

and the executors, leaves it to the option of the executors to agree on other land; and where the land specified has been sold under a mortgage during the life-time of the testatrix, the executors cannot be compelled to exercise the power.—*Weber v. Lester*, 10 N. Y. S. 258.

4. A will gave to the wife of the testator all his property for the wife's "sole use and benefit during her natural life," authorized her to lease, sell, give, and devise the whole or any part of the property, and provided that after her death the residue "if any there should be," should be distributed, etc. 1 Rev. St. N. Y. p. 737, § 126, provides that lands embraced in any power to devise shall pass by a will purporting to convey all the real property of the testator, unless the intention that the will shall not operate as an execution of the power shall appear expressly or by implication. *Held*, that the will of the wife, providing that after the payment of debts and funeral expenses she gave her property to certain persons in equal shares, passed all the property of the husband.—*Kibler v. Huver*, 10 N. Y. S. 375.

5. Testator devised property to his adopted daughter for life, and after her death to such of her lawful issue as she should appoint, and, in default of appointment, to her issue, to take *per stirpes*, if they should be of unequal degrees of consanguinity. By the ninth clause he provided that, if said daughter should die without issue, she should have power to appoint the property devised to any of testator's sisters, "or to all or any of the lawful issue" of his sisters. The adopted daughter was generally regarded as testator's illegitimate child, and, being much displeased at the manner in which his sisters and their children treated her, he said, before making his will, that he would "make a lady of her in spite of them." When the will was executed, testator's sisters were living, all had children, and one had a grandchild. *Held*, that the "issue" of testator's sisters mentioned in the ninth clause included any of their descendants, and the appointment to grandchildren of such sisters in the life-time of the appointees' parents was valid. Affirming 3 N. Y. S. 760.—*Drake v. Drake*, 10 N. Y. S. 183.

PRACTICE IN CIVIL CASES.

See, also, *Appeal*; *Certiorari*; *Costs*; *Deposition*; *Judgment*; *Jury*; *New Trial*; *Parties*; *Pleading*; *Reference*; *Trial*; *Venue in Civil Cases*; *Writs*.

Examination of party before trial, see *Discovery*, 1-4.

Probate practice, see *Executors and Administrators*, 17.

Dismissal and discontinuance.

1. Where the testimony warrants a finding in favor of one of several plaintiffs, a motion to dismiss the entire case is properly denied.—*Lewis v. Iba*, 10 N. Y. S. 537.

2. Where plaintiff refuses to proceed with the trial of a case, and submits to a nonsuit on the denial of his motion to amend the complaint, made after the trial had commenced, there is not a dismissal for neglect to prosecute within Code Civil Proc. N. Y. § 405, providing that where an action is not thus terminated plaintiff may bring another action within one year after such termination.—*Marx v. Manhattan Ry. Co.*, 10 N. Y. S. 222.

3. The general term cannot, on the motion of the attorney general, dismiss a submission of a controversy intended to establish the right of the sole highway commissioner of a town to make a contract for the building of a bridge, on the ground that certain commissioners appointed by the supervisors, and claiming the right to make such contract, were not parties to the submission, and that such commissioners might be bound by the decision.—*Berlin Iron-Bridge Co. v. Wagner*, 10 N. Y. S. 215.

4. Where replevin against a sheriff to recover goods levied on as the property of the execution debtor is discontinued by plaintiff without returning the goods to the sheriff, the discontinuance will be set aside, and the execution debtor allowed to contest the claim of plaintiff in replevin.—*Rosenberg v. Flack*, 10 N. Y. S. 759; *Adler v. Same*, *Id.*; *Ergerbrecht v. Same*, *Id.*; *Boley v. Same*, *Id.*

Stipulations.

5. A stipulation by a party may be set aside where it appears that it was given unadvisedly, that it would be inequitable to hold him to it, and that the other party has not been prejudiced thereby.—*Sperb v. Metropolitan El. Ry. Co.*, 10 N. Y. S. 865.

6. Where defendants appear, and demand a copy of the complaint, which is served accordingly, and counsel for the parties then agree that defendants have 20 days from the service of the complaint, under the demand, within which to answer, such agreement of counsel is a binding stipulation, though a copy of the complaint had theretofore been served on defendants, and they were not entitled to the second copy so demanded.—*Van Zandt v. Van Zandt*, 10 N. Y. S. 200.

Extension of time to answer.

7. Gen. Rule Prac. N. Y. No. 24, provides that an extension of time to answer shall not be granted unless the party shall present to the judge an affidavit of merits. Code Civil Proc. N. Y. § 782, provides that

the affidavit on which an extension of time to answer is granted, or a copy thereof, must be served with a copy of the order. Defendant made an affidavit of merits, and his attorney made an affidavit, which was served on plaintiff's attorney, stating the facts, and asking an extension, which was granted. The affidavit of merits was not served with the order granting the extension and the other affidavit. *Held*, that plaintiff properly disregarded the order granting the extension, and entered judgment by default.—*Corning v. Roosevelt*, 10 N. Y. S. 937.

Service of papers.

8. Code Civil Proc. N. Y. § 799, providing that where a party has appeared a notice or other paper required to be served in an action must be served on his attorney, is imperative, and a defendant who appears in the action is entitled to notice of a pending motion to strike his name from the complaint, though the motion was noticed for hearing before he appeared.—*Stephens v. Hall*, 10 N. Y. S. 758.

Production of books and papers.

9. On a proceeding to settle a trustee's accounts, the court, at special term, may order the production of books and papers before the referee, to whom the matter has been referred, so that they may be examined by the *cestui que trustent*.—*Elsworth v. Hinton*, 10 N. Y. S. 40.

Preliminary Hearing.

See *Criminal Law*, 1.

Prescription.

Establishment of highway, see *Highways*, 1.

Price.

Action for, see *Sale*, 17, 18.

PRINCIPAL AND AGENT.

Insurance agents, see *Insurance*, 4, 5.

Rights of sureties on accommodation note, see *Negotiable Instruments*, 8.

The relation.

1. In an action against a married woman for injuries received by plaintiff while working on a building which was being erected on defendant's land, and for the construction of which defendant had borrowed money, it appeared that defendant's husband had charge of the construction of the building. Neither defendant nor the husband testified on the trial. *Held*, that there was a sufficient presumption of the agency of the husband for the wife to require the submission of the question of

defendant's liability to the jury; all the other requisites of plaintiff's cause of action being present.—*Schmidt v. Keehn*, 10 N. Y. S. 287.

Authority of agent.

2. Where, pursuant to a written invitation, a laborer goes to defendant's office for service, finds there a person assuming to employ hands, is engaged by him for one year, and put to work, and the service continues for several weeks to the knowledge of the firm's general superintendent, such laborer may assume that the person who employed him was authorized to do so; and private instructions to such person not to employ labor for more than one day, unknown and uncommunicated to the laborer, will not relieve the firm from liability, on the contract.—*Cox v. Albany Brewing Co.*, 10 N. Y. S. 218.

8. Where it appears that defendant's husband was her agent in operating a quarry, the jury are justified in finding that he had authority to purchase machinery for use in the quarry.—*Dorsey v. Pike*, 10 N. Y. S. 268.

Liability of agent to third persons.

4. One who wrongfully takes property as the agent of another is liable therefor.—*Thompson v. McLean*, 10 N. Y. S. 411.

Rights of agent against third parties.

5. One dealing with a fire insurance company through an intervening agent is not liable to the latter for his services in making out the policy.—*Townsend v. Tompkins*, 10 N. Y. S. 797.

Privileged Communication.

See *Witness*, 2-4.

Process.

See *Writs*.

Promissory Notes.

See *Negotiable Instruments*.

Proximate and Remote Cause.

See *Damages*.

Public Improvements.

See *Municipal Corporations*, 40-45.

Public Policy.

See *Contracts*, 4, 5.

Public Printing.

See *Counties*, 1.

RAILROAD COMPANIES.

See, also, *Carriers; Horse and Street Railroads*.

Railroad in street, see *Horse and Street Railroads*, 1, 2.

Accidents at crossings.

1. Plaintiff's intestate, injured at a railroad crossing by collision with defendant's locomotive, was obstructed in his view of the locomotive by several objects, among which was a box-car which defendant had projected into the highway. There was evidence that, as decedent passed the car, he stood up in the sleigh in which he was riding. His ears were muffled, but he could hear ordinary conversation. *Held*, that the question as to whether he was negligent was properly left to the jury.—*Perkins v. Buffalo, R. & P. R. Co.*, 10 N. Y. S. 356.

2. Evidence that persons observing the locomotive by which plaintiff's intestate was struck did not hear the bell rung or the whistle sounded is sufficient to justify a finding that no such signals were given.—*Perkins v. Buffalo, R. & P. R. Co.*, 10 N. Y. S. 356.

8. In an action for damages, occasioned by a collision with defendant's train at a highway crossing, the court properly refused to charge that it was negligence in plaintiff to drive up to the crossing at a slow trot, and left it to the jury to say whether, under the circumstances, he was negligent.—*Totten v. New York, L. E. & W. R. Co.*, 10 N. Y. S. 572.

4. Plaintiff's intestate, in attempting to cross defendant's railroad track in front of a train rapidly approaching and in full view, fell down, was struck by the locomotive, and killed. A companion had asked her not to cross. When she fell the locomotive was 50 or 60 feet away. *Held*, that she was guilty of negligence defeating a recovery for her death.—*Collins v. Long Island R. Co.*, 10 N. Y. S. 701.

5. Where a person starts to cross the track as soon as the rear of the train from which he had alighted has passed him, without turning his head in either direction to see if any train is coming, and regardless of a caution given him by the conductor, he is guilty of contributory negligence, and no recovery for his death can be had of the company.—*Meserole v. Brooklyn City R. Co.*, 10 N. Y. S. 812.

Fires set by locomotives.

6. Where a fire which originated from a locomotive spark upon the premises of the railroad company, near a station, in some dry grass, was communicated thereby to a house, the company is liable for the destruction thereof, where it appears that

the station agent's attention was attracted by the burning grass, but that, seeing some boys engaged in an apparently successful attempt to stamp it out, he gave it no further attention.—*Elighme v. Rome, W. & O. L. Co.*, 10 N. Y. S. 600.

RAPE.

Indictment.

Pen. Code N. Y. § 278, defines rape "as an act of sexual intercourse with a female, not the wife of the perpetrator, committed against her will or without her consent." It then provides for the punishment of a person committing the crime of rape, "or an act of sexual intercourse with a female not his wife, where the female is under the age of sixteen." *Held*, that an indictment charging defendant with having committed the crime of rape, describing it as sexual intercourse with a female, not defendant's wife, under the age of 16 years, is fatally defective, as an essential element of rape is sexual intercourse committed "against her will, or without the consent, of the female."—*People v. Maxon*, 10 N. Y. S. 598.

RECEIVERS.

Of national bank, action by, see *Banks and Banking*, 8.

Actions begun against corporation—
Substitution of receiver.

1. Where a receiver has been appointed on the dissolution of a corporation, against whom an action is pending, a motion to substitute him as party defendant, in its stead, comes too late after he has distributed the assets, under order of the court, among proved claims duly advertised for under the statute.—*Owen v. Homeopathic Mut. Life Ins. Co.*, 10 N. Y. S. 75.

2. There is no "devolution of liability" where a receiver is appointed on the voluntary dissolution of a corporation, within Code Civil Proc. § 756, providing that, in case of a "devolution of liability," an action may be continued against the original party, unless the court directs the person on whom the liability is devolved to be substituted in the action, or joined with the original party, as the case requires.—*Owen v. Homeopathic Mut. Life Ins. Co.*, 10 N. Y. S. 75.

Actions by foreign receiver.

8. A foreign receiver will be permitted by comity to sue in the courts of New York, where there is no question of local rights or interests.—*Peters v. Foster*, 10 N. Y. S. 89.

4. The receiver, appointed by the compeller of the currency, for a national bank located in another state, is not a foreign

receiver, and may sue in the courts of New York for an assessment levied on shareholders of the bank, without regard to the doctrine of comity.—*Peters v. Foster*, 10 N. Y. S. 89.

Action on bond.

5. An action cannot be maintained against the sureties on the bond of the receiver of a firm without a settlement of the accounts of the receiver having first been had; it appearing that obligations have been incurred in the business of the receiver ship, and it not appearing that debts of the firm have been paid.—*French v. Dauch*, 10 N. Y. S. 468.

Reconvention.

See *Set-Off and Counter-Claim*.

Redemption.

From tax-sale, see *Taxation*, 11-13.

REFERENCE.

When allowed.

1. Under Code Civil Proc. N. Y. § 2288, which requires that, "upon the return of an order to show cause, the questions which arise must be determined as upon any other motion;" and section 1015, which empowers a court of its own motion to direct a reference "upon a question of fact arising in any stage of the action, upon a motion or otherwise, except upon the pleadings,"—the court properly directed a reference to determine a question of fact arising in a proceeding to punish for contempt.—*Alldinger v. Pugh*, 10 N. Y. S. 684; *People v. Same*, *Id.*

Compulsory reference.

2. In actions on insurance policies, where each defendant charges fraud on the part of insured, defendants' motions for a compulsory reference are properly denied.—*Bamberger v. Fire Ass'n of New York*, 10 N. Y. S. 229; *Same v. Mutual Fire Ins. Co.*, *Id.*; *Same v. Armstrong Fire Ins. Co.*, *Id.*

8. Where the answer in a foreclosure suit sets up fraud in the taking of the mortgage and its assignment to plaintiff, the action is not one in which a reference can be compulsorily ordered.—*Quinn v. McDonald*, 10 N. Y. S. 855; *Id.* 856.

Irregularity in order appointing referees.

4. The substitution by the court, without notice, of the name of another person in the order appointing a referee who has resigned, is an irregularity for which the order may be vacated, but is waived by appearing before the referee without moving

to vacate.—*Amberg v. Kramer*, 10 N. Y. S. 302.

Procedure.

5. Where, by consent of parties, the referee inspects the premises which are the subject of the action, he may construe the testimony adduced before him in the light of the information obtained by the inspection, and it cannot be objected that his finding is unsupported by the evidence.—*Crouch v. Gutmann*, 10 N. Y. S. 275; *Gutmann v. Crouch*, Id.

Power to allow amendment.

6. A referee has power to allow amendment of pleadings.—*Hall v. Abella*, 10 N. Y. S. 581.

RELEASE AND DISCHARGE.

See, also, *Accord and Satisfaction*; *Compromise*; *Payment*.

Discharge of joint wrong-doer, by compromise with the other, see *Compromise*, 1.

Modification and setting aside.

1. Where a release is executed with full knowledge that it is a general release of all differences between the parties it will not afterwards be restricted merely because the party giving it claims to have discovered other frauds, of which he was not aware when he executed it.—*Duff v. Hutchinson*, 10 N. Y. S. 857.

2. Where defendants pay a sum of money to plaintiff in consideration of a complete release of all claims on his part against them, an action to open the settlement cannot be maintained where the complaint contains no offer to return the money so paid and the evidence shows that plaintiff is incapable of making such return.—*Duff v. Hutchinson*, 10 N. Y. S. 857.

RELIGIOUS SOCIETIES.

Notice of meeting of trustees.

1. The failure of a notice calling a special meeting of the trustees of a religious corporation to state the object of the meeting, renders the action taken at the meeting, in the absence of at least two of the trustees, invalid and illegal.—*Maclaury v. Hart*, 10 N. Y. S. 125.

Agreement for consolidation—Action by trustee to set aside.

2. Laws N. Y. 1876, c. 176, § 8, as amended by Laws 1880, c. 167, authorizing any two or more religious societies incorporated under the laws of the state to consolidate into a single corporation, with the approval of the supreme court, to be obtained on an application for the purpose,

and providing that on such application "all persons interested may be heard," does not debar a trustee and vestryman of a church from maintaining an action in equity to set aside an agreement illegally entered into by his co-trustees for the consolidation of their church with another, the remedy conferred by the statute being merely cumulative, and insufficient to deprive plaintiff of his equitable right to have an illegal transaction set aside.—*Maclaury v. Hart*, 10 N. Y. S. 125.

Removal.

Of executors, etc., see *Executors and Administrators*, 8-5.

Rent.

See *Landlord and Tenant*, 7-10.

Repairs.

See *Landlord and Tenant*, 8.

REPLEVIN.

Discontinuance, see *Practice in Civil Cases*, 4.

When lies.

1. The owner of the legal title to uninclosed and unimproved land is in constructive possession, and may maintain replevin for timber wrongfully cut thereon.—*Weeks v. Martin*, 10 N. Y. S. 656.

Action for depreciation in value.

2. Where a judgment in favor of plaintiff in replevin for coupon bonds is affirmed by the court of appeals, and defendant thereupon returns the bonds, plaintiff may sue for their depreciation in market value pending the appeal; Code Civil Proc. N. Y. § 1722, giving plaintiff in replevin, who recovers a chattel depreciated in value while in defendant's possession, a right of action for such depreciation, if it happened under such circumstances that defendant is liable therefor.—*Corn Exch. Bank v. Blye*, 10 N. Y. S. 151.

Reply.

See *Pleading*, 13, 14.

Res Adjudicata.

See *Judgment*, 8-10.

Rescission.

Of compromise, see *Compromise*, 2, 3.
sale, see *Sale*, 9-16.

—by factor to customer, see *Factors and Brokers*, 1.

Restoration of consideration on rescission of contract, see *Equity*, 1.

Review.

On appeal, see *Appeal*, 11-86.

Revival.

Of actions, see *Abatement and Revival*.

Riparian Rights.

See *Waters and Water-Courses*.

Risks of Employment.

See *Master and Servant*, 24-27.

Rivers.

See *Waters and Water-Courses*.

Roads.

See *Highways*.

SALE.

See, also, *Vendor and Vendee*.

The contract.

1. Plaintiff, who held a paid-up life policy, the surrender value of which was \$1,600, applied to one of the defendants for a loan of \$1,500, which was refused. Two days afterwards he entered into an agreement with both defendants which recited that plaintiff "has this day sold and assigned" his policy to defendants, "and they have agreed to sell the same to him on or before" a certain day on payment of \$1,600, and that, if "said \$1,600 be not paid as aforesaid, and in the event of their not selling said policy to [plaintiff] they will, on demand, at any time after said date, pay to" plaintiff \$100 in full of all demands. *Held*, that the transaction was not a mortgage, but a sale of the policy with the right to repurchase on or before the day named.—*Brennan v. Crouch*, 10 N. Y. S. 419.

When title passes.

2. The owner of certain chattels agreed to "sell, assign, transfer, and set over unto" another all his right, title, and interest therein, in consideration of the purchaser's agreement to pay certain notes due by the seller. The chattels were delivered to, and remained in possession of, the purchaser. The seller repeatedly declared, and once testified in supplementary proceedings against the purchaser, that the chattels belonged to the latter, and the purchaser's financial reputation was good. *Held*, that title passed at once, and the sale was not conditioned on the purchaser's payment of the notes, though, on sale of the chattels under execution against him,

the seller claimed them.—*Byam v. Hampton*, 10 N. Y. S. 872.

Delivery.

3. Plaintiff testified that he delivered a carriage ordered by defendant on board the steamer designated by her, directed to her address, and that he afterwards saw the same carriage in possession of defendant's counsel. Defendant claimed that the carriage which she received was not the one ordered by her. *Held*, that there was sufficient proof of a delivery.—*Bozzoni v. Woodward*, 10 N. Y. S. 644.

4. A shipment of wheat on June 13th is not a compliance with a contract entered into on May 25th, which calls for the delivery of the wheat at a certain place "as soon as possible" by lake transportation, though vessels for transportation are difficult to obtain, where the usual time of lake transportation is six days, and but a few hours are required to load the wheat for shipment, and where the sellers knew at the time of making the contract that vessel-room was difficult to obtain, and shipped wheat to third persons between the date of the contract and the date of shipment, some of it being on other contracts made after that in question.—*Arthur v. Wright*, 10 N. Y. S. 868.

Acceptance.

5. Defendant looked at a book of cuts of carriages sold by plaintiff, and selected one to be sent to her. In an action for the price of the carriage, plaintiff testified that he showed to defendant a carriage which she said was just what she wanted, and that she directed certain alterations to be made, and that the carriage be delivered on board a steamer for shipment to her. The alterations were to be paid for in addition to the price originally fixed for the carriage. *Held*, that a finding of the jury that the carriage was accepted by defendant was justified.—*Bozzoni v. Woodward*, 10 N. Y. S. 644.

6. In an action for the price of an engine sold defendant, which plaintiffs had guaranteed to give satisfaction, it appeared that the engine was started in April, 1887, but it was conceded that defendant had not accepted it up to November 30, 1887, when defendant asked plaintiffs to remove it, but continued to use it. On February 10, 1888, plaintiffs wrote defendant to know "what decision you have come to about the engine." On February 21st defendant replied, "We have no reason to change our views expressed in our letter of November 30, 1887," and said that the engine was at plaintiffs' risk, and requested them to remove it. Plaintiffs replied by writing that they did not wish to remove the engine, and argued to show that they should not be held responsible, and said: "If we ad-

mit, which was *W. v. Kramer*, must take the engine on the instructions. "What is to be done in the event of an inundation?" Defendant insisted that the engine was not to be used on February 28th that it was to be used on the plaintiffs' order. *Held*, that there was no acceptance of the engine by user, and it was error to submit that question to the jury.—*Cooke v. Underhill Manuf'g Co.*, 10 N. Y. S. 446.

Warranty.

7. A manufacturer and dealer in painters' materials stated to a customer that all goods he sold thereafter would be warranted as represented, and that he had a varnish made from pure gum shellac and pure wood alcohol, which would dry and was quick in hardening, and was suitable for use on mouldings. A sample cask was ordered, and the customer told that future sales would be warranted equal to that. Six months after, a barrel was ordered "same as the cask," and, two months later, another "same as the last." *Held*, that the varnish sent to fill this order was warranted made of pure gum shellac and pure wood alcohol, suitable for use on mouldings, and equal to the sample.—*Moore v. King*, 10 N. Y. S. 651.

Damages for breach.

8. It was shown that the mouldings on which the varnish was used would have been worth 10 cents a foot if it had been as warranted, but were in fact worth only 5 cents. This evidence was not objected to as not furnishing the proper measure of damages. It was also shown that the difference of 5 cents a foot would be the expense of taking off the old finish and putting on a new one. The defendant knew that the varnish was to be used on mouldings, and warranted it suitable. The defect could not have been discovered before it was applied. *Held*, that a finding allowing as damages 5 cents a foot will not be disturbed.—*Moore v. King*, 10 N. Y. S. 651.

Rescission.

9. Plaintiffs agreed to buy, and defendant agreed to sell, a quantity of hops at a certain price, the hops to be delivered at any time the plaintiffs might designate, and defendant to have the benefit of any raise up to June 20, 1886. On June 18th, plaintiffs wrote to defendant that they had examined the hops, and found them in an unsatisfactory condition, that they thought some of the hops would spoil, and that they did not see how they could "accept of them under the circumstances." Subsequently plaintiffs described how they thought the hops might be saved, and said that they did not compare with the sample by which they were purchased, and that they were "very dirty picked." There

was evidence that, after the receipt of such letter, defendant had an interview with plaintiffs, in which the latter offered something to be released from the contract, and defendant declined the offer, and sought and obtained the opportunity, of which he availed himself, to put the matter in a more satisfactory condition. *Held*, that it could not be said, as a matter of law, that such letter constituted a rescission of the contract so as to absolve defendant from its terms.—*Wilber v. Leonard*, 10 N. Y. S. 850.

10. Where a purchaser of merchandise returns it to the sellers because it is not of the stipulated quality, and they accept it without objection, there is a mutual rescission of the contract, and the sellers can neither recover the price nor deal with the merchandise in any way on the purchaser's account.—*Hart v. Haight*, 10 N. Y. S. 795.

By vendor.

11. Where a sale of goods is for cash, and after getting possession the vendee refuses to pay for a portion of the goods, the vendor may maintain replevin for such portion.—*Thompson v. McLean*, 10 N. Y. S. 411.

12. In replevin for goods alleged to have been fraudulently obtained from plaintiffs by means of false representations by defendant as to his ability to pay for them, it appeared that when plaintiff W., who sold the goods, asked for a statement, defendant replied that he had not long since made a statement to plaintiff H., then absent, and that he stood "better than ever," and that W. reported this to the credit clerk, who let the goods go. H. testified to the statement as it was made to him, and that he communicated it to plaintiff's credit clerk at the time it was made. *Held*, that it was competent for plaintiffs to show by the credit clerk that, in letting the goods go, he took into consideration the communication made to him by H.—*Hahlo v. Grant*, 10 N. Y. S. 188.

13. That the purchaser of goods on credit knew that he was insolvent does not entitle the seller to rescind, and replevy the goods, unless the insolvency was of such a hopeless character that the purchaser must have known that he would not be able to pay for the goods when the credit expired.—*Bach v. Tuch*, 10 N. Y. S. 884.

14. Representations made by the purchaser to persons other than the seller as to his financial condition cannot be considered as made with a fraudulent intent in the absence of proof that he defrauded any of the persons to whom they were made.—*Bach v. Tuch*, 10 N. Y. S. 884.

15. Evidence of the false representations by which the purchase obtained the property is admissible in an action to recover

its possession by the seller against the sheriff, who levied on it in the hands of the purchaser.—*Lewis v. Flack*, 10 N. Y. S. 585.

16. On the direct examination of defendant in an action by the sellers to recover goods alleged to have been procured from them by defendant's false representations as to his ability to pay for them, the question whether defendant was asked to purchase goods from other merchants after his purchase from plaintiffs is properly excluded as having no bearing on the intent with which he purchased plaintiffs' goods.—*Hahlo v. Grant*, 10 N. Y. S. 188.

Action for price.

17. In an action for the contract price of bronze-gilt mouldings, the court charged that, if plaintiffs agreed to furnish such mouldings, and did furnish them, they were entitled to recover; but if, as claimed by defendant, the contract called for silver-gilt mouldings, then defendant was entitled to a verdict. *Held*, that this submission of the conflicting contentions was more favorable to defendant than if his counter-claim for a supposed breach of warranty had been submitted; for the charge made a breach of warranty a defense to the whole claim, while the counter-claim went only to a part of the claim.—*Becker v. Puels*, 10 N. Y. S. 99.

18. In an action for goods sold, the answer alleged that they were delivered under an agreement that they were to be applied to the payment of a debt owing by plaintiff's husband to defendant. *Held*, that the exclusion of evidence tending to prove the agreement, and the refusal to let the jury determine whether the goods were delivered under it, called for the reversal of a judgment in plaintiff's favor.—*Ruppel v. Donohue*, 10 N. Y. S. 100.

Rights of purchaser.

19. A purchaser of lumber who declines to accept the same because it is not of the stipulated quality can recover the money paid for freight and customs duties and for storage, but cannot at the same time recover damages for a breach of the contract, as such a claim would proceed on an affirmation of the contract.—*Taylor v. Saxe*, 10 N. Y. S. 869.

SCHOOLS AND SCHOOL-DISTRICTS.

Ejectment of teacher—Liability of trustee.

The trustees of a public school may determine the employment of the teacher at pleasure, and the only remedy is on the contract; and a trustee is not liable, as for an assault and battery, for using sufficient

force to prevent a school-house from entering a school-house. *Walbridge*, 10 N. Y. S. 844.

Service.

Of papers, see *Practice in Civil Cases*, 8. process, see *Writs*, 1, 2.

SET-OFF AND COUNTER-CLAIM.

Reply to counter-claim, see *Pleading*, 13, 14.

In partition.

1. In an action for partition of land purchased by defendant, and conveyed to plaintiff and defendant jointly, under an agreement between them that plaintiff should pay a certain part of the purchase money and make certain improvements, an answer which alleges that plaintiff entered into the contract fraudulently, as a mere device to obtain the half interest in the land, and that he never performed and never intended to perform his part of the contract, states a good counter-claim.—*Michel v. Halheimer*, 10 N. Y. S. 489.

In action arising from torts.

2. In an action for a wrongful arrest, defendant cannot set up as a counter-claim the judgment recovered by it in the action wherein plaintiff was arrested, as the judgment does not arise out of the wrongful arrest, the transaction set forth in plaintiff's complaint, nor is such judgment connected with the subject of plaintiff's action, within the meaning of Code Civil Proc. N. Y. § 501, which permits a counter-claim to be pleaded when it is based on a cause of action arising out of the transaction set forth in plaintiff's complaint, or when it is connected with the subject of the action.—*Ferris v. Armstrong Manufg Co.*, 10 N. Y. S. 750; *Same v. New Haven Web Co.*, *Id.* 751.

3. In an action for malicious prosecution by unlawfully causing plaintiff's arrest, a claim for damages for inducing defendants to sell goods on credit by false representation, which was one of the causes of action for which the original prosecution of plaintiff was commenced, cannot be maintained as a counter-claim, as it does not arise out of the same transaction, and is not connected with the subject-matter of the action, as required by Code Civil Proc. N. Y. § 501.—*Rothschild v. Whitman*, 10 N. Y. S. 427.

Settlement.

See *Accord and Satisfaction; Compromise, Payment; Release and Discharge*.

By executors, etc., see *Executors and Administrators*, 7-10.

Marriage settlement procured by fraud, see *Husband and Wife*, 4.

SHERIFFS AND CONSTABLES.

Liabilities—Failure to execute process.

1. In an action against a sheriff for failure to levy and return an execution, where defendant pleads that the judgment was at the date thereof, and is yet, uncollectible, he may give evidence that the judgment debtor had no property subject to levy.—*Crouse v. Bailey*, 10 N. Y. S. 273.

2. No action lies against a sheriff for failure to levy and return an execution within or at the expiration of the time limited for its levy, where it was retained by him for that time at the request of plaintiff's attorney.—*Crouse v. Bailey*, 10 N. Y. S. 273.

3. Where a constable's bond, given under Laws N. Y. 1872, c. 788, providing that the constable and his sureties shall be liable to any person "for any damages which he may sustain from or by any act or thing done by said constable by virtue of his office," by its terms includes acts of omission as well as commission, the constable and his sureties are liable for the deficiency where the constable levies an attachment on part only of the property of a debtor who at the time has sufficient property to satisfy plaintiff's claim, and after judgment against the debtor the property attached does not sell for enough to satisfy the judgment, though the property attached was appraised at a sufficient valuation.—*Sutherland v. McKinney*, 10 N. Y. S. 876.

—Escape of prisoner.

4. Though an action lies for an escape from jail limits against the sheriff individually the addition of his official title is merely *descriptio personæ*, and cannot be assigned as error.—*Didsbury v. Van Tassel*, 10 N. Y. S. 32.

—Failure to pay over money—Contempt.

5. A deputy-sheriff cannot be held for contempt, in refusing to pay over money collected on execution, where it appears that the deputy paid the money so collected to the sheriff, who on the same day paid it back to the deputy in settlement of wages due. Distinguishing *Whitman v. Haines*, 4 N. Y. S. 48.—*Bartlett v. Halligan*, 10 N. Y. S. 85.

Unlawful seizure—Substitution of parties.

6. Under Code Civil Proc. N. Y. § 1421, as amended by Laws N. Y. 1887, c. 182, pro-

viding that, in an action against an officer to recover chattels levied on under one or more executions, or to recover damages for their detention, if a bond or bonds have been given to indemnify the officer against the levy or levies, the person or persons who gave it may apply to the court to be substituted as defendants in place of the officer, it is not within the discretion of the court to refuse the application of the officer to substitute his indemnitors in the action.—*Cantor v. Grant*, 10 N. Y. S. 223.

—Liability of execution creditors.

7. Where a sheriff, in an action against him for an unlawful seizure of property, and also for an excessive levy, obtains an order substituting his indemnitors, the execution creditors, as defendants, and requiring them to give a further bond conditioned to pay any judgment plaintiff may obtain in the action, and the reversal of such order is opposed by the indemnitors, they cannot be heard to claim that they are not liable for the excessive levy, because not covered by their original bond.—*McBride v. Tappen*, 10 N. Y. S. 137.

Shipping.

See *Marine Insurance*.

Slander.

See *Libel and Slander*.

Societies.

See *Associations; Benevolent Societies; Religious Societies*.

SPECIFIC PERFORMANCE.

Insufficiency of title.

1. In an action to enforce the specific performance of a contract for the sale of land, it appeared that there were two past-due mortgages on the land, of which defendant knew; and he also knew that they were to be satisfied out of the purchase price, which far exceeded the amount of the mortgages. *Held*, that they constituted no valid objection to the title, nor defense to the enforcement of the contract.—*Keating v. Gunther*, 10 N. Y. S. 784.

2. In a controversy submitted on agreed facts the question was whether defendants should be compelled to specifically perform a contract to purchase of plaintiff certain premises on Thirty-Eighth street in the city of New York, title to which plaintiff claimed under a devise by one N. to his widow of all his interest "in and to certain lots in Thirty-Seventh street, in the city of New York, which I acquired from

Chatfield H. Smith." The agreed case contained an admission that, in proceedings for probate of N.'s will, Chatfield H. Smith testified that he conveyed to testator real property on Thirty-Eighth street, that he never sold him any other real property, and that, as far as he knew, there was no other person bearing his name in New York city. *Held*, that the admission did not include a concession of the truth of Smith's testimony, and was not of itself sufficient to warrant the assumption that N. was not seised of real property in Thirty-Seventh street, and that, in the absence of such estoppel, plaintiff's title was not sufficiently free from doubt to justify a direction that defendants accept it.—*McGrane v. Kennedy*, 10 N. Y. S. 119.

8. Testator devised all his property to his executor in trust to receive the income, pay it to testator's mother during her life, and, on her death before two certain children should become 21 years of age, to apply it to their support, etc., until that time, and, if the mother had died before that time, the property was then to be equally divided between the children, and, in case of the death of either, leaving lawful issue, such issue was to take the share of the decedent. There was no devise of the estate given to the executor until both the children became 21 years of age. *Held*, that the validity of the trust, and of a power of sale given to the executor to aid in its execution, were so uncertain, on the ground that the will unlawfully suspended the power of alienation, that one who had agreed to purchase the property from the executor would not be compelled to take the title.—*Bearns v. Mela*, 10 N. Y. S. 439.

Contract—Construction.

4. A land-owner, whom one B. had sued for specific performance of a contract to sell the land, agreed that when that suit should be determined in her favor, she would sell the land to plaintiffs. Pending an appeal in his action, B. agreed with plaintiffs that in the event of a decision in his favor, he would proceed for damages only, and would relinquish all claim to the land itself. *Held*, that the owner was not bound to accept this as equivalent to a final decision in her favor, and plaintiffs are not entitled to specific performance of their contract.—*Beck v. Pinkney*, 10 N. Y. S. 983.

Indefiniteness.

5. A verbal agreement was entered into by the M. and the E. railroad companies by which a junction was to be made at a certain point, and the E. company agreed to furnish rolling stock for the operation of the M. company and a certain sum per mile. The M. company was afterwards reorganized, when it made an arrangement

with the E. company by which certain charges were to be made by the E. company for the use of its turn-table and cars, but until further notice no charge was to be made for terminal facilities. Charges were afterwards made for terminal facilities, but were not enforced. Finally the E. company refused to allow the M. company to use its property any longer. *Held*, that the agreement under which the M. company was allowed to use the terminal facilities of the E. company without charge was too indefinite to be enforced in equity.—*Port Jervis, M. & N. T. R. Co. v. New York, L. E. & W. R. Co.*, 10 N. Y. S. 852.

— Inequitable conditions.

6. Defendant, being in need of \$2,000 to complete a purchase made by him, agreed that if plaintiff, his wife, would join him in a mortgage for that amount of his farm of 52 acres, which she had refused to do, he would convey to her 10 acres of the land, including the buildings, which part was worth \$7,000. *Held*, that the agreement was inequitable, and would not be enforced.—*Carpenter v. Carpenter*, 10 N. Y. S. 486.

States and State Officers.

Mandamus to boards and officers, see *Mandamus*, 4, 5.

STATUTES.

Construction of foreign statutes.

1. Expert testimony to prove the construction of a statute of a foreign country is not admissible where the language of the statute is plain, and there is no decision by the courts of such country upon the points in controversy.—*Geoghegan v. Atlas Steam-Ship Co.*, 10 N. Y. S. 121.

2. A commission to take the testimony of foreign lawyers to prove the existence and construction of a statute of their country is properly denied where the moving papers fail to show any ambiguity or uncertainty in the meaning of the statute, or that it has received any judicial interpretation, or that it cannot be proved under Code Civil Proc. N. Y. § 942, providing for the proving of foreign statutes by officially printed copies.—*Geoghegan v. Atlas Steam-Ship Co.*, 10 N. Y. S. 121.

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Stipulation.

See *Practice in Civil Cases*, 5, 6.

Street.

Defective streets, see *Municipal Corporations*, 80, 81.

SUBROGATION.

Of second mortgagee.

On foreclosure of a second mortgage, where it appears that the loan by the second mortgagee was made on an agreement with the mortgagor that it should be applied to extinguish the first mortgage, and

that part of the loan was actually so applied, the second mortgagee is entitled to a decree subrogating him to the rights of the first mortgagee on payment of the balance due on the first mortgage.—*Quinlan v. Stratton*, 10 N. Y. S. 152.

Suicide.

Effect on life insurance, see *Insurance*, 7.

Summons.

See *Writs*.

Supplementary Proceedings.

See *Execution*, 6, 7.

TAXATION.

Inheritance and legacy taxes, see *Descent and Distribution*, 6-17.

Of telegraph lines, see *Constitutional Law*, 1.

Town taxes, see *Towns*, 4-7.

Non-residents.

1. Rev. St. N. Y. (7th Ed.) p. 989, § 2, as amended by the act of 1851, provided that "land occupied by a person other than the owner may be assessed to the owner or occupant, or as non-resident lands." Laws 1878, c. 152, amended the section to read that "lands occupied by a person other than the owner may be assessed to the occupant as lands of non-residents, or, if the owner resides in the county in which such lands are located, to such owner." *Held* that, prior to the act of 1878, lands could not be assessed to a non-resident of the city where the assessment was made, and that, under such act of 1878, lands cannot be assessed to a non-resident of the county where the assessment is made.—*Butler v. City of Oswego*, 10 N. Y. S. 768.

Assessment.

2. When the valuation is not made by the acre, a mistake as to the quantity of land included in the assessment does not affect the rights of the parties, and is immaterial.—*People v. Adams*, 10 N. Y. S. 295; *Same v. Edick*, *Id.* 299.

3. The village trustees are not required by the charter, § 41, to verify their assessment in the manner prescribed for the town assessors, and the absence of such verification does not invalidate the assessment.—*People v. Adams*, 10 N. Y. S. 295; *Same v. Edick*, *Id.* 299.

4. Under charter of the village of Little Falls, § 39, as amended by Laws 1878, c. 153, the village trustees, thereby constituted a board of assessment, whose duty it is to copy from the last assessment roll of the several towns which comprise the territory of the village the names and valuations of

persons and property taxable in the village, are not bound to adopt the valuations made by the town assessors, but may, in the exercise of their judgment, increase such valuations for the purpose of village taxation.—*People v. Adams*, 10 N. Y. S. 295; *Same v. Edick*, Id. 299.

5. Under Laws N. Y. 1880, c. 839, providing that tax assessments on land in Long Island City shall not be invalidated "by reason of any error, mistake, or insufficiency in the owner's name," and that the tax shall be a "lien on the property assessed until discharged by payment," an assessment of the land of a non-resident is not vitiated by being assessed to unknown owners.—*Collins v. City of Long Island*, 10 N. Y. S. 167.

6. The assessment will not be disturbed unless the party seeking to reduce it shows by clear and satisfactory evidence that the property was overvalued.—*People v. Adams*, 10 N. Y. S. 295; *Same v. Edick*, Id. 299.

Void assessment—Reliev by legislature.

7. The legislature has power to ratify and relieve void taxes, and the power includes the interest as well as the amount of the tax originally.—*Van Deventer v. Long Island City*, 10 N. Y. S. 801.

Equalization.

8. In an action to reduce an assessment on the ground of an overvaluation, the burden is on the property owner to show that the assessors have not complied with 2 Rev. St. N. Y. (8th Ed.) p. 1098, § 17, providing that they shall assess property at its full and true value.—*People v. Murphy*, 10 N. Y. S. 877.

9. In a proceeding under Laws N. Y. 1880, c. 269, to reduce an excessive and unequal assessment, the relator, on appeal by *certiorari*, cannot, under section 6 of that act, recover costs against the assessors unless it is shown that they acted with gross negligence, or in bad faith.—*People v. Russell*, 10 N. Y. S. 891.

Tax-titles.

10. In an action for the price of lands in L. county, the defense was a breach of covenant. Defendants offered in evidence tax-deeds of the lands, which had been recorded over two years, to the state, based on taxes assessed prior to the conveyance to covenantees. Act N. Y. 1855, § 65, as amended by Laws 1860, c. 209, provides that such deeds shall be presumptive evidence that the sale, and all proceedings prior thereto, and all notices required to be given previous to the expiration of the two years allowed for redemption, were regular and according to law. Laws 1885,

c. 448, provides that as to certain counties, including L., such deeds shall, after being recorded two years, be conclusive evidence of the regularity of the sale, and of the proceedings prior thereto, and of the notices for redemption. *Held*, that these deeds were at least *prima facie* proof that the title of the covenantees was lost by reason of liens prior to the deed to them.—*Brown v. Allen*, 10 N. Y. S. 714.

Redemption.

11. Laws N. Y. 1880, c. 91, § 12, provides that "all powers which are conferred upon the comptroller of this state in relation to * * * the effect of any such sale of land for taxes upon the lien of any mortgage thereon, the right of a mortgagee to redeem, the consequence of neglect to do so after notice, and the lien of the mortgagee for the amount paid on such redemption, * * * are hereby conferred, so far as relates to the county of Oneida, upon the treasurer thereof." Section 14 provides that all acts relating to Oneida county in conflict with this act are hereby repealed. *Held*, the general law of the state as to redemption by a mortgagee is still applicable to Oneida county, the county treasurer being substituted for the state comptroller; and, where a mortgagee tendered to such treasurer the amount for which the mortgaged lands were sold, with interest, as provided by Laws N. Y. 1855, c. 427, § 82, it was the treasurer's duty to receive the same, and issue his certificate therefor, and on refusal a writ of *mandamus* was properly issued to compel him thereto.—*People v. Edwards*, 10 N. Y. S. 835.

12. Section 8 of the special act provides that the payment shall be "for the use of the purchaser, his heirs and assigns." *Held*, that a tender "for and in full redemption of said premises from sale for delinquent taxes in August, 1887, to Davis & Johnson," was sufficient.—*People v. Edwards*, 10 N. Y. S. 835.

13. When the tender was rejected by the treasurer on the sole ground that he had no right to receive the money or give the certificate, it was not invalid because a receipt or certificate was demanded.—*People v. Edwards*, 10 N. Y. S. 835.

Erroneous taxation—Injunction.

14. Under Laws N. Y. 1880, c. 68, § 8, making a deed executed by the tax receiver "presumptive evidence that the sale, and all proceedings prior thereto," were regular, and authorizing any one interested in assessed property to sue to restrain a sale, an action may be brought to set aside an assessment, and restrain a sale thereunder, though the assessment is void, as such sale would create a cloud on plaintiff's title.—*Coxe v. Town*, 10 N. Y. S. 73.

Erroneous taxation—Waiver of objection.

15. Under Laws N. Y. 1880, c. 269, § 1, requiring relator on *certiorari* to a tax assessment to specify in the petition the grounds of the illegality of the tax, the question of whether the assessor swore to the assessment rolls before the right person is waived by failure to make it a ground of the *certiorari*.—*People v. Terney*, 10 N. Y. S. 940; *Id.* 948.

Taxation of Costs.

See *Costs*, 9-15.

Telegraph Companies.

Taxation of lines, see *Constitutional Law*, 1.

Termination.

Of lease, see *Landlord and Tenant*, 4-6.

Testamentary Powers.

See *Powers*, 2-5.

Theaters and Shows.

Employment of children, prosecution, see *Infancy*, 2.

Title.

Tax-titles, see *Taxation*, 10.

Torts.

See *Deced;* *False Imprisonment;* *Libel and Slander;* *Malicious Prosecution;* *Negligence;* *Replevin;* *Trespass;* *Trover and Conversion*.

Measure of damages, see *Damages*, 3-9.

TOWNS.

See, also, *Highways;* *Schools and School-Districts*.

Bridge bonds—Authorisation by county board.

1. A resolution of the county board authorizing a town to erect a bridge, and issue its bonds in payment therefor, is rendered entirely void by the board's failure to require (as provided by Laws N. Y. 1875, c. 482, § 8) adequate security, in addition to that given for the faithful performance of their ordinary duties, from the officers charged with the duty of issuing the bonds and disbursing the proceeds.—*Barker v. Town of Oswegatchie*, 10 N. Y. S. 834.

2. A resolution of the county board authorizing a town to issue its bonds in the usual form of town bonds, with interest coupons payable to bearer at the rate of 4

per cent. per annum, the bonds and interest to be paid at a designated bank and at specified times, substantially complies with Laws N. Y. 1875, c. 482, § 4, which requires the board, in its resolution authorizing the issuance of bonds, to prescribe their form, and to fix the time and place of payment and the rate of interest.—*Barker v. Town of Oswegatchie*, 10 N. Y. S. 834.

3. Laws N. Y. 1875, c. 482, as amended by Laws 1885, c. 451, provides that the board of county supervisors may authorize towns to borrow money for the erection of bridges; but that no authority shall be exercised under the act, except on the application of the town, to be made by a vote of the majority of the electors voting at a regular town-meeting, or at a special town-meeting "called for the purpose." *Heid.* that an application by a town to the county board for permission to issue bonds for the erection of a bridge made pursuant to a vote of a special town-meeting called under 1 Rev. St. N. Y. pt. 1, c. 11, tit. 2, art. 1, § 7, as amended by chapter 259, Laws 1886, which authorizes a vote on the question of raising and appropriating moneys for the construction of a bridge, but which makes no provision for an application to the county board, and which provides that "no special town-meeting shall have power to act on any subjects other than such as are specified in this section," does not confer on the county board any power to authorize the issue of the bonds.—*Berlin Iron Bridge Co. v. Wagner*, 10 N. Y. S. 840.

Taxation.

4. Laws N. Y. 1869, c. 907, § 4, as amended by Laws 1871, c. 383, providing that all taxes, except school and road taxes, collected for the ensuing 80 years by any town, "on the assessed valuation of any railroad," for which said town has issued bonds, shall be paid over to the county treasurer to redeem such bonds, applies to renewal bonds issued to refund the original bonds as they fell due, though the railroad has been sold under a mortgage, and purchased by another company.—*Van Tassel v. Derrenbacher*, 10 N. Y. S. 145.

5. By Laws N. Y. 1870, c. 762, amending Laws 1868, c. 311, so as to provide by taxation a sinking fund sufficient to pay at maturity bonds issued in aid of the Wallkill Valley Railroad, it was not the intention of the legislature to supersede the provision made by the general act of 1869, but merely to give an additional fund for the payment of said bonds.—*Van Tassel v. Derrenbacher*, 10 N. Y. S. 145.

—Application of taxes.

6. Laws N. Y. 1869, c. 907, § 4, as amended by Laws 1871, cc. 263, 925, provides that all taxes, except road and school taxes,

collected and paid over to the county treasurer, on the assessed valuation of any railroad in any town, village, or city, which has issued bonds to aid in the construction of such railroad, shall be used by the treasurer to purchase such bonds, in order that they may be canceled. *Held*, that, though part of the taxes of a town, thus collected, have been paid over to the town in violation of the above provision, and used by it for other purposes, the county is not liable therefor, and the treasurer can only be compelled to use the balance of such taxes remaining in his hands for the purchase of such bonds.—*Clarke v. Sheldon*, 10 N. Y. S. 357.

7. Laws N. Y. 1869, c. 907, § 4, as amended by Laws 1871, cc. 283, 925, provides that all taxes, except road and school taxes, collected and paid over to the county treasurer, on the assessed valuation of any railroad in any town, village, or city, which has issued bonds to aid in the construction of such railroad, shall be used by the treasurer to purchase such bonds, in order that they may be canceled. *Held*, that plaintiff, being a resident and tax-payer of the town, is affected in his property rights by a refusal to appropriate the tax to the purpose provided, and can therefore maintain an action in the town's behalf to compel the county treasurer to purchase the bonds.—*Clarke v. Sheldon*, 10 N. Y. S. 357.

TRADE-MARKS.

Validity—Descriptive words.

1. The word "hygieniques," as applied to suspenders, is not descriptive, in the ordinary sense, and may become the subject of a valid trade-mark.—*Bailly v. Nashawannuck Manuf'g Co.*, 10 N. Y. S. 224.

Infringement—Injunction.

2. Plaintiff issued a monthly periodical named "The Railroad and Engineering Journal," the result of the consolidation of two periodicals he had purchased, one of which was known as "The American Railroad Journal." Defendant published a weekly periodical called "Engineering News and American Railway Journal." In an action to enjoin defendant from using the words "Railway Journal" it appeared that plaintiff's paper had but a limited circulation, and there was no evidence showing actual confusion in any instance from the claimed similarity in names, while the titles, as printed, indicated possibility of error from plaintiff's use of the term "Engineering" rather than the defendant's use of the words "Railway Journal." *Held*, that relief sought was properly denied.—*Forney v. Engineering News Pub. Co.*, 10 N. Y. S. 814.

Counterfeiting trade-mark — Criminal prosecution.

3. Act Cong. March 3, 1881, § 7, (21 St. at Large, 502,) relating to trade-marks used in commerce with foreign nations, which provides that any person who shall counterfeit "any trade-mark registered under this act" shall be liable to an action on the case, does not apply to any trade-mark that has not been registered, so as to oust the jurisdiction of a state court in a prosecution for counterfeiting a foreign trade-mark which is not registered under the act of 1881.—*People v. Molins*, 10 N. Y. S. 130.

4. Evidence that defendant, in an indictment for counterfeiting a trade-mark by printing copies of the labels used by the owner of the trade-mark, also put on the labels the name of the printer of the original, and that he was found in possession of counterfeits of other labels, is admissible to show his knowledge of the fraudulent intent.—*People v. Molins*, 10 N. Y. S. 130.

5. In order to convict of counterfeiting a trade-mark, the jury must be satisfied that it was the exclusive property of the person alleged in the indictment to be the owner, that the alleged trade-mark was capable of appropriation as such, and that, if ever valid, it has not been abandoned by acquiescence in its use by others.—*People v. Molins*, 10 N. Y. S. 130.

TRESPASS.

Items of damage.

In an action for trespass in wrongfully entering on plaintiff's premises for the purpose of carrying away personal property belonging to plaintiff's intestate, the value of plaintiff's property carried away by defendant may be included in the damages.—*Moore v. Baylis*, 10 N. Y. S. 62.

Trespass to Try Title.

See *Ejectment*.

TRIAL.

See, also, *Appeal; Certiorari; Hoidenes; Judgment; Jury; New Trial; Pleading; Practice in Civil Cases; Witness.*

Objections to evidence.

1. Where defendant is allowed as a witness to refer to and refresh his memory from a certain instrument which is excluded from evidence, and plaintiff subsequently withdraws all objections to the admission of the instrument, but defendant declines to introduce it, any error in its original exclusion is cured.—*Flanagan v. Mitchell*, 10 N. Y. S. 234.

2. The objection to the question, "State whether there was any signal, either by the ringing of the bell or blowing of the whistle of that train, before it got to the crossing," that it was improper in form, and that there was no foundation laid for it, was not well taken, as form of question and order of proof is in the discretion of the court.—*Totten v. New York, L. E. & W. R. Co.*, 10 N. Y. S. 572.

Arguments of counsel.

3. In an action for damages to abutting property, caused by the construction and operation of an elevated railroad, the reading by plaintiff's counsel of an opinion of the court of appeals in a similar case, as to what was to be included within the right to recover, was not erroneous.—*Williams v. Brooklyn El. R. Co.*, 10 N. Y. S. 929.

4. In an action for damages to abutting property, caused by the construction and operation of an elevated railroad, a verdict for plaintiff will not be disturbed because counsel read to the jury an article from a newspaper in respect to the violation by corporations of the rights of persons, where the article in question was not in respect to defendant, did not refer to elevated railroad companies, and was not offered in evidence, and where the substance of the article could properly have been stated by counsel in summing up.—*Williams v. Brooklyn El. R. Co.*, 10 N. Y. S. 929.

Right to open and close.

5. In an action upon a promissory note, where defendant denies the making and delivery of the note, except for the purposes of stating the defenses of fraud and failure of consideration, defendant is not entitled to open and close.—*Redmond v. Tone*, 10 N. Y. S. 506.

6. An exception that defendant was improperly denied the affirmative of the issues became unavailing when the court directed a verdict for plaintiff.—*Redmond v. Tone*, 10 N. Y. S. 506.

Instructions.

7. Refusal to charge abstract principles is not error where all the principles applicable to the case have already been charged.—*Mendel v. Brooklyn City R. Co.*, 10 N. Y. S. 796.

8. In an action for wrongfully discharging plaintiff from defendant's service, error in submitting to the jury the question whether a certain individual transaction between plaintiff and the president of defendant company was a reasonable ground for the discharge, is not cured by a subsequent instruction that such transaction did not arise under the contract of employment, when the jury are not told that they should not consider it in determining

whether plaintiff was properly discharged.—*Kellogg v. American Manuf'g & Supply Co.*, 10 N. Y. S. 481.

9. In an action for breach of an alleged contract of hiring for a year, a charge that "the fair inference from the testimony in the case is that the bettering of his [plaintiff's] condition, in his [plaintiff's] opinion, was not so much the increase of \$2.00 a week in the salary, but was to be a contract for employment for one year," is not objectionable as stating that, as a matter of law, it must be inferred that the contract was for a year, where that part of the charge immediately following rehearses the evidence as to the employment, and leaves the question to the jury, and the judge expressly disclaims any intention of charging that such inference must be drawn.—*Junge v. Haug*, 10 N. Y. S. 215.

Verdict.

10. An exception to a finding that plaintiff was duly appointed does not raise the question as to whether there was a vacancy in the office at the time such appointment was made.—*King v. City of Buffalo*, 10 N. Y. S. 564.

11. In an action to recover back taxes paid, on the ground that they were illegally assessed to a non-resident, plaintiff requested the court to find the fact of non-residence in connection with other facts. *Held*, that, as the evidence did not support a finding of the other facts, the court properly refused to find the fact of non-residence, especially as the evidence in support of such finding was not satisfactory.—*Butler v. City of Oswego*, 10 N. Y. S. 768.

12. In an action for moneys belonging to plaintiff which came into defendant's hands, defendant pleaded and testified that plaintiff agreed to give him part thereof if he would refuse to pay a certain note which he had given in settlement of certain actions against him wherein plaintiff was attorney for the persons suing, and that plaintiff agreed to furnish evidence to defeat the recovery thereon. Three questions, in substance as follows, were propounded to the jury: (1) Was such an agreement made? (2) If it was, was the money delivered to defendant in pursuance thereof? (3) Was the arrangement sworn to by a certain witness, in regard to allowing the note to go to protest, entered into between plaintiff and defendant? The first two questions were answered in the negative, but the third was not answered. *Held*, the two answers given disposed of the defense. Plaintiff was therefore entitled to judgment, and the failure to answer the third was immaterial.—*Garfield v. Blair*, 10 N. Y. S. 840.

13. In an action for damages to abutting property caused by the operation of an el-

evated railway, the finding of fact referring to smoke, steam, gas, and cinders, of which there was ample proof, stated that grease, oil, and water, of which there was no evidence, were allowed to drop from passing trains, and fall in front of plaintiff's premises. No motion was made to amend the finding, and the judgment was apparently just on its merits. *Held*, that the statement would be treated as surplusage by the general term. Distinguishing *Pappenheim v. Railway Co.*, 7 N. Y. S. 679.—*Sanders v. New York El. R. Co.*, 10 N. Y. S. 112

Verdict—Amendment.

14. In an action to restrain the operation of defendants' railway on the avenue in front of plaintiff's property, the court first found that such avenue was kept open in like manner as other streets in the city "are, and of right ought to be." Subsequent findings were to the effect that such avenue was used by defendants for unauthorized purposes, and judgment was given for plaintiff. *Held*, that the court had power at the next term of court to amend the first finding so as to make it conform to the other findings and the decision.—*Lippe v. Metropolitan El. Ry. Co.*, 10 N. Y. S. 519.

Findings by court.

15. The decision of the court in an equity cause which is tried without a jury, that upon the whole evidence plaintiff fails to make out a case, and its judgment dismissing the complaint, constitute substantially a finding of the facts.—*Noyes v. Morris*, 10 N. Y. S. 561.

TROVER AND CONVERSION.

Title to maintain.

1. One who has sold and delivered a chattel, reserving the privilege of repurchasing it within a specified time at the same price, but who has done nothing towards regaining it, has not sufficient interest to enable him to maintain trover against a sheriff who has sold it under execution against him, on the ground that it is exempt.—*Byam v. Hampton*, 10 N. Y. S. 872.

Evidence of conversion.

2. In an action for the alleged conversion of money left with defendant to be sent to a third party, the testimony of plaintiff that he received letters from such third party, saying that she had not received the money, is not sufficient to support a verdict for plaintiff.—*Goldberg v. Wolff*, 10 N. Y. S. 544.

TRUSTS.

Dissolution, see *Injunction*, 1.
Of personality by will, see *Conflict of Laws*.
Power in trust, see *Powers*, 1.

Resulting trust.

1. A. and B. purchased land, A. paying the consideration with an understanding that title should be taken in his name, and the profits of sale shared equally; but without his knowledge title was taken in the name of a third person, who, for a nominal consideration, conveyed to a fourth, who in turn conveyed without notice to defendant, with whom B. had agreed to share the profits of a sale of the land if he would pay off the liens. *Held*, that a subsequent deed from B. to plaintiff conveyed no interest, and that defendant was entitled to be paid, out of the proceeds of sale, the advances actually made by him in good faith in paying off liens, and that the balance of the proceeds should be equally divided between him and A. after payment to A. of the advances made by him, with interest. Modifying 8 N. Y. S. 189.—*Kearney v. Fleming*, 10 N. Y. S. 169.

2. No trust results to a husband from his conveyance of land to his wife as a cover.—*In re Camp*, 10 N. Y. S. 141.

Validity—Indefiniteness.

3. A direction in a will that the residue of testatrix's estate be "placed" in the hands of her trustee, and "bestowed" as he may "wisely direct," creates a trust which is invalid for want of a defined beneficiary entitled to enforce its execution.—*In re Foley's Will*, 10 N. Y. S. 12.

Nature of estate.

4. A grantee executed a declaration of trust reciting that the trust was for the sale of the land for the benefit of the grantor's widow and two children; that when the youngest child became 21 years old the trust should terminate, and the estate be conveyed to the children subject to their mother's dower rights; and that, "in case of the death of both of said children before the age of maturity, then I am to convey all and every part of said property then remaining unsold, and to pay over all income and proceeds of sales in my hands," to the grantor's widow, "for her sole and separate use and benefit, forever." *Held*, that the children took a fee-simple estate under the trust, subject to their mother's right of dower.—*Knowlton v. Atkins*, 10 N. Y. S. 77.

Compensation of trustee.

5. The G. Railroad Company conveyed all its property to plaintiff in trust to secure its bonds, and afterwards leased all its property to plaintiff, who assumed the

bonds secured by the deed of trust. A few days after this lease plaintiff leased the property to the E. Railway Company, which assumed plaintiff's obligations under the lease to him. Afterwards plaintiff sued the E. Company to enforce payment of the bonds, and a judgment was rendered, which relieved plaintiff from personal liability, but was also in other respects unfavorable to the bondholders. Plaintiff appealed, and procured a judgment which fixed his liability, and made the bondholders secure. *Held*, that the litigation was for the benefit of the bondholders, and not for plaintiff's benefit, and that plaintiff was entitled to an allowance for expense and attorneys' fees.—*Woodruff v. New York, L. E. & W. R. Co.*, 10 N. Y. S. 805.

Liability of estate for trustee's negligence.

6. A trust-estate cannot be mulcted for personal injuries sustained through the negligence of the trustees in relation thereto.—*Norling v. Allee*, 10 N. Y. S. 97.

Turnpikes and Toll-Roads.

Railroad on road, see *Horse and Street Railroads*, 1, 2.

USURY.

What constitutes.

The fact that an accommodation note at a legal rate of interest was sold a day or two after its date by the principal debtor for its face value, and by mistake or inadvertence no allowance was made for the interest then accrued, did not render the note usurious.—*Benjamin v. Rogers*, 10 N. Y. S. 777.

Vacation.

Of judgment, see *Judgment*, 16-19.

Variance.

In description of offense in indictment, see *Indictment and Information*, 1.

VENDOR AND VENDEE.

See, also, *Deed; Frauds, Statute of*, 3, 4; *Fraudulent Conveyances; Sale; Specific Performance*.

Objections to title.

1. Covenants in a deed by which the grantee, for himself, his representatives and assigns, agrees to erect and maintain certain streets and wharves along and opposite the granted premises, and extending into a river in front thereof, and by

which the grantor reserves the right to open one or more other streets through the premises, form no cloud or incumbrance on the title of a subsequent grantee, where the original grantor has made a second conveyance of land in the river to the original grantee, who fills it in and erects and maintains thereon the streets and wharves covenanted for in the first deed, and the streets which the grantor reserved the right to open through the granted premises have been opened and maintained for many years.—*Bogardus v. Caragher*, 10 N. Y. S. 225.

2. Where the contract of sale describes the land as "the same premises now occupied by myself and family," it is no objection to the title that the boundary fence is set a little inside of the true line, and that the space between it and the line is occupied by telegraph poles; for there is no failure of title as to quantity under such contract, especially if it be not shown that the outside strip is held under a claim of title.—*Keating v. Gunther*, 10 N. Y. S. 784.

3. The fact that there is a small and trifling charge on the land for the maintenance of a fence, which it is highly improbable will ever be required, affords no substantial objection to the title; for compensatory damages may be allowed for such defect.—*Keating v. Gunther*, 10 N. Y. S. 784.

4. Plaintiff paid \$25, taking a receipt reciting that it was in part payment for house 508 West Forty-Seventh street; price \$21,000. It transpired that the house stood on a leasehold, so that defendant could not convey the fee, which plaintiff intended to purchase. *Held*, that plaintiff was entitled to recover back the part payment.—*Stone v. Thaden*, 10 N. Y. S. 286.

Damages for opening street.

5. Where a deed of land, executed two years after the report of the commissioners awarding damages for opening a street through the same was confirmed, recites that it excepted "from said premises so much thereof as has been taken for the opening of Girard avenue," but did not refer to the award which had been made for the part taken, the vendee is not entitled to the damages awarded.—*In re Pierce*, 10 N. Y. S. 81.

Rescission of contract—Right to assign.

6. A contract for the sale of land was rescinded on the vendee's default at his request, and it was orally agreed between him and the vendor that he should retain possession of the land a few months longer, cut the hay on the premises, and feed it to the vendor's cows. *Held*, that the rescission of the contract discharged the vendee's equitable right in the land, and constituted him the vendor's servant

in cutting and feeding the hay, and that his subsequent assignment of the contract of sale to a third person was ineffectual to pass title to the hay as against the vendor.—*Davis v. Willis*, 10 N. Y. S. 888.

Recovery of earnest money.

7. In an action to recover money paid on a land contract on the ground that the title was defective the tender of a good title at the trial nine months after it was to have been given will not defeat a recovery.—*Harris v. Strodl*, 10 N. Y. S. 859.

VENUE IN CIVIL CASES.

Change of venue.

In an action by a wife for the alienation of her husband's affections, a motion by defendant to change the place of trial to the county where she claims to have gone through a marriage ceremony with plaintiff's husband, believing him to be unmarried, should be granted.—*Blake v. Everman*, 10 N. Y. S. 74.

Verification.

Of pleadings, see *Pleading*, 15, 16.

Vicious Horses.

See *Livery Stable Keeper*.

Waiver.

Of judgment, see *Judgment*, 12.
notice of non-payment of note, see *Negotiable Instruments*, 4.

Warranty.

See *Sale*, 7, 8.

Covenants of, see *Covenants*, 2.

WATERS AND WATER-COURSES.

Rights in spring.

1. Plaintiff for many years was the owner of a lot, appurtenant to which was the right to take water from a spring on another lot across a highway. Up to 1877 the spring was open, and plaintiff took water therefrom in pails. In that year it was inclosed by a reservoir, and a pump log laid therefrom along the street past plaintiff's premises to convey water to other premises. Thereafter plaintiff and the owner of the servient tenement executed their several conveyances to each other, both of which recited the existence of the easement appurtenant to plaintiff's tenement. The conveyance to plaintiff, in consideration of the release by plaintiff,

his heirs and assigns, of all right and title in the spring, granted to plaintiff, his heirs and assigns, the right to take by a half-inch pipe, from the main pipe leading from the spring along the street, all the water necessary for the family use of plaintiff, his heirs, etc., holding and occupying the said lot. Plaintiff's conveyance recited that, in consideration of the rights and privileges conveyed to him, he released all right, title, and interest in the spring. *Held*, that the right conveyed to plaintiff constituted an easement in the tenement of the grantor, and ran with the land.—*Cady v. Springville Water-Works Co.*, 10 N. Y. S. 570.

Diversion of stream.

2. In an action by a riparian owner for diverting a stream which defendants had a right to use, the court properly charged that if defendants used the water, and left enough in the river to enable the jury to say that what they took away was immaterial, then the verdict must be for defendants; but that, if defendants used and diverted the water to a degree that appreciably and materially lessened the stream, then the verdict must be for plaintiff for six cents, there being no pretense of damages.—*New York Rubber Co. v. Rothery*, 10 N. Y. S. 872.

Ways.

See *Highways*.

Wife's Separate Estate.

See *Husband and Wife*, 2.

WILLS.

See, also, *Executors and Administrators*.

Compromise of contest, distribution of proceeds, see *Descent and Distribution*, 1.
Conversion, see *Conversion*.

Devise in lieu of dower, see *Dower*.

Testamentary powers, see *Powers*, 2-5.

Trusts of personality, see *Conflict of Laws*.

Undue influence.

1. An inference of undue influence will not be drawn from the inequality of a will, especially when there is complete proof of testator's capacity.—*In re Lasak's Estate*, 10 N. Y. S. 844.

2. On an issue whether a will was the result of undue influence on the part of testator's daughter, there was evidence that, at the time of its execution, testator was 67 years old, and feeble in mind and body; that his relations with his daughter were such that he would avoid and hide from her, and had described her as being "one of the most cold-hearted daughters; that testator had six months previously ex-

ecuted a will making a fair distribution of his property among his wife and children; that this will came to the possession of the daughter, who wrote testator, imploring him to see her, so that he might "look at things in a different light;" that, after repeatedly avoiding her, testator had frequent interviews with her, some of which irritated him, while others moved him to tears; and that the will in question was then executed upon the model of the old one, with important amendments in favor of the daughter and her children, and to the probable exclusion of testator's favorite son and his children. There was also evidence that testator had remarked upon the importunity of his daughter, and had stated that he had to make three wills before he could satisfy her. *Held*, that the question as to undue influence should have been submitted to a jury.—In re Bishop's Will, 10 N. Y. S. 217.

8. Seven years before his death, testator executed a will dividing his estate between his son and two daughters, with an annuity of \$100 to his housekeeper; appointing his son and two grandsons executors. By a subsequent codicil the housekeeper's annuity was increased to \$300. His son managed testator's business, and was highly esteemed by him. Three years later, testator, then 84 years old, was stricken down with paralysis, and his condition was such as to require great care from some one, which was given him by his housekeeper. By threatening to leave him, she so worked on testator's fears that he secretly married her. An attorney who was intimate with both testator and the housekeeper persuaded testator that his son had deceived him in some trivial business transaction, and testator became suspicious of him. After the marriage the treatment of the children by the attorney and the housekeeper was such that they rarely visited testator. Testator's son continued to transact some business for him; but the housekeeper and attorney dominated all testator's business affairs, and never permitted the son to see testator alone. *Held*, that a will executed without the knowledge of any of testator's children a few months after the marriage, and within 18 months of testator's death, by which he gave the housekeeper a one-fourth share in all his property, the two daughters each one-fourth, and by which he cut off his son with a life-interest in the other fourth, vesting the entire control of the estate in the attorney, would be set aside for undue influence.—In re Stewart's Will, 10 N. Y. S. 744.

Revocation.

4. A testator, shortly after his wife's death, commenced cohabitation with his fe-

male servant, and subsequently he bought a house, and placed her there, to live with other members of his family. He visited her there, and treated her as his wife in that locality for several years, and for a few months before his death he lived at the house with her as his wife. After the illicit intercourse, but prior to the purchase of the house in which the woman was installed as wife, the testator executed a will, leaving her a legacy as his "servant." In an action for dower after his death, a jury found that he had married the woman at some indefinite time after the commencement of the illicit intercourse. *Held*, that the marriage occurred subsequently to the execution of the will, which was consequently revoked.—In re Gall, 10 N. Y. S. 661.

Probate.

5. An executor who has propounded his testator's will for probate has no active duty to perform, and cannot discontinue the proceeding.—In re Lasak's Estate, 10 N. Y. S. 844.

— Revocation.

6. The surrogate having exclusive jurisdiction, under Code Civil Proc. N. Y. § 2472 et seq., to admit wills to probate, and to revoke probate thereof, an action cannot be maintained to restrain defendant from proceeding before the surrogate to revoke probate of a will, and to admit to probate a later will, on the ground that the limited powers of the surrogate preclude him from considering the question whether defendant is estopped by having received benefits under the first will.—Paxton v. Brogan, 10 N. Y. S. 808.

— Contest.

7. Where the subscribing witnesses to a will and several codicils thereto all testify to the formal execution of the several papers, that testator's mind was clear and calm, and that he was under no restraint, and subject to no apparent importunity or influence, and their testimony covers a considerable portion of testator's later years, such papers should be admitted to probate.—In re Lasak's Estate, 10 N. Y. S. 844.

8. In a will contest a daughter of testator, whose interest was adverse to the will, testified without objection that her father had said to her that the executor had helped him make his will, and that he was glad his son, who had disgraced his name, was dead. Before her examination was closed this evidence was stricken out on motion of an attorney supporting the application for probate. *Held* that, assuming that testimony received without objection should not have been stricken out, there was no sufficient error to call for a reversal, the

evidence not tending to show either incapacity or undue influence.—In re Lasak's Estate, 10 N. Y. S. 844.

Construction.

9. Where a testator directs land to be sold, and the proceeds applied first to the payment of a mortgage on other land, and afterwards to certain legacies, it is the duty of the executor to pay the mortgage in full out of such proceeds, without regard to whether the assets remaining are sufficient to pay the legacies in full.—In re Oviatt's Estate, 10 N. Y. S. 264; In re Hopkins, Id.

After-acquired property.

10. Testator devised a tract of land to his widow, "being all the real estate I am now seised and possessed of; also all my personal property, horses, cattle, wagons, harness, farm tools, grain, hay, and oats, mortgages and money—about \$2,100—I am now possessed of, or may die possessed of; also household furniture, bed, bedding, etc., etc., whatsoever I may die possessed of; to have and to hold, first erecting me a monument to cost not less than \$50." After making the will, testator purchased land with part of the personalty which he had bequeathed to his widow. He left no children. The income of his estate was barely sufficient to support his widow. *Held*, that the widow took the land acquired by testator after he had made his will.—Schuck v. Shook, 10 N. Y. S. 985.

Description of legatees and devisees.

11. A testator devised property to his wife for life, with directions that at her death it should be sold by the executors; and the proceeds he devised to his children "then surviving, to be equally divided among them, share and share alike." *Held*, that testator's grandchildren living at the death of his wife were not entitled to take under the will.—In re Robinson's Estate, 10 N. Y. S. 692.

12. A bequest of testator's residuary estate, to be divided among "all my children, share and share alike, except that the share which my daughter M., deceased, would have had, had she survived me, shall be paid to my daughter E., and the share which my son W. would have had, had he survived me, shall be paid to my grandson J.," does not include the child of a daughter who was dead when the will was made, but was not referred to therein.—In re Goble's Will, 10 N. Y. S. 18.

Nature of estate.

13. A testator gave to each of his two children one-third of his estate, and to his wife "one-third; that is to say, her dower right of my estate." The wife was given power, in conjunction with the executor, to sell the real estate, and the children, on

reaching their majority, were to receive the interest of one-third of any moneys derived from such a sale. *Held*, that the wife took one-third of the testator's real estate absolutely.—Schult v. Moll, 10 N. Y. S. 703.

14. A testator gave \$2,000 to his executors in trust for his nephew, to be so managed as to best promote his future welfare and happiness, and to that end left "the disposition and management of said sum, both interest and principal, should it be necessary," to their "better judgment and discretion." *Held*, the legacy vested in the nephew at testator's death, subject to the control of the executors, and at his death passed to his personal representatives, and not to the residuary legatee.—In re Brooks' Estate, 10 N. Y. S. 20.

15. A testatrix directed all her real estate to be divided in two equal portions, one of which she devised absolutely to her son, and the other to her daughter, to be kept intact, and to be used and enjoyed by her during her life, and to be left and divided among her children in such manner as she should direct. Soon after the death of the testatrix, the executors, who were also the devisees, made a formal division of the realty, which was assented to, and executed by them, both as executors and as individuals, and possession of the respective shares was delivered. *Held*, that the division vested in the son the fee of that portion allotted to him.—Knevals v. Prince, 10 N. Y. S. 676.

16. Testator devised all his property to his wife, to receive the rents and profits for life or until she should remarry, and directed that, should she remarry, all the estate should be sold, and one-third of the proceeds be paid to his widow, and the residue be divided equally between his children, the children of any child of testator who may have died to receive the amount which their parent would have been entitled to if living, and that, should his widow die without remarrying, then the estate should be divided between testator's children and the children of any child who may have died, as above. *Held*, that the substituted devise to the children of any deceased child of testator referred to the death of such child before the remarriage or death of the widow, and not during testator's life-time, and a good title to such property could not be given during the life-time of the widow, before her remarriage.—Harris v. Strodl, 10 N. Y. S. 859.

17. By his will testator gave the income of his real and personal estate to his wife and son during their joint lives, the survivor to take the whole thereof, and upon their decease, the son leaving lawful issue then surviving, all the estate was to go to such issue, and in case there should be no such issue, then the real estate was to be

sold. Testator further provided that "upon the decease of my said wife and son, he not leaving lawful issue them both surviving, as aforesaid, I give and bequeath my estate, and the proceeds and sales of my real estate, aforesaid, as follows." Then followed certain legacies, including one to plaintiff, a religious society in Connecticut, the interest of which was to be applied to keeping testator's monument in repair, and the balance, if any, towards discharging the salary of plaintiff's minister. At testator's death plaintiff had not capacity to take the legacy, but before the death of the life-tenants the Connecticut statutes were amended so as to enable it to take. *Held*, that it was testator's intention that the bequest to plaintiff should not go into effect until the death of his wife and son, the latter leaving issue both surviving, and that as plaintiff had capacity to take upon the happening of that event, the gift then went into effect.—*Plymouth Soc. v. Hepburn*, 10 N. Y. S. 817.

— Duration of estate.

18. A will gave to the wife of the testator all his property, real and personal, for the wife's "sole use and benefit during her natural life," authorized her to lease, sell, give, and devise the whole or any part of the property, and provided that after her death the residue, "if any there should be," should be distributed, etc. *Held*, that the wife took a life-estate only in the property unless she disposed of it during her life, or provided for such disposition by will.—*Kibler v. Huver*, 10 N. Y. S. 875.

— Rights of devisees and legatees.

19. Testator bequeathed \$1,000 to his granddaughter, the only child of a deceased daughter, but who was not supported by testator, "to be paid to her when she attains the age of 21 years," and gave the residue of his estate to his wife for life. He further provided that, on the death of his wife, the residuary estate should be divided among certain other persons. *Held*, that the granddaughter was entitled to interest on the \$1,000 after one year from testator's death.—*In re Goble's Will*, 10 N. Y. S. 18.

20. A testator directed the sale of his household furniture, and that the balance of the proceeds, after payment of funeral expenses, be paid to a certain named church. He then bequeathed to one S. the joint note of herself and her husband. By the fourth clause of the will testator's estate was directed to be applied to the payment of certain legacies therein given, and that any residue should be divided among "the said legatees in the same proportion that the several legacies bear to each other," and that a deficiency, if the

"sale of my property should prove insufficient for the payment of all said legacies in full," should be borne in like manner. *Held*, that the bequests of the note and the balance of the proceeds of the furniture were specific bequests.—*In re Willett's Estate*, 10 N. Y. S. 871.

21. Testatrix left her residuary estate to her executor in trust, to convert into bonds, and from the income thereof to pay such sums as he should in his judgment think necessary for the support of her sister, but only in case she should be in "absolutely needy circumstances;" the surplus in any year to be paid the trustees of a certain church, to be used solely for the purpose of paying the salary of the minister, and the whole of the income to be so paid, if not needed for the support of the sister. The will further provided that after her sister's death, if the said church should be in good standing, and her executor should regard it safe, and for the best interests of her estate, he should in that event hand over to the trustees of the church the residue of her estate, or the securities representing it, and the church trustees should thereafter be the trustees of the fund under her will, and be governed in all respects by the directions therein in regard to the fund, in no event using any part of the principal for any purpose, and only appropriating the income in the manner and for the purpose indicated and directed in her will, and, from the time of handing over and delivering the fund to the church trustees, her executor should be discharged from the care of and liability for the fund. It was further provided that, if at any time such investments as the will prescribed could not be made, the executor or the church trustees, whichever should then have control of the fund, should invest it under the direction of the surrogate. *Held*, that, after the sister's death, the church was the sole beneficiary of the fund, the trust to continue in the executor unless he decided to pass it over to the church.—*In re Bailey*, 10 N. Y. S. 877.

Payment of legacies.

22. An affidavit which fully states the facts, filed with a notice of a motion to require the administrator to pay a legacy, is a sufficient "petition" to authorize a citation, as prescribed by Code Civil Proc. N. Y. §§ 2717, 2718, prescribing the procedure to compel payment of legacies.—*In re Dunscomb's Will*, 10 N. Y. S. 247.

23. Under 2 Rev. St. N. Y. p. 90, § 48, providing that payment of legacies cannot be compelled until one year after letters testamentary have issued, interest on general legacies begins to run one year after the issue of letters testamentary, and not after the lapse of that period from testa-

tor's death.—*In re Pryor's Estate*, 10 N. Y. S. 861.

Payment of legacies—Presumption.

24. Where a legacy of \$1,500 is payable on the legatee's attaining his majority, and either in one amount or installments, as the executor might elect, its payment will be presumed, as against the unsupported testimony of the legatee, after the death of the executor, and a lapse of 43 years from testator's death, and 30 years from the legatee's becoming of age, coupled with testimony showing that the executor had discharged all the other obligations of the will, educated and housed the legatee, kept his house always open for him, obtained him situations, furnished him with outfits, and to a great extent with clothing, for many years.—*Sweeney v. Sweeney*, 10 N. Y. S. 178.

Action to construe.

25. An action to construe a will for the purpose of having it declared invalid cannot be maintained in the supreme court, where complete relief can be obtained in the surrogate's court.—*Higgins v. Union Trust Co.*, 10 N. Y. S. 889.

WITNESS.

See, also, *Deposition; Evidence.*

Competency.

1. The burden is on the party urging the disqualification of a witness as an objection to his testimony to show the existence of the facts which disqualify him from testifying.—*Henry v. New York, L. E. & W. R. Co.*, 10 N. Y. S. 508.

Privileged communications.

2. A surgeon who had been requested to examine plaintiff by his attending physician two weeks after the accident resulting in the alleged injury occurred, is not disqualified from testifying against plaintiff as to the existence of the alleged injuries by Code Civil Proc. § 834, which prohibits a physician from disclosing "information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity," where it does not appear that the witness was requested or expected to treat or prescribe for plaintiff, or that he did either.—*Henry v. New York, L. E. & W. R. Co.*, 10 N. Y. S. 508.

3. Where plaintiff, in an action for personal injuries, testifies as to his consultation with a physician concerning the injury, he waives his privilege, under Code Civil Proc. N. Y. § 836, providing that the prohibition of section 834, against disclosing information acquired while acting as a

physician, shall "apply to every examination of a person as a witness, unless the provisions thereof are expressly waived" by "the patient."—*Marx v. Manhattan Ry. Co.*, 10 N. Y. S. 159.

4. A communication by plaintiff to his attorney, for the purpose of its publication to defendant, is not privileged, under Code Civil Proc. N. Y. § 835, prohibiting an attorney from disclosing a communication made by his client to him in the course of his professional employment.—*Bartlett v. Bunn*, 10 N. Y. S. 210.

Transactions with decedents.

5. Under Code Civil Proc. N. Y. § 829, which forbids a party to be examined in his own behalf against the executor of a deceased person "concerning a personal transaction or communication between the witness and the deceased person," it is not reversible error to permit the claimant in a statutory claim case against the estate of a decedent to prove that he had a conversation with decedent, unless the mere fact that there was a conversation is a material fact to be proved.—*Heyne v. Doerfler*, 10 N. Y. S. 908.

6. In an action by a surviving partner to foreclose a mortgage, plaintiff testified, with reference to an alleged payment of money in satisfaction of the mortgage, that the money was paid by defendant to the deceased partner, to be handed to him (plaintiff) for the purpose of buying goods for defendant; that the decedent gave him the money, and that he used it for the purpose indicated. *Held*, that such testimony related indirectly to a transaction between decedent and defendant; and that the testimony of defendant concerning such transaction was therefore not prohibited by Code Civil Proc. N. Y. § 829.—*Mitchell v. Cochran*, 10 N. Y. S. 545.

7. Where a witness, in case the will propounded should be admitted to probate, would take as legatee, and in case probate should be denied would take as heir of testator, then his interest in the event is sufficiently apparent to exclude his testimony as to personal transactions with the testator, under Code Civil Proc. N. Y. § 829, providing that a party or person interested in an action shall not be examined as a witness in his own behalf or interest against the executor, administrator, or survivor of a deceased person, concerning a personal transaction or communication between the witness and the deceased person.—*In re Lasak's Will*, 10 N. Y. S. 80.

8. On foreclosure of a land contract because of the non-payment of a balance alleged to be due thereon, brought by the vendor's administrators against the vendee's heirs and administrator, the trial of a feigned issue out of chancery, before a

jury, as to the amount due on the contract, is a "trial of an action" within the meaning of Code Civil Proc. N. Y. § 829, providing that on "the trial of an action" a party or person interested shall not be examined in his own behalf against the administrator of a deceased person.—*Parks v. Andrews*, 10 N. Y. S. 844.

9. On foreclosure of a land contract because of the non-payment of a balance alleged to be due thereon, brought by the vendor's administrators against the vendee's heir and administrator, the latter, who is also one of the heirs, is incompetent to testify that the vendor, in his life-time, never presented a claim against the vendee's estate for the balance due on the contract; Code Civil Proc. N. Y. § 829, providing that on "the trial of an action" a party or person interested shall not be examined in his own behalf against the administrator of a deceased person.—*Parks v. Andrews*, 10 N. Y. S. 844.

Examination—Privilege of witness.

10. The provision of Const. N. Y. art. 1, § 6, that "no person shall be * * * compelled in any criminal case to be a witness against himself," does not apply to an investigation by police commissioners of a charge against a police sergeant for conduct unbecoming an officer.—*People v. McClave*, 10 N. Y. S. 764.

Credibility.

11. It is error to refuse to allow a question whether plaintiff is sole owner of a claim in suit, as that fact might affect his credibility.—*Strawbridge v. Vandenburg*, 10 N. Y. S. 610.

12. In an action against the maker and indorser of a note, the joint answer of defendants alleged an agreement by which plaintiff's intestate was to receive from the maker \$10 above lawful interest on the loan, which was the consideration of the note. The indorser testified that, some days before the date on which the agreement was averred in the answer to have been made, the intestate agreed to make a loan of \$200 upon a note payable to the order of the indorser, that a bonus of \$10 was paid by the maker, and that afterwards he (the indorser) delivered the note of \$200 to the intestate, and received \$188. *Held*, that the jury was justified in dis-

crediting the testimony of the indorser.—*Varnum v. Skinner*, 10 N. Y. S. 263.

WRITS.

See, also, *Attachment; Certiorari; Execution; Injunction; Mandamus; Replevin.*

Publication, see *Divorce*, 1.

Service of process on Christmas, see *Holidays*.

—on foreign corporations, see *Corporations*, 19.

Service—On corporations.

1. Under Code Civil Proc. N. Y. § 481, subd. 3, providing that a summons shall be served on a domestic corporation by delivering a copy thereof to the president or other head of the corporation, the cashier, treasurer, or managing agent, service on an employe of a domestic corporation who attends to the publication of a periodical issued by it, and to its printing, binding, and mailing, under instructions received immediately from the officers of the company, is sufficient.—*Ruland v. Canfield Pub. Co.*, 10 N. Y. S. 918.

2. Service of a summons against a telephone and telegraph company on its general superintendent, an officer having general charge of one of its departments, is a service on a "managing agent," under Code Civil Proc. N. Y. § 481, providing that service of a summons upon a domestic corporation must be made by delivering a copy thereof within the state "to the president or other head of the corporation, * * * or a director or managing agent."—*Barrett v. American Telephone & Telegraph Co.*, 10 N. Y. S. 188.

Amendment.

3. Code Civil Proc. N. Y. § 723, which provides that, in pursuance of justice, a court may, at any stage of the action, amend any process by correcting a mistake in the name of a party, does not authorize the court to correct a mistake as to defendant's name in the summons, unless it has in some way obtained jurisdiction of his person; and where a summons issues from justice's court against defendant by a wrong name, and he does not appear, the judgment against him is void, though before its rendition the summons was so amended as to give his true name.—*McGill v. Weil*, 10 N. Y. S. 246.

